

[2023] FWC 2785

The attached document replaces the document previously issued with the above code on 24 October 2023.

The name of the Club's HR Consultant has been redacted, on request of that person and by consent of the parties.

Associate to Deputy President Wright

Dated 8 November 2023.



DECISION

s.394 - Application for unfair dismissal remedy

*Fair Work
Act 2009*

Ms Deanna Giblin

v

Coogee Legion Ex-Service Club Ltd

(U2023/4600)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 24 OCTOBER 2023

Application for an unfair dismissal remedy – no valid reason – dismissal found to be unfair – order for compensation appropriate.

Introduction and outcome

[1] On 26 May 2023, Ms Deanna Giblin 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 Coogee Legion Ex-Service Club Limited (**the Club**).

[2] The Club is a registered and licensed club. Ms Giblin was employed by the Club as a casual Customer Service Attendant, and then as a Duty Manager, from 15 October 2021 until she was dismissed on 5 May 2023.

[3] The reason for dismissal was theft and dishonesty arising out of an incident when Ms Giblin did not pay for a drink which she consumed after attending a staff meeting. Ms Giblin denies that she engaged in theft and dishonesty and seeks compensation. During the hearing, it emerged that Ms Giblin had consumed alcohol prior to the staff meeting. The Club made submissions that Ms Giblin was prohibited from doing so and that this conduct also constituted a valid reason for the dismissal.

[4] In summary, I have found that Ms Giblin's actions with respect to not paying for the drink were unintentional and that she did not engage in theft and dishonesty. I have also found that the Club's prohibition on staff consuming alcohol prior to a shift does not extend to staff meetings.

[5] As such, there was not a valid reason for the dismissal. On this basis of this and other findings, I have determined that Ms Giblin's dismissal was harsh, unjust and unreasonable and that an order for compensation is appropriate.

The hearing

[6] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[7] After taking into account the views of Ms Giblin and the Club, and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing pursuant to s.399 of the FW Act.

[8] At the hearing Ms Giblin represented herself. The Club was represented by Ms Nicola Shaw, Senior Legal Counsel at the Registered Clubs Association of NSW trading as Clubs NSW (**Clubs NSW**)

[9] Ms Giblin gave evidence on her own behalf, and the following witnesses also gave evidence on her behalf:

1. Aedan Dunbar-Reid, former Bar Attendant at the Club.
2. Mark Fethers, Managing Director of Harts Pub/Pickled Monkey Brewing and Ms Giblin's support person.
3. Lisa Laing, Ms Giblin's mother.

[10] The following witnesses gave evidence on behalf of the Club:

1. Gail Patrin, Chief Executive Officer.
2. Matthew Armstrong, Operations Manager.

[11] Ms Giblin filed submissions in the Commission on 17 July 2023, 8 August 2023 and 17 August 2023. The Club filed submissions on 31 July 2023 and 14 August 2023.

Background facts

[12] The Club is a not-for profit registered and licensed club which was established in 1946. Its purpose is to provide social and recreational activities to its members, their guests and visitors. The Club currently has two VIP lounges, multiple bars, a restaurant, function facilities and an open-air terrace overlooking Coogee Beach.¹

[13] The Club currently employs 33 employees comprising 6 full-time, 2 part-time and 23 casual employees.²

[14] Ms Giblin is in her final year at university studying nursing.³ Ms Giblin was employed by the Club on a casual basis as a level 3 Customer Service Attendant on 15 October 2021.⁴

[15] The Giblin's employment was governed by a contract of employment and the *Registered and Licensed Clubs Award 2020 (the Award)*.⁵ The contract of employment required Ms Giblin to comply with the Club's policies,⁶ many of which are in the Club's Staff Handbook.⁷

[16] The duties of a level 3 Customer Service Attendant include:

- a. Open, operate and close bars and function service areas with minimal waste;
- b. Serve all Club patrons in a courteous and efficient manner;
- c. Dispense and mix beverages in accordance with Club policies;
- d. Clean and clear tables, service areas and ashtrays in a timely manner;
- e. Reset and stock bars per club procedures; and
- f. Ensure all crockery, glassware and rubbish is always kept clear from the floor.⁸

[17] On 25 August 2022, Ms Giblin commenced performing Duty Manager shifts. The duties of a Duty Manager include:

- a. Managing staff and operations during Club trading for the achievement of policy objectives, optimum staff performance and customer satisfaction of members and guests;
- b. Embodying the Club values – teamwork, respect, commitment, responsibility, integrity, enthusiasm;
- c. Controlling the poker machine clearance and balance in conjunction with the Clearance team;
- d. Organising the CRTs and ATMs daily;
- e. Organising all tills in operation;
- f. Authorise payments within delegated authority or seek higher approval, as appropriate;
- g. Redeem and authorise any poker machine tickets as required;
- h. Liaising with all staff when accounting/money discrepancies arise;
- i. Assisting in monitoring patrons/visitors in restricted areas of the Club;
- j. Liaising with security staff while on Club premises;
- k. Updating knowledge and skills in regard to the Club’s evacuation procedures;
- l. Attend to all First Aid incidents and report accordingly;
- m. Report and record all staff injuries in Incident Register for WorkCover purposes.⁹

[18] Level 3 bar staff report to the Duty Manager on shift.¹⁰ As a Duty Manager, Ms Giblin reported to Mr Matthew Armstrong, Operations Manager¹¹ who in turn reported to Ms Gail Patrin, Chief Executive Officer.¹² Ms Patrin has 25 years' experience in senior management roles in the club industry.¹³

[19] During her employment, Ms Giblin was awarded employee of the month three times, as well as receiving an end of year award from management. She was promoted to Duty Manager 10 months into her employment, because of her hard work.¹⁴

[20] According to Mr Armstrong, Ms Giblin worked an average of 28 hours per week, approximately two thirds of which were spent serving drinks behind the bar, both in her role as a Customer Service Attendant and a Duty Manager. She would perform Duty Manager shifts on average two times a week.¹⁵

[21] As part of the Club's yearly audit, Mr Armstrong organised for an external audit to be performed in relation to the Club's stocktake. On 13 April 2023, the Club was presented with the outcome of the external audit which showed that the Club was missing a significant amount of stock as follows:

- 7 bottles of house vodka
- 21 bottles of wine
- 10 kegs of beer
- 63 packets of chips
- 76 cans of soft/energy drink¹⁶

[22] Mr Armstrong and Ms Patrin discussed the report and agreed that all staff would be invited to a meeting to discuss their requirements and expectations when handling stock and processing transactions in light of the significant stock variances. They also agreed that changes to current Club policies would be made.¹⁷

[23] There were a range of possible reasons for the discrepancy including over-pouring of vodka due to shot glasses being 36ml instead of 30ml, missed deliveries, smashed bottles and unauthorised free drinks.¹⁸

[24] On 14 April 2023, Mr Armstrong sent a memorandum to staff outlining changes to Club policy, to be discussed further at a staff meeting scheduled the following Tuesday 18 April 2023. The memorandum provided a summary of the external stocktake and relevantly provided:

...in line with the food & beverage policy, if you are found to be eating chips or drinking a canned drink, and cannot provide the receipt, this is considered theft and will be dealt with according to the Staff Handbook.¹⁹

[25] The memorandum was sent to Ms Giblin's personal and work email address, and the amended Staff Handbook was sent to all staff on 17 April 2023.²⁰

[26] Clause 11.16. of the Staff Handbook states:

Supplying or accepting drinks without payment is considered as theft and staff involved may be dismissed.²¹

[27] The Club also has a Food Beverage Consumption and Sampling Policy which states:

It is a requirement that ALL beverages, food items and services provided to members, customers, team members, contractors & other officers are to be paid for and accounted for in the correct [manner].

Examples of conduct which is strictly NOT permitted:

Making free or discounted food or beverage produce for self, member, customer or other Team Member with or without request whilst on shift or on a break.

Breach of policy

Any breach to this policy must be reported and investigated immediately and, if necessary an[y]Team Members suspect[ed] of violating this policy [will be] suspended until further investigation can be carried out.

A food or beverage item consumed without payment or removed from the premises, with the exception of genuine food or beverage sampling as outlined in this policy, will be considered as theft. Breaches of this policy are considered serious and may result in serious disciplinary action up to and including termination of employment.

If a team member becomes aware of another team member breaching this policy, they must report the incident to their Manager immediately. Failure to report the act of misconduct will result in disciplinary action, for failure to not report.²²

[28] On 18 April 2023, Mr Armstrong and Ms Patrin attended the meeting with all staff. At the meeting, Mr Armstrong reiterated the contents of the memorandum in relation to the stocktake, and that all food and beverage must be paid for. Mr Armstrong left the Club after the meeting at about 7:00pm. Before he left, Mr Armstrong noticed some staff members, including Ms Giblin, socialising at one of the Club's bars after the meeting.²³

[29] On 27 April 2023, the Club had a further external stocktake performed which showed more significant variances, including 6.5 bottles of spirits, 73 bottles of wine and 13 kegs of beer that were not accounted for.²⁴ After Mr Armstrong discussed the results of the second stocktake with Ms Patrin, Ms Patrin suggested that Mr Armstrong check the CCTV footage recorded while the staff were socialising after the staff meeting on 18 April 2023.²⁵

[30] The Club undertakes workplace surveillance in the form of CCTV, which is outlined in the Staff Handbook. The cameras are clearly visible in the Club and there are signs which notify

people that they may be under surveillance at the entry of the Club. All staff are notified on commencement that CCTV is used by the Club.²⁶

[31] On 27 and 28 April 2023, Mr Armstrong reviewed the CCTV footage from 18 April 2023 and noted that an employee, Employee A (**EA**), received drinks on five occasions that he did not pay for from the period 3:43pm-5:01pm then at 6:52pm. He noted that a different employee, Employee B (**EB**), provided EA with three of these drinks and a third employee, Employee C (**EC**), provided EA with the other two drinks. He also noted that Ms Giblin consumed drinks on two occasions that were paid for, and a drink that was not paid for at 6:55pm. After reviewing the CCTV footage, Mr Armstrong looked at the list of transactions on the till and could not find any transactions for these times.²⁷

[32] Ms Patrin reviewed the footage on 28 April 2023 and a folder prepared by Mr Armstrong containing transactions for the evening of 18 April 2023. Ms Patrin noted that EC was providing drinks and falsely ringing up the drinks on the Club's cash register without any payment being received.²⁸ She also noted that EA was pretending to use his phone to pay for drinks, but the payments were not made. Finally, she noted that at 6:55pm, Ms Giblin ordered a drink from Mr Aedan Dunbar-Reid that she did not pay for, and that Mr Dunbar-Reid did not process the drink through the till.²⁹

[33] After reviewing all of the information and liaising with Clubs NSW, Ms Patrin informed Mr Armstrong that all staff members would be suspended on the evening of 28 April 2023. EB resigned that night.³⁰

[34] Ms Patrin and Mr Armstrong met with EA, EC, Mr Dunbar-Reid and Ms Giblin individually on 28 April. During the meeting, Ms Patrin said:

We have found that following the staff meeting there was an instance of you giving/receiving a drink and not paying for it. As per our Staff Handbook, this is considered theft. Whilst the investigation is happening, you will be suspended. We have scheduled a meeting for Monday. Do you have any questions?³¹

[35] Each staff member was then provided with a letter. The letter provided by Ms Patrin to Ms Giblin dated 28 April 2023 relevantly provided:

Allegations and Show Cause Notice

Coogee Legions Club (the Club) has recently been made aware of a number of allegations of serious misconduct against you.

Specifically, it is alleged that you have engaged in theft and fraud. The Club is very concerned that if this has occurred, this may affect the viability of the Club. Accordingly, the purpose of the investigation is to determine, if possible, whether the allegations are true and consider your responses.

Specifically, it is alleged that:

1. On 18 April 2023, you attended a meeting where the Club discussed large discrepancies relating to the Club's stocktake.
 - a. You did not provide any reasons for these discrepancies.
2. On 18th April 2023 at 6:55pm you were seen on CCTV footage ordering, receiving and failing to pay for drinks.

If these allegations are substantiated, then the Club will consider terminating your employment for serious misconduct.

Next steps

The purpose of this letter is to ensure you are afforded the right of procedural fairness. As such, you are required to attend the Club on 1st May 2023 at 11am to provide your responses and otherwise provide reasons as to why your employment should not be terminated in relation to the allegations outlined.³²

[36] The letter also advised that the matter was strictly confidential and required Ms Giblin and her support person to refrain from discussing with anyone the fact there was an investigation, the subject matter of the investigation or any of the issues discussed at any meetings or interviews relating to the investigation. The letter further provided that any breach of confidentiality would result in the immediate termination of Ms Giblin's employment.³³

[37] On 29 April 2023, Ms Patrin received advice from the Club's HR Consultant, in relation to the show cause process for the four employees who had been suspended.³⁴

[38] Evidence provided by the Club showed that Ms Giblin was not rostered to work on 18 April 2023. In cross-examination, Ms Giblin's evidence was that she had consumed four to five drinks before receiving the free drink³⁵ and that she had consumed one or two drinks before attending the staff meeting on 18 April 2023.³⁶ Ms Giblin further stated that there has never been a discussion about whether employees are allowed to drink before meetings and that management and other staff have consumed alcohol before meetings.³⁷ Ms Giblin also said that she didn't consider a meeting to be work and noted that EA, who resigned, had been seen on CCTV receiving drinks prior to the meeting, and that this was not a part of his termination.³⁸

[39] At 11:00am on 1 May 2023, Ms Giblin attended a meeting with Ms Patrin, Mr Armstrong and her support person Mr Mark Fethers. Mr Fethers gave evidence that he has known Ms Giblin for several years on a personal and professional level. Mr Fethers' partner had previously worked with Ms Giblin at a golf course and Mr Fethers had employed Ms Giblin at his pub to work at various functions and events.³⁹

[40] According to minutes of the meeting which were provided as part of Ms Patrin's statement, Ms Patrin explained the purpose of the meeting to Ms Giblin and Ms Fethers which was to address the allegation of theft and fraud. Ms Patrin stated that on 18 April 2023, following a staff meeting, Ms Giblin was provided with a drink by a staff member and took it without payment. Ms Giblin responded that she could not remember what the drink was and who had served it. She explained that she would not have purposely not paid. Ms Patrin stated

that as a manager, Ms Giblin should have flagged the failure to process the transaction with the staff member and should have not accepted the drink without paying for it. Ms Patrin advised that she had lost confidence in Ms Giblin to manage her own decisions and manage staff. Mr Fethers said he had never seen a letter written with ‘fraud’ and ‘theft’ used to intimidate a young member of staff. Ms Patrin said that Clubs NSW had written the letter. Ms Patrin then asked Ms Giblin why she should remain employed. Ms Giblin stated that she had been with the Club for two years and had picked up many shifts in her time, as well as there being no intent to take the drink from the staff member. Ms Patrin advised that she and Mr Armstrong would take five minutes to discuss. Ms Giblin and Mr Fethers then left the room for five minutes.⁴⁰

[41] According to Ms Patrin’s evidence, the following conversation then took place between Ms Patrin and Mr Armstrong:

Ms Patrin: I am concerned that Deanna didn’t show any remorse or take any accountability for her actions. Deanna observed Aedan’s movements in the bar and did not direct him to process the transaction and took the drink. She stated that there was no intent but took the drink anyway. From the CCTV footage, Deanna could be seen observing Aedan make and serve the drink and holding her phone near the EFTPOS terminal without effecting the transaction. Based on her actions I considered her response at the meeting to be dishonest. She had read and understood the employee handbook which required all drinks to be paid for. She received a memo stating that there were large stock variances. We had a staff meeting to highlight the stock variances and stated that we are conducting investigations into the large variances. She took the drink without paying for it directly after the staff meeting which was conducted to address the stock variances. She is a manager and should be guiding staff. I have lost confidence in her ability to manage, to lead by example and to adhere to the Club’s policies. Have we been fair, and do you trust her?

Mr Armstrong: Yes, we have, we have openly communicated to her and all staff of the variances and investigation. No, I do not trust her.⁴¹

[42] The minutes of the meeting recorded that when Mr Patrin and Mr Armstrong returned to the meeting, Ms Patrin explained that procedural fairness had been afforded to Ms Giblin by the Club as follows:

- An outline in the staff handbook (11.16) stating that theft may result in dismissal;
- Ms Giblin’s signed agreement stating that she acknowledges and accepts all policies and procedures of the Club dated 1 April 2022;
- The memorandum sent out to all staff by email stating the variances and that investigations would occur dated 14 April 2023; and

- The staff meeting on 18 April 2023 which further reiterated that investigation into variances would occur and the seriousness about any breach of the staff handbook in reference to the taking of Club stock without payment.⁴²

[43] After considering Ms Giblin's response, Ms Patrin explained that Ms Giblin was being offered the option to resign from her position otherwise she would be terminated. Mr Fethers requested a copy of the CCTV footage be given to Ms Giblin. Ms Patrin stated that she would check with legal counsel. Mr Fethers reminded Ms Giblin that she should be paid for all shifts which took place after she had been suspended. Ms Patrin confirmed that Ms Giblin would be paid. Mr Fethers advised that Ms Giblin would consider the options before making a decision. The meeting concluded at 11:20am.⁴³

[44] Later that day, Ms Patrin and Mr Armstrong met with EA and Mr Dunbar-Reid who both resigned.⁴⁴ On 2 May 2023, Ms Patrin and Mr Armstrong met with EC, who also resigned.⁴⁵

[45] The evidence of Mr Armstrong, Mr Fethers and Ms Giblin in relation to what occurred at the meeting on 1 May 2023 was broadly consistent. Mr Armstrong, Mr Fethers and Ms Giblin all stated that Ms Giblin apologised during the meeting.⁴⁶ Ms Patrin said that Ms Giblin did not apologise.⁴⁷ Ms Giblin's evidence was also that when asked why she should remain employed by the Club, Ms Giblin responded that she had worked at the Club for almost two years, worked nearly every weekend as well as picking up any shifts that needed to be filled and that she had never had any prior warnings or incidents and advised she was sorry.⁴⁸ During the hearing, Ms Patrin's evidence was that she did not know if the outcome would have been different if Ms Giblin had shown remorse and taken responsibility because as Duty Manager, Ms Giblin had the responsibility to lead and direct staff.⁴⁹ Ms Giblin, Mr Dunbar-Reid and Mr Armstrong all gave evidence during the hearing that customers in bars sometimes walk away without paying for drinks which requires the bar staff to follow up the customer to remind them to pay.⁵⁰

[46] On 3 May 2023, Ms Giblin attended the Club's premises to review the CCTV footage because she was advised she would not be provided with a copy of it. Ms Patrin claims that after reviewing the footage, Ms Giblin said she did not see herself waving her phone.⁵¹ Ms Giblin's evidence is that after reviewing the footage, Ms Giblin advised Ms Patrin that it did not look like she was pretending to pay and that the phone in her hand showed that she intended to pay.⁵² Ms Giblin further stated that she thought it was unfair that the Club went straight to termination or resignation and did not give Ms Giblin a warning.⁵³ Ms Patrin then advised she would need Ms Giblin's decision otherwise she would send a termination letter. Ms Giblin advised she would let Ms Patrin know by the next day.⁵⁴

[47] At 10:00am on 4 May 2023, Ms Giblin sent Ms Patrin an email advising that she would not be resigning as she believed the Club's decision was unfair.⁵⁵ Ms Giblin did not receive any response from Ms Patrin. Ms Patrin incorrectly claimed that Ms Giblin did not contact her to advise her of her decision,⁵⁶ which she corrected during cross-examination.⁵⁷

[48] On 4 May 2023, Ms Patrin called Mr Dunbar-Reid to ask if Ms Giblin had requested a free drink. According to Ms Patrin, the following exchange took place:

Ms Patrin: I would like to ask you a couple of questions about the incident where you served Deanna a drink. Did Deanna ask you to give her a free drink?

Mr Dunbar-Reid: No, she didn't.

Ms Patrin: So you just served her and did not process the drink through the till.

Mr Dunbar-Reid: Yes, that's right.⁵⁸

[49] In cross-examination, Ms Patrin said that she called Mr Dunbar-Reid to establish the accuracy of what went on, and whether it was Ms Giblin's intention or his to provide Ms Giblin with the free drink.⁵⁹ She did not recall asking Mr Dunbar-Reid this during the meeting on 28 April 2023.⁶⁰

[50] However, when I sought more information about this conversation during the hearing, Ms Patrin said that she called Mr Dunbar-Reid after receiving Ms Giblin's letter email on 4 May 2023.⁶¹ According to Ms Patrin, she then considered for a second time Ms Giblin's responses as to why her employment should not be terminated and whether Ms Patrin could continue to trust Ms Giblin if she worked at the Club. Ms Patrin noted that Ms Giblin stated that there was no intent to take the drink but took it anyway, and that Mr Dunbar-Reid did not attempt to process the transaction through the till. As Manager, Ms Giblin should have directed Mr Dunbar-Reid to process the transaction through the till so she could pay for it but didn't. Ms Giblin showed no remorse for her actions, nor did she offer to pay for the drink. The three employees who were suspended for similar incidents took accountability for their actions and resigned.⁶²

[51] Later on 4 May 2023 Mr Dunbar-Reid messaged Ms Giblin advising that Ms Patrin had called him that afternoon to discuss the incident. Mr Dunbar-Reid advised that Ms Patrin had asked if Ms Giblin requested the free drink and Mr Dunbar-Reid advised that Ms Giblin did not and that it was his decision.⁶³

[52] Mr Dunbar-Reid's evidence at the hearing was that he resigned to avoid being dismissed and that he understood that the Club was considering terminating his employment because he had given Ms Giblin a free drink.⁶⁴ He said at the time he believed he had rung up the purchase on the till.⁶⁵ However, because the Club said that it had CCTV evidence he told Ms Patrin on 4 May 2023 that he did not ring up the drink on the till⁶⁶ although he did not know this for certain until he was shown the CCTV footage during the hearing.⁶⁷ Mr Dunbar-Reid said he had never provided a free drink previously.⁶⁸ He also said that he was not aware of other staff doing this on 18 April 2023 until later.⁶⁹

[53] At 4:00pm on 5 May 2023, Mr Armstrong called Ms Giblin and asked her to attend the Club's premises that day to hand back property belonging to the Club. Ms Giblin advised Mr Armstrong that if she had time, she would attend the Club. The phone call then ended. About 2 minutes later Mr Armstrong called Ms Giblin back and urged that she go to the Club that afternoon to hand everything back so she could receive her remaining pay and to discuss a matter.⁷⁰

[54] Ms Giblin advised Mr Armstrong that she would come in to drop off the belongings but that she did not need to discuss anything with the Club as she had already sent Ms Patrin an email with her decision. At about 5:30pm Ms Giblin arrived at the Club with her belongings. Mr Armstrong asked Ms Giblin to go into an office where Ms Patrin was seated. Ms Patrin and Mr Armstrong asked Ms Giblin to sit down and proceeded to hand her a letter of termination.⁷¹

[55] The letter of termination⁷² relevantly provided:

On the 28th April 2023, the Coogee Legions Club (the Club) conducted an investigation into allegations of theft against you.

On the 1st May 2023 the Club met with you to discuss the allegations and provided you with an opportunity to respond. The Club met with you and found that **all of the allegations** of theft were substantiated. [emphasis added]

Furthermore, in the allegations meeting we found your response to be dishonest stating that you believed that you had paid for the relevant drink. CCTV footage of the incident on the 18th April 2023 at 6:55pm clearly shows:

- No drink being rung up on the Club's cash register
- You not placing your phone close enough to EFTPOS terminal to process a payment;
- Your phone on the home screen rather than the debit/credit card function.

You have also worked at the Club for 18 months and have a detailed understanding of how the EFTPOS terminal works.

On 3rd May 2023, you were given an opportunity to view this footage and provide further written responses as to why your employment should not be terminated. You continued to maintain that you thought you had paid for the drink.

The Club has now considered your verbal responses and written responses that you believed if the Club was to terminate then it would be considered harsh. Based on the inadequacy of your explanation of your responses, your dishonesty during the meeting and the fact that the Club has lost trust and confidence in you to perform your senior role at the Club, we wish to advise you that we will be terminating your employment for the following reasons:

- Theft; and
- Dishonesty

[56] After the termination Ms Giblin applied for jobs within and around Coogee. Ms Giblin had an interview with 'Aidan' at the Coogee Diggers Club which went well. Aidan advised Ms Giblin that she received a good reference from Ross Thornton at the Club and that he would contact Ms Giblin in the coming week about starting the job.⁷³

[57] A few weeks passed and since Ms Giblin had not heard anything, she called Aidan on 30 May 2023. Aidan advised that Coogee Diggers Club would not be offering Ms Giblin a job because the Club gave her a bad reference.⁷⁴

[58] Ms Giblin also had an interview with Bob Tate from the Glasshouse Hotel in Maroubra. This interview went very well and Ms Giblin was offered a trial shift for the following week. A few days later, Mr Tate sent Ms Giblin an email advising that he could not proceed with the employment offer.⁷⁵

[59] In relation to the Glasshouse Hotel, Mr Armstrong said that Mr Tate attended the Club on 25 May 2023 after initially making contact by phone and email. Mr Armstrong and Mr Tate had the following conversation:

Mr Tate: I thought it'd be easier to come see you face to face. I have two questions about Deanna...is she honest?

Mr Armstrong: What's the second question?

Mr Tate: Would you hire her again?

Mr Armstrong: No.⁷⁶

When can the Commission order a remedy for unfair dismissal?

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

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

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

When has a person been unfairly dismissed?

[62] 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.

Initial matters

[63] A threshold issue to determine is whether Ms Giblin has been dismissed from her employment.

[64] There was no dispute and I find that Ms Giblin's employment with the Club was terminated at the initiative of the Club. I am therefore satisfied that Ms Giblin has been dismissed within the meaning of s.385 of the FW Act.

[65] 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.

[66] I have decided these matters below.

[67] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[68] It is not disputed, and I find, that Ms Giblin was dismissed from her employment on 5 May 2023 and made the application on 26 May 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

[69] 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.

[70] It was not in dispute, and I find, that at the time of dismissal, Ms Giblin was a regular casual employee with a reasonable expectation of continuing employment by the Club on a

regular and systematic basis who had completed at least the minimum period of employment with the Club, and that the Award applied to Ms Giblin's employment.

[71] I am therefore satisfied that, at the time of dismissal, Ms Giblin was a person protected from unfair dismissal.

[72] It was not in dispute, and I find, that Ms Giblin's dismissal was not a case of genuine redundancy and that the Small Business Fair Dismissal Code does not apply.

[73] Having considered each of the initial matters, I am required to consider the merits of the application.

Was the dismissal harsh, unjust or unreasonable?

[74] 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.

[75] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.⁷⁷

[76] I set out my consideration of each of these criteria below.

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

[77] In order to be a valid reason, the reason for the dismissal should be ‘sound, defensible or well founded’⁷⁸ and should not be ‘capricious, fanciful, spiteful or prejudiced.’⁷⁹ 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.⁸⁰

[78] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁸¹ 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.⁸²

[79] Deputy President Asbury (as she then was) summarised the relevant principles in relation to the employer’s onus of establishing that there was a valid reason for a dismissal on the balance of probabilities as follows in *Gary Mellios v Qantas Airways Limited*⁸³ which was confirmed on appeal by the Full Bench:⁸⁴

[17] In considering whether there is a valid reason for the Applicant’s dismissal, I am required to be satisfied on the balance of probabilities that he engaged in the alleged misconduct or in misconduct to which dismissal was a valid, sound and defensible response. I must be conscious of the gravity of the allegations and the ramifications for the Applicant if they are made out. However, the standard of proof does not change and the issues in dispute must be determined on the balance of probabilities. Put another way, it must be more probable than not that the Applicant engaged in the relevant misconduct.

[80] I have applied these principles to the matter before me.

[81] The parties provided detailed written and verbal submissions which are summarised below. I have considered the submissions made by the parties and all of the evidence in my determination of this matter and the conclusions I have reached.

The Club

[82] Although the misconduct by Ms Giblin occurred when she was not working, the Club submits that it still warrants dismissal. The Club submits that the misconduct by Ms Giblin was conduct that caused serious damage to the relationship between the employer and employee and therefore her employment was validly terminated. Ms Giblin was on the Club’s premises when the misconduct occurred. The conduct occurred shortly after a staff meeting and in the presence of other staff. Ms Giblin received the stolen goods from a staff member who was performing work for the Club at the time and also reported to Ms Giblin.

[83] Ms Giblin’s misconduct also caused damage to her employer’s interests as Ms Giblin stole directly from the Club. Although small, Ms Giblin’s conduct contributed to a loss of profit for the Club.

[84] The Club submits that Ms Giblin was terminated for receiving of stolen goods/theft on 18 April 2023. The Club also found Ms Giblin to be dishonest during the investigation.

It is not disputed by Ms Giblin that she knowingly received a free drink and this is supported by the statement in her F2:

I am truly sorry I received a free drink, it was poor judgement and not what I would ever do, I had already had a few drinks and it was just a terrible decision on my part.

[85] In addition, the conduct is supported by CCTV footage. Therefore, on the balance of probabilities the Commission should be satisfied that the misconduct took place.

[86] The next question for the Commission is whether the receiving of the stolen goods and dishonesty is a valid reason for termination. The policy provided to Ms Giblin is clear. Receiving beverages or consuming beverages without payment is prohibited by the Club under the policy and when Ms Giblin signed the Staff Handbook she agreed to this arrangement. Ms Giblin received the free drink from a level 3 employee who reports to her on shifts. There was an obligation on Ms Giblin to also report his conduct to management.

[87] On the balance of probabilities, the Club also found that Ms Giblin was dishonest during the show cause meeting. The CCTV footage shows Ms Giblin holding her phone close to the EFTPOS machine to pay for the drink in an attempt to mislead anyone who would review the footage.

[88] Ms Giblin had been employed for approximately 18 months, she regularly worked behind the bar and had detailed knowledge about how drinks are paid for. Ms Giblin had detailed knowledge of the process needed to pay for a drink. Ms Giblin had undergone further training when she was promoted in August 2022 to Duty Manager.

[89] When the drink was received by Ms Giblin, Mr Aedan Dunbar-Reid took no steps to put the drink through the Point of Sale system. It would have been clear to Ms Giblin that the drink had not been processed.

[90] During the hearing Ms Giblin gave evidence that she had consumed alcohol before the staff meeting. The Club claimed that it was not previously aware of this and sought leave to file further submissions in relation to this matter. I subsequently directed the Club to file submissions about this matter and Ms Giblin any material in response during the week after the hearing.

[91] In their submissions filed on 14 August 2023, the Club claimed that Ms Giblin's evidence during the hearing was that she had consumed 5-6 alcoholic drinks prior to accepting the free drink at the Club on the 18 April 2023. As the CCTV showed Ms Giblin consuming two drinks at the Club prior to 6:55pm when the free drink was accepted, the Club submitted that Ms Giblin consumed 3-4 alcoholic drinks prior to the staff meeting on the 18 April 2023. Ms Giblin did not advise the Club that she had been drinking 3-4 alcoholic drinks before the Staff Meeting at the meeting on 1 May 2023.

[92] The Club submitted that staff were paid to attend the meeting on 18 April 2023 and that Ms Giblin was paid 1 hour at the level 3 Bar Attendant rate to attend the meeting.

[93] In addition to Ms Giblin accepting a free drink, which is a breach of her contract of employment and the Staff Handbook, she has also engaged in further serious misconduct by consuming alcohol prior to attending the staff meeting on 18 April 2023. Where such misconduct is discovered following a person's termination, it can still be taken into account for the purpose of justifying the termination.

[94] The Staff Handbook provides a Code of Conduct which makes it clear that the Club has a zero alcohol policy. It states:

Alcohol must not be consumed prior to a shift, during a shift or break period.

[95] Ms Giblin attending a paid meeting is deemed a shift and therefore Ms Giblin has breached the Code of Conduct. As the term 'shift' is not defined in the Staff Handbook the Commission should have regard to its ordinary meaning. The term 'shift' is defined by the Oxford Dictionary as a 'period of work.' Therefore, it is open for the Commission to find that the prohibition on drinking alcohol would apply to Ms Giblin while she attended a paid meeting.

[96] If the Commission does not accept it was a shift, this meeting should be deemed to be training as staff were trained on policies, including the no phone policy, the changes to the Staff Handbook, changes to tills, loyalty programs and also confidentiality requirements. There is no other evidence to contradict that this was discussed. In accordance with Clause 15 of the Staff Handbook the Code of Conduct applies to all training. Therefore, Ms Giblin breached the Code of Conduct by consuming alcohol prior to the training shift.

[97] Based on the following reasons, Ms Giblin's conduct of attending a paid training shift on updated Club policies after having consumed 3-4 drinks prior, is considered serious misconduct in accordance with the Club's Code of Conduct:

- (a) Ms Giblin had four (4) days notice of the meeting and chose to attend the staff training meeting whilst consuming 3-4 drinks prior;
- (b) Ms Giblin was paid for the meeting;
- (c) The meeting involved training all existing employees on the updates to the Club's policies; and
- (d) As a Duty Manager, Ms Giblin had a higher responsibility to understand the updates to policies. Specifically, her job description states she is required to 'manag[e] staff and operations during Club trading for the achievement of policy objectives, optimum staff performance and customer satisfaction of Members & Guests' and was responsible for 'Ensuring all staff are adhering to all Club rules, regulations and procedures as set down in the staff manual, memorandums and notices.'

[98] Ms Giblin breached her work health and safety obligations by attending a training session after consuming 3-4 alcoholic drinks. Further, Duty Managers are responsible for promotion of good health in the workplace.

[99] Based on the above the Club has a valid reason for termination. Ms Giblin's conduct is a substantial and wilful breach of the policies.

Ms Giblin

[100] Ms Giblin submitted that she had shown remorse and understood the seriousness of the incident, as she apologised in the meeting with Mr Armstrong and Ms Patrin. There was no intent behind receiving a free drink, it was simply an accident. Ms Giblin was not on shift at the time of the incident and no staff member approached her to advise she had not paid for the drink.

[101] If Ms Giblin had known of the issue it would have been corrected. Ms Giblin had paid for her drinks prior to the one in question. Ms Giblin does not think it is fair that she is being placed in the same situation as the other staff who chose to resign. Two of these staff were on shift at the time and chose to give the free drinks out and the other staff member, as per the Club's statements, had been seen receiving five drinks that day and pretending to pay for the drinks.

[102] Ms Giblin never asked for a free drink and never pretended to pay for it. Ms Giblin honestly thought it had been paid for. Ms Giblin believes that her length of service at the Club, her promotion to Duty Manager and the fact she never had any warnings or incidents against her should have been considered by the Club. Ms Giblin believes that she should have received a warning from the Club.

[103] On 4 May 2023, Ms Patrin contacted Mr Dunbar-Reid, to ask if Ms Giblin had asked for a free drink. Mr Dunbar-Reid advised Ms Giblin had not. This call was made after the meeting where Ms Giblin was offered resignation or termination, showing that the Club looked at the facts after making their decision.

[104] The Club have also given Ms Giblin two bad references, to the Coogee Diggers Club and the Glasshouse Hotel in Maroubra. This has stopped Ms Giblin from gaining employment at both and from working within the area. It is a small community and word is spreading around. The Club could have declined to give references but chose to give bad ones instead.⁸⁵

[105] In relation to consuming alcohol before the staff meeting, Ms Giblin submitted that the Club's claim that she had consumed 3-4 drinks before the meeting was false and did not reflect her evidence at the hearing.

[106] Ms Giblin provided the memorandum sent by Mr Armstrong on 14 April 2023 in relation to the staff meeting on 18 April 2023 and pointed out there was no reference to staff training. Ms Giblin further submitted that the staff meeting was not a shift as she was not serving customers or undertaking work and those in attendance were not required to wear uniform.

[107] Ms Giblin said that Mr Armstrong was aware that staff would have drinks prior to meetings as he was in the building at the time and would witness managers as well as staff consuming alcoholic beverages prior to meetings and never said this was not allowed. A manager who would do this regularly prior to meetings is still employed at the Club. Mr Armstrong and Ms Patrin were aware that EA was drinking prior to the staff meeting as some

of his free drinks are recorded in Mr Armstrong's statement as being ordered before the meeting on 18 April 2023 commenced. However, EA was not terminated for consuming alcohol prior to the meeting.

Findings

a. Allegations of accepting a free drink and dishonesty

[108] Based upon my consideration of the evidence and submissions, I am satisfied that receiving or consuming beverages without payment is prohibited by the Club's policies and that Ms Giblin was aware of and agreed to comply with the policies. Further I am satisfied that these policies with respect to receiving or consuming beverages extended to out of hours conduct by Ms Giblin while she was on Club premises and using the Club's facilities.

[109] There is no dispute between the parties that Ms Giblin was provided with a vodka at 6:55pm by Mr Dunbar-Reid on 18 April 2023 which she did not pay for. What is in dispute is whether Ms Giblin did not pay for the drink deliberately.

[110] The letter from the Club to Ms Giblin dated 28 April 2023 made allegations that Ms Giblin was seen on CCTV footage ordering, receiving and failing to pay for drinks. This was incorrect, as the Club had only identified one drink that Ms Giblin failed to pay for. Ms Patrin did not put the correct allegation to Ms Giblin until the meeting on 1 May 2023.

[111] Ms Giblin responded that she could not remember what the drink was or who had served it and explained that she would not have 'purposely not paid'. At no stage did Ms Patrin seek to test or explore Ms Giblin's explanation that her actions were unintentional by asking further questions. Instead, Ms Patrin appeared to immediately disregard Ms Giblin's explanation by telling Ms Giblin that she should have flagged the failure to process the transaction with the staff member and should have not accepted the drink without paying for it.

[112] The private conversation that Ms Patrin and Mr Armstrong had when they left the meeting indicated that Ms Patrin believed that Ms Giblin was being dishonest based on her observations of Ms Giblin in the CCTV footage. However, Ms Patrin did not disclose to Ms Giblin her concerns about the CCTV footage and did not show Ms Giblin the CCTV footage during the meeting. There was no discussion between Ms Patrin and Mr Armstrong about whether it was possible that Ms Giblin's actions were unintentional. After returning to the meeting, Ms Patrin informed Ms Giblin that her employment would be terminated if she did not resign.

[113] Ms Giblin's evidence that her actions were unintentional were partially corroborated by Mr Dunbar-Reid, who told Ms Patrin on 4 May 2023 that Ms Giblin had not requested a free drink. This indicates that at its highest, the Club's case is that Ms Giblin's actions in not paying for the drink were opportunistic rather than pre-planned. Ms Patrin did not investigate whether Ms Giblin requested a free drink until after determining that she would be dismissed, and further did not advise Ms Giblin of her conversation with Mr Dunbar-Reid. If Mr Dunbar-Reid had not contacted Ms Giblin after his conversation with Ms Patrin, Ms Giblin would have been unaware that the Club was privy to information which partially supported Ms Giblin's explanation that her actions were not intentional.

[114] The CCTV footage was in evidence during the hearing. There is no doubt that it shows that Ms Giblin ordered a drink from Mr Dunbar-Reid, that Mr Dunbar-Reid provided the drink to Ms Giblin, that Mr Dunbar-Reid did not put the transaction through the Point of Sale machine and that Ms Giblin did not pay for the drink. None of this is in dispute. However, during the hearing the Club made much of its theory that the CCTV footage shows Ms Giblin holding her phone close to the EFTPOS machine to pay for the drink in an attempt to mislead anyone who would review the footage.

[115] I have watched the footage and do not agree that it shows what the Club claims it does. The Club produced photos of the EFTPOS machine during the hearing which showed that the machine used by the club is the type where the card reader is on the side rather than on top of the machine. If Ms Giblin was trying to give the impression for the CCTV cameras that she was paying for the drink, she would have held her phone to the side of the machine where the card reader is located. She did not do this. Furthermore, the fact that the CCTV shows that Mr Dunbar-Reid did not process the transaction would have thwarted any attempt by Ms Giblin to pretend she was paying for the drink.

[116] When asked in cross-examination what she was doing with her phone in the CCTV footage, Ms Giblin said she does not remember the incident but speculated that she was holding her phone, that she waited to pay for the drink and then assumed that she had paid before.⁸⁶ The suggestion that payment could be sought by the bar attendant either before or after providing the drink was consistent with Ms Giblin's earlier unchallenged evidence that when serving a customer a drink, sometimes she would put the drink through the register first and charge them while she is making the drink. At other times Ms Giblin would make the drink then charge the customer through the till.⁸⁷

[117] The CCTV footage shows Ms Giblin receiving her drink then moving her phone towards but not tapping on the EFTPOS machine reader. In my view these actions are consistent with Ms Giblin intending to tap on the EFTPOS machine reader, seeing that there was no payment recorded on the EFTPOS machine screen, assuming that she had already paid, then not tapping on the card reader. The fact that the home screen appeared on Ms Giblin's phone rather than the credit/debit card screen is of no consequence as it is not necessary to open the credit/debit card until immediately before the point of touching the card reader.

[118] The Club submits that it is not disputed by Ms Giblin that she knowingly received a free drink, and this is supported by the following statement in the Form F2 (F2) filed by Ms Giblin:

I am truly sorry I received a free drink, it was poor judgement and not what I would ever do, I had already had a few drinks and it was just a terrible decision on my part.

[119] In my view, this statement needs to be read in the context of previous statements in the F2 which make reference to Ms Giblin not remembering receiving a free drink and the Club's evidence that Ms Giblin said at the meeting on 1 May 2023 that she did not remember the incident. Ms Giblin also clarified this statement in cross-examination by saying:

However, there is more to that statement and I, again, stand by the fact that I did not remember the drink. The wording, I guess, is not put correctly. I've never had to deal with a situation like this.⁸⁸

[120] I therefore do not accept the Club's submission that the F2 contains an admission that Ms Giblin knowingly received the free drink.

[121] In considering whether there is a valid reason for Ms Giblin's dismissal, I am required to be satisfied that it was more probable than not that Ms Giblin engaged in the alleged misconduct or in misconduct to which dismissal was a valid, sound and defensible response.

[122] I find that Ms Giblin was an honest and credible witness during the hearing. She has consistently maintained that her actions were unintentional. I accept the evidence of Ms Giblin, Mr Fethers and Mr Armstrong that Ms Giblin apologised. Apart from the incident which led to her dismissal, the Club does not allege that Ms Giblin has any history of dishonesty or of other wrongdoing. The Club has the ability to check whether Ms Giblin has received or provided free drinks on other occasions by reviewing CCTV footage and does not allege that any other incidents of this nature have occurred in the past.

[123] In these circumstances I have difficulty understanding why the Club immediately disregarded Ms Giblin's explanation that her actions were unintentional. The CCTV footage showed that Ms Giblin received a free drink, but it does not establish that Ms Giblin's actions were intentional. In any event, it seems implausible that Ms Giblin would be able to act so quickly and decisively to cover up not paying for an unexpected free drink. This is in contrast to the other employees involved in providing and consuming free drinks on 18 April 2023 who were observed falsely ringing up drinks on the Club's cash register without payment being received and pretending to use a phone to pay for drinks without payment being made on multiple occasions.⁸⁹ The actions of the other employees suggests that there may have been some preplanning involved in providing and taking the free drinks however there was no evidence of this with respect to Ms Giblin. It is possible that the Club's view of Ms Giblin was tainted by the actions of other employees who received and provided free drinks, but given the differences outlined above it should not have been.

[124] Taking into account these matters I find on the balance of probabilities that Ms Giblin did not deliberately take the free drink and that the alleged misconduct did not occur. I accept that Ms Giblin's actions occurred immediately after a meeting when stock variances were discussed, and employees were instructed that they must pay for all food and drink consumed. In these circumstances, Ms Giblin should have been more vigilant in ensuring that she paid for her drink. However, this does not amount to misconduct and given Ms Giblin's good employment history and remorse, this could have been dealt with by way of a verbal warning. It follows that I do not accept that Ms Giblin was dishonest in responding to the allegations in the meeting of 1 May 2023.

b. Consumption of alcohol before the staff meeting

[125] In cross-examination, Ms Giblin's evidence was that she had consumed four to five drinks before receiving the free drink⁹⁰ and that she had consumed one or two drinks before

attending the staff meeting on 18 April 2023.⁹¹ The Club is therefore incorrect in claiming that Ms Giblin consumed 3-4 drinks before attending the staff meeting.

[126] In relation to whether the Staff Handbook bans consumption of alcohol before a meeting, Ms Giblin's evidence was that there has never been a discussion about whether employees are allowed to drink before meetings and that management and other staff have consumed alcohol before meetings.⁹² Ms Giblin also said that she did not consider a meeting to be work and noted that EA, who resigned after consuming five free drinks had been seen on CCTV receiving drinks prior to the meeting, and that was not a reason for his termination.⁹³

[127] The roster produced by the Club in relation to Ms Giblin shows that Ms Giblin was not rostered to attend any work on 18 April 2023 including the staff meeting. In my view, this demonstrates that the Club does not regard attendance at a meeting as a 'shift'. The Club's characterisation of meetings is also demonstrated by its actions in paying Ms Giblin for only one hour to attend the staff meeting. Clause 11.5 of the Award provides that a casual employee (other than a casual employee engaged solely as a bingo caller, assistant bingo caller or fitness instructor) is entitled to a minimum payment for two hours' work on each occasion that they are required to attend work. The fact that the Club did not pay Ms Giblin for two hours' work on 18 April 2023 shows that it did not regard the staff meeting as a period of work. I have some doubts about whether the Club was complying with the Award in paying Ms Giblin for one rather than two hours when attending the staff meeting, but that is not an issue which requires determination with respect to the matter before me.

[128] Taking into account these matters and Ms Giblin's uncontested evidence that staff and management have previously consumed alcohol before staff meetings without sanction, I find that the prohibition on the consumption of alcohol prior to a shift, during a shift or break period does not extend to staff meetings. On this basis, I find that Ms Giblin did not engage in misconduct when consuming alcohol prior to the staff meeting.

Was Ms Giblin notified of the valid reason?

[129] Proper consideration of s.387(b) requires a finding to be made as to whether Ms Giblin 'was notified of that reason'. Contextually, the reference to 'that reason' is the valid reason found to exist under s.387(a).⁹⁴

[130] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.⁹⁵

Was Ms Giblin given an opportunity to respond to any valid reason related to her capacity or conduct?

[131] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.⁹⁶

Did the Club unreasonably refuse to allow Ms Giblin to have a support person present to assist at discussions relating to the dismissal?

[132] There is no dispute and I find that the Club did not unreasonably refuse to allow Ms Giblin to have a support person present at discussions relating to the dismissal.

Was Ms Giblin warned about unsatisfactory performance before the dismissal?

[133] 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 Club's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[134] The Club submitted that it followed a thorough process in affecting the dismissal by affording Ms Giblin full procedural fairness on 1 May 2023 as it does with all formal disciplinary matters. The Club undertook an extensive investigation as outlined in paragraphs 42-48 of Mr Armstrong's statement. The Club is a relatively small business with 33 employees of which 25 were casual.

[135] I accept that the Club is a relatively small business however I note that the Club has a 77-year history and as such would be expected to have well established workplace relations policies and procedures. I also note that Ms Patrin has 25 years' experience in senior management roles in the Club Industry and that the Club was assisted by the Club's HR Consultant and Clubs NSW throughout the procedures which led to Ms Giblin's dismissal.

[136] There were many aspects of the procedures followed in effecting Ms Giblin's dismissal that were concerning. The first of these is that the initial letter dated 28 April 2023 alleged that Ms Giblin had engaged in theft and fraud. There were never any particulars provided in relation to the allegation of fraud. The letter went on to accuse Ms Giblin of not providing any reasons for the discrepancies relating to the Club's stocktake at the staff meeting where this was discussed. There is no suggestion in the evidence that Ms Giblin was ever specifically asked to explain the discrepancies, so there was no basis for the Club to accuse her of wrongdoing in this regard.

[137] Further, the letter refers to Ms Giblin being seen 'ordering, receiving and failing to pay for drinks,' and the letter of termination refers to the Club finding that 'all of the allegations of theft were substantiated.' Both the letter of allegations and the termination letter refer to multiple acts of wrongdoing when there was only ever one drink that was accepted by Ms Giblin without payment. When making such serious allegations against an employee, there can be no justification for an employer getting such critical details wrong on not just one, but two occasions. In addition, Ms Patrin incorrectly claimed that Ms Giblin did not contact her to advise her of her decision about whether to resign which she corrected during cross-examination. The Club's tendency to make errors with respect to the facts extended to the hearing, when the Club wrongly claimed that Ms Giblin admitted to consuming 5-6 drinks before the free drink and therefore 3-4 drinks before the staff meeting, when Ms Giblin's evidence was that she had consumed 4-5 drinks before the free drink and 1-2 drinks before the staff meeting.

[138] In addition, there were further significant issues with the procedure. During the break in the meeting with Ms Giblin on 28 April 2023, Ms Patrin made adverse findings about Ms Giblin's honesty based on the CCTV footage without showing Ms Giblin this footage and

without advising Ms Giblin of these findings. Although the Club claimed in its submissions that Ms Giblin was given the opportunity to view the CCTV footage and provide further information for the Club's consideration, I do not accept that the Club was providing procedural fairness in doing so. Ms Giblin was able to view the footage only as a result of requesting this but by that time it was too late; since Ms Patrin had already determined that Ms Giblin had engaged in misconduct and that her employment would be terminated if she did not resign.

[139] Perhaps the most concerning aspect of the process was Ms Patrin's call to Mr Dunbar-Reid on 4 May 2023. Having determined that Ms Giblin engaged in misconduct and should be terminated, there was no reason for Ms Patrin to call Mr Dunbar-Reid to ask if Ms Giblin requested the free drink. Ms Patrin claimed during cross-examination that she called Mr Dunbar-Reid to establish the accuracy of what went on and whether it was Ms Giblin's intention or Mr Dunbar-Reid's intention to provide Ms Giblin with the free drink. She then considered for a second time Ms Giblin's responses as to why her employment should not be terminated and whether Ms Patrin could continue to trust Ms Giblin if she worked at the Club. I do not accept this explanation as a credible one. If Ms Patrin was genuinely interested in establishing the accuracy of what went on, she would have asked Mr Dunbar-Reid when she interviewed him on 1 May 2023, and this would have informed her deliberations about whether Ms Giblin's actions were intentional.

[140] I think it is more likely than not that Ms Patrin called Mr Dunbar-Reid in the hope that she would obtain additional evidence that would establish that Ms Giblin's actions were intentional, given that Ms Giblin had just advised Ms Patrin that she would not resign. Having received a response from Mr Dunbar-Reid which confirmed that Ms Giblin's actions were not pre-meditated, and therefore potentially unintentional, Ms Patrin should have advised Ms Giblin about the conversation as a matter of fairness. This is particularly so as Ms Giblin was prohibited from gathering her own evidence by the Club's threat to terminate her employment if she spoke to other employees about the investigation. In these circumstances, I find Ms Patrin's conduct in withholding information from Ms Giblin which potentially supported Ms Giblin's version of events both dishonest and a serious breach of procedural fairness.

[141] I also disagree that the Club's actions were consistent with respect to four other employees who resigned after supplying or consuming free drinks. The Club's own evidence established significant differences in the actions of Ms Giblin and Mr Dunbar-Reid compared to the other three employees involved. The other three employees were involved in the provision of five free drinks, compared to one free drink with respect to Ms Giblin and Mr Dunbar-Reid. Ms Giblin was seen purchasing drinks before receiving one free drink which supports her claim that her actions were unintentional.

[142] This is to be contrasted with EA who was observed consuming five free drinks. There was no evidence presented which showed that EA purchased any drinks. The staff providing EA the free drinks were seen pretending to put the drinks through the till, whereas there was no such pretence on the part of Mr Dunbar-Reid. Taking into account these matters, I find it unfair that the Club did not differentiate between the conduct of Ms Giblin and the three employees who were involved in the provision and consumption of EA's five free drinks. I also find it unfair that the Club took into account that the three employees took accountability for their actions and resigned⁹⁷ in determining that Ms Giblin's employment should be terminated. The evidence shows that Ms Giblin took accountability for her actions by apologising. It was

unreasonable for the Club to find that Ms Giblin did not take accountability because Ms Giblin denied her conduct was deliberate and refused to resign.

[143] Given the long history of the Club, the extensive experience of Ms Patrin and the involvement of the Club's HR Consultant and Clubs NSW, there was no reason for the Club not to follow fair procedures in relation to the dismissal. If fair procedures had been followed, I believe that it would have been likely that the Club would have accepted that Ms Giblin's actions were unintentional and would not have dismissed her. I therefore find that the deficiencies in the procedures followed in effecting the dismissal weigh in favour of a finding that the dismissal was unfair.

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

[144] The Club submitted that it does not have a dedicated human resource management function but was provided with some assistance from Clubs NSW, and followed a thorough process in effecting the dismissal by affording Ms Giblin full procedural fairness as it does with all formal disciplinary matters.

[145] I have found above that there were significant deficiencies in the procedures which led to Ms Giblin's dismissal, so I do not accept the Club's submissions that it followed a thorough process in effecting the dismissal by affording Ms Giblin full procedural fairness. These deficiencies are not explained by the absence of dedicated human resource management specialists given the long history of the Club, the extensive experience of Ms Patrin and the involvement of the Club's HR Consultant and Clubs NSW. Therefore, the absence of dedicated human resource management specialists is not a matter which favours a finding that the dismissal was not unfair.

What other matters are relevant?

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

[147] The following matters referred to in Ms Giblin's submissions are relevant to the Commission's consideration of whether the dismissal was harsh, unjust or unreasonable:

- (a) Ms Giblin submitted that she had shown remorse and understood the seriousness of the incident, as she apologised in the meeting with Mr Armstrong and Ms Patrin. There was no intent behind receiving a free drink, it was simply an accident.
- (b) Ms Giblin had paid for her drinks prior to the one in question. Ms Giblin does not think it is fair that she is being placed in the same situation as the other staff who chose to resign. Two of these staff were on shift at the time and chose to give the free drinks out and the other staff member, as per the Club's statements, had been seen receiving five drinks that day and pretending to pay for the drinks.

- (c) Ms Giblin's length of service at the Club, her promotion to Duty Manager and the fact she never had any warnings or incidents against her should have been considered by the Club.
- (d) The Club has given Ms Giblin two bad references, to the Coogee Diggers Club and the Glasshouse Hotel in Maroubra. This has stopped Ms Giblin from gaining employment at both and from working within the area. It is a small community and word is spreading around. The Club could have declined to give references but chose to give bad ones instead.

[148] The Club submitted that the following other matters are relevant to the Commission's consideration of whether the dismissal was harsh, unjust or unreasonable:

- (a) The consistent treatment of all employees involved in similar conduct on the 18 April 2023. As outlined, all employees involved were issued show cause letters, stood down and attended a show cause meeting. All other employees involved recognised the seriousness of their misconduct and resigned from their employment.
- (b) Ms Giblin's short service with the Club. Ms Giblin was only employed for 17 months and 21 days so did not have significant service with the Club.
- (c) The location of the Club and its proximity to other jobs and businesses. The Club is located in Coogee, which is in the Eastern Suburbs of Sydney. Sydney is a highly populated area with significant job opportunities.
- (d) Ms Giblin being employed in a casual capacity while she is studying nursing. There appears to be no evidence that there are considerable restrictions on what areas she can work in.
- (e) Ms Giblin was given an opportunity to resign and chose not to.
- (f) Ms Giblin still fails to understand the seriousness of her conduct.
- (g) Ms Giblin's position as a Duty Manager at the Club which is considered a senior position and had direct reports to it. She was required to work independently without constant or even regular supervision. There is a level of trust required in this role and an expectation of exhibiting the right behaviour and rectifying any concerns with other employees' conduct.
- (h) There is nothing unusual, extreme or significant about Ms Giblin's financial issues.
- (i) Ms Giblin was terminated for misconduct and not serious misconduct.
- (j) Finally, the timing of the misconduct is important. The Club had been reviewing the inventory management process. They had spent considerable money on engaging an external stocktake to identify any stock discrepancies, variances and waste. The external stocktake identified that there were significant variances in

many products up to the value of \$4360.19 on 12 April 2023. Ms Giblin had been resent the handbook on 17 April 2023 and attended a meeting to discuss these variances on 18 April 2023.

[149] It has long been established that the effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s.387(h) of the FW Act.⁹⁸I accept Ms Giblin's evidence that she has suffered financial loss as a result of the dismissal.

[150] Many of the matters raised by the Club have already been dealt with or are not relevant to my consideration under s.387(h) of the FW Act. In relation to the consistent treatment of employees involved in similar conduct, I have already found that the Club's failure to differentiate Ms Giblin's conduct from other employees is a matter which weighs in favour of a finding of unfairness. Ms Giblin's length of service, the location of the Club and job opportunities are relevant to the consideration of compensation under s.392(2) but not whether the termination was unfair. The fact that Ms Giblin was given the opportunity to resign, that she was terminated for misconduct rather than serious misconduct and her position of Duty Manager are not relevant to determining whether the termination was unfair given that I have found that there was no valid reason for the dismissal. I have accepted that the timing of Ms Giblin's conduct was relevant with respect to the Club's discussion with staff about the stock variances and have already considered this. There is simply no evidence to support the Club's submissions that Ms Giblin fails to understand the seriousness of her conduct or that there is nothing unusual, extreme or significant about Ms Giblin's financial issues.

[151] There is one final matter which I believe is relevant to my consideration under s.387(h). In the evidence provided by the Club in relation to the meeting on 1 May 2023, the Club noted that Mr Fethers said he had never seen a letter written with 'fraud' and 'theft' used to intimidate a young member of staff. Although there is no evidence before the Commission about Ms Giblin's age, I believe that it is likely that Ms Giblin is in the early stages of her working life, given Mr Fethers' comments.

[152] I agree that the use of the words 'fraud' and 'theft' by the Club in relation to Ms Giblin were intimidatory, especially when directed at an employee in the early stages of their career. I believe that the Club's intention in using these words was to suggest that Ms Giblin engaged in criminal behaviour. These words have specific legal meanings and great caution should be exercised before finding an employee has engaged in criminal conduct. Intent is required and the conduct must be established to the criminal standard of proof, which is beyond reasonable doubt. In my view it is unconscionable for the Club to claim that Ms Giblin engaged in criminal behaviour in circumstances where Ms Giblin explained that her conduct was unintentional and there was evidence which corroborated this, including Ms Giblin's prior favourable employment record and evidence which Ms Patrin deliberately withheld from Ms Giblin. It was open to the Club to investigate Ms Giblin's conduct on the basis that she breached the Club's policies but instead the Club made baseless conclusions that Ms Giblin engaged in criminal conduct. This is in circumstances where Ms Giblin is studying nursing and such serious findings may have an adverse impact on her ability to commence a career in that profession.

[153] I also note Clubs NSW's liberal use of the expression throughout the hearing that in accepting the free drink, Ms Giblin 'received stolen goods'. This is not terminology that was

used during the disciplinary investigation or in relation to the dismissal and was introduced for the first time during the hearing. The offence of receiving stolen property is contained in section 188 of the *Crimes Act 1900* (NSW). It is difficult for me to see how Clubs NSW could genuinely believe that Ms Giblin committed such an offence. There was no basis for Clubs NSW to characterise Ms Giblin's conduct in this way and it was unprofessional for Clubs NSW to do so.

[154] In the circumstances, I find that the financial impact of the dismissal on Ms Giblin, the incorrect and inappropriate characterisation of her conduct as criminal, and the adverse impact on her employment prospects caused by the dismissal are all matters which weigh in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

Is the Commission satisfied that the dismissal of Ms Giblin was harsh, unjust or unreasonable?

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

[156] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.⁹⁹

[157] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Ms Giblin was harsh, unjust and unreasonable because there was no valid reason related to Ms Giblin's conduct, there were procedural deficiencies in the Club's investigation and because of the harsh consequences of the dismissal due to the financial impact of the dismissal on Ms Giblin and the adverse impact on her employment prospects.

[158] I am therefore satisfied that Ms Giblin was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[159] Being satisfied that Ms Giblin made an application for an order granting a remedy under s.394, was a person protected from unfair dismissal, and was unfairly dismissed within the meaning of s.385 of the FW Act, I may, subject to the FW Act, order Ms Giblin's reinstatement, or the payment of compensation to Ms Giblin.

[160] Under section 390(3) of the FW Act, I must not order the payment of compensation to Ms Giblin unless:

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

Is reinstatement of Ms Giblin inappropriate?

[161] Ms Giblin has not sought reinstatement and the Club has not made any submissions in relation to this matter. On this basis I consider that reinstatement is inappropriate.

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

[162] 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...’¹⁰⁰

[163] 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.¹⁰¹

[164] At the time of the hearing, Ms Giblin had not obtained alternative employment and submitted that she was hindered from doing so because the Club had provided unfavourable references to at least two prospective employers. The Club disputed that it provided an unfavourable reference to the Coogee Diggers Club and provided evidence that it told the Glasshouse Hotel that it would not employ Ms Giblin again.

[165] Regardless of the reasons that Coogee Diggers Club and the Glasshouse Hotel did not offer Ms Giblin employment, it is likely that any person whose employment is terminated for theft and dishonesty would have difficulty in obtaining employment, particularly as it is common practice for prospective employers to ask applicants the reason their previous employment ceased and to seek references from the most recent employer. I have already found that Ms Giblin suffered financial loss as a result of the dismissal. Based on the evidence before me, I find that Ms Giblin’s financial loss has been compounded by the reasons for her dismissal which has made it difficult for Ms Giblin to obtain alternative employment. In all the circumstances, I consider that an order for payment of compensation is appropriate.

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

[166] 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 to Ms Giblin in lieu of reinstatement including:

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

- (f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[167] There are difficulties in determining the compensation given that both parties did not call evidence or make submissions about these criteria. I am unable to form a definitive conclusion about the remuneration earned by Ms Giblin based upon the information provided by the parties.

[168] In the circumstances I will be issuing directions and listing the matter for further hearing in relation to determining an amount to be paid as compensation to Ms Giblin.

Conclusion

[169] I have found that on 18 April 2023, Ms Giblin's actions in not paying for a drink were not intentional and that she was not dishonest during the subsequent investigation. I have also found that the Club's prohibition on staff consuming alcohol prior to a shift does not extend to staff meetings. On this basis, I found that Ms Giblin did not engage in misconduct when consuming alcohol prior to the staff meeting.

[170] I have also determined that there were numerous procedural deficiencies in the Club's investigation of the matter. Both the letter of allegations and the termination letter refer to multiple acts of wrongdoing when there was only ever one drink that was accepted by Ms Giblin without payment. In addition, the Club made adverse findings about Ms Giblin's honesty based on the CCTV footage without showing Ms Giblin this footage and without advising Ms Giblin of these findings. Further, Ms Patrin withheld information from Ms Giblin which potentially supported Ms Giblin's explanation that her actions were unintentional.

[171] The Club did not differentiate between the conduct of Ms Giblin and the three employees who were involved in the provision and consumption of another employee's five free drinks. The Club made adverse findings about Ms Giblin's attitude towards the conduct based upon the actions of three other employees who resigned when it was unfair and unreasonable to do so.

[172] Finally, I have found that the financial impact of the dismissal on Ms Giblin, the incorrect and inappropriate characterisation of her conduct as criminal, and the adverse impact on her employment prospects caused by the dismissal are all matters which weigh in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

[173] I have concluded that there was no valid reason for Ms Giblin's dismissal and that the dismissal was harsh, unjust and unreasonable having regard to all of the matters in s.387. I

consider that an order for payment of compensation is appropriate and will determine that amount after a further hearing.



DEPUTY PRESIDENT

Appearances:

D Giblin, the Applicant.
N Shaw of Clubs NSW, on behalf of the Respondent.

Hearing details:

2023
11 August
Sydney.

Printed by authority of the Commonwealth Government Printer

<PR767569>

¹ Statement Of Gail Patrin dated 30 July 2023, 12.

² Ibid, 13.

³ Unfair dismissal application Form F2.

⁴ Statement Of Gail Patrin dated 30 July 2023, 1.

⁵ Ibid, 1-2.

⁶ Statement Of Gail Patrin dated 30 July 2023, Annexure "A".

⁷ Statement of Matthew Armstrong dated 31 July 2023, Annexure "G".

⁸ Statement of Matthew Armstrong dated 31 July 2023, 18.

⁹ Ibid, 20.

¹⁰ Ibid, 21.

¹¹ Statement Of Gail Patrin dated 30 July 2023, 7.

¹² Ibid, 10.

¹³ Statement Of Gail Patrin dated 30 July 2023, 7.

¹⁴ PN38.

¹⁵ Statement of Matthew Armstrong dated 31 July 2023, 22-23.

¹⁶ Ibid, 29-30.

¹⁷ Ibid, 31-32.

¹⁸ PN199-PN202.

¹⁹ Statement of Matthew Armstrong dated 31 July 2023, 33, Annexure “D”.

²⁰ Ibid, 34.

²¹ Ibid, Annexure “G”.

²² Outline of Respondent’s Submissions, 4.10.

²³ Ibid, 37-39.

²⁴ Ibid, 40.

²⁵ Ibid, 41.

²⁶ Outline of Respondent’s Submissions, 1.6-1.7.

²⁷ Statement of Matthew Armstrong dated 31 July 2023, 42-43.

²⁸ Statement Of Gail Patrin dated 30 July 2023, 20.

²⁹ Statement Of Gail Patrin dated 30 July 2023, 19.

³⁰ Statement of Matthew Armstrong dated 31 July 2023, 47

³¹ Ibid, 48.

³² Statement Of Gail Patrin dated 30 July 2023, Annexure “H”.

³³ Ibid.

³⁴ Ibid, 24.

³⁵ PN333

³⁶ PN334.

³⁷ PN341.

³⁸ PN342.

³⁹ PN371.

⁴⁰ Statement Of Gail Patrin dated 30 July 2023, Annexure “K”.

⁴¹ Statement Of Gail Patrin dated 30 July 2023, 26.

⁴² Statement Of Gail Patrin dated 30 July 2023, Annexure “K”.

⁴³ Ibid.

⁴⁴ Statement of Matthew Armstrong dated 31 July 2023, 50.

⁴⁵ Ibid, 51.

⁴⁶ PN706; Statement of Matthew Armstrong dated 31 July 2023; 58, Statement of Mark Fethers; Witness Statement of Deanna Giblin.

⁴⁷ PN652.

⁴⁸ Witness Statement of Deanna Giblin.

⁴⁹ PN675.

⁵⁰ PN287; PN539-PN542; PN699-PN701; PN712-PN717;

⁵¹ Statement Of Gail Patrin dated 30 July 2023, 29.

⁵² Witness Statement of Deanna Giblin.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Applicant’s Response to Respondent’s witness statements.

⁵⁶ Statement Of Gail Patrin dated 30 July 2023, 31.

⁵⁷ PN663.

⁵⁸ Statement Of Gail Patrin dated 30 July 2023, 30.

⁵⁹ PN654.

⁶⁰ PN672.

⁶¹ PN673.

⁶² Statement Of Gail Patrin dated 30 July 2023, 31.

⁶³ Witness Statement of Deanna Giblin.

⁶⁴ PN455-PN460.

⁶⁵ PN493-PN500.

⁶⁶ PN516-PN527.

⁶⁷ PN516.

⁶⁸ PN462.

⁶⁹ PN465-466.

⁷⁰ Witness Statement of Deanna Giblin.

⁷¹ Ibid.

⁷² Statement Of Gail Patrin dated 30 July 2023, Annexure “L”.

⁷³ Witness Statement of Deanna Giblin.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Statement of Matthew Armstrong dated 31 July 2023, 54.

⁷⁷ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

⁷⁸ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁷⁹ Ibid.

⁸⁰ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁸¹ *Edwards v Justice Giudice* [1999] FCA 1836, [7].

⁸² *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

⁸³ [\[2020\] FWC 2989](#).

⁸⁴ [\[2020\] FWCFB 5885](#).

⁸⁵ PN46-PN50.

⁸⁶ PN268

⁸⁷ PN212.

⁸⁸ PN332.

⁸⁹ Statement Of Gail Patrin dated 30 July 2023, 20-21.

⁹⁰ PN333

⁹¹ PN334.

⁹² PN341.

⁹³ PN342.

⁹⁴ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].

⁹⁵ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFB 762](#), [46]-[49].

⁹⁶ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFB 762](#), [46]-[49].

⁹⁷ Statement Of Gail Patrin dated 30 July 2023, 31.

⁹⁸ *Ricegrowers Co-operative v Schliebs* [PR908351](#) (AIRC FB, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001), [26].

⁹⁹ *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](#) (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

¹⁰⁰ *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#), [9].

¹⁰¹ *Vennix v Mayfield Childcare Ltd* [\[2020\] FWCFB 550](#), [20]; *Jeffrey v IBM Australia Ltd* [\[2015\] FWCFB 4171](#), [5]–[7].