



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Diane Duncan

v

PKK Transport Pty Ltd ATF the PKK Family Trust T/A Ashtons

Removals

(U2022/10822)

COMMISSIONER HUNT

BRISBANE, 28 MARCH 2023

Application for an unfair dismissal remedy

[1] On 11 November 2022, Ms Diane Duncan made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (the Act), alleging that she had been dismissed from her employment with PKK Transport Pty Ltd ATF the PKK Family Trust T/A Ashtons Removals (the Respondent) and that her dismissal was harsh, unjust and unreasonable.

[2] On 15 December 2022, I issued Directions to the parties and noted that the Respondent had not completed a Form F3 Employer Response. I directed the Respondent to file the Form F3 by no later than 20 December 2022. The Respondent failed to do so.

[3] On 22 December 2022, I convened a telephone conference between Ms Duncan and Mr John Pfeiffer, Company Owner of the Respondent. Following the conference, Mr Pfeiffer filed a Form F3 the following day. The Form F3 declared that the Respondent employed 18 employees at the time of Ms Duncan’s dismissal.

[4] The Form F3 noted a jurisdictional objection as ‘other’, but it appears a valid jurisdictional objection had not been made. The following was declared on the Form F3:

“3.1 What were the reasons for the dismissal?”

1. Applicant gave General Manager an ultimatum to dismiss another staff member, or she was leaving.
2. As a result of this ultimatum, the General Manager suffered significant mental deficiencies that resulted her having to go to hospital caused by added pressure and responsibilities. She was in hospital for one month.

3.2 What is the employer’s response to the Applicant’s contentions?

The Applicant was solely responsible for requesting another employee to be sacked. Which put the sacked employee in hospital. It also cost our business to be grossly understaffed in a very busy time for our industry. The Applicant obviously knew she was regularly late to work on numerous occasions.”

Background

[5] The Respondent operates a removalist company which provides local, interstate and overseas removal as well as storage services in the Gold Coast.

[6] Ms Duncan commenced employment with the Respondent on 30 May 2011 and remained with the Respondent up until her dismissal on 25 October 2022, a period of 11.5 years. Ms Duncan was engaged as a Sales Representative / Removal Consultant at the time of her dismissal.

[7] The matter was heard before me in person on 20 February 2023. Ms Duncan represented herself, and the Respondent was represented by Mr Pfeiffer. I considered it appropriate to conduct the matter as a determinative conference.

Relevant Legislation

[8] Section 394 of the Act provides:

“394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and

- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.”

[9] Further, ss.385 and 387 provides as follows:

“385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

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

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.”

“387 Criteria for considering harshness etc.

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

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

[10] There are no jurisdictional issues preventing the Commission determining if the dismissal was unfair. The application was made in time. Ms Duncan has been dismissed and has met the minimum employment requirements. The Respondent is not a small business, and the dismissal was not a case of genuine redundancy. Accordingly, it is necessary to determine if the dismissal was unfair having regard to the considerations in s.387 of the Act.

Evidence of Ms Duncan

[11] Ms Duncan commenced employment with the Respondent on 30 May 2011 as a full-time Sales Representative Removal Consultant. At the time of her dismissal she was paid \$87,750 per annum.

[12] On 25 October 2022, Ms Duncan was out of the office conducting an inspection when a colleague contacted her. The colleague informed Ms Duncan that Mr Pfeiffer had called a meeting with staff in the office where he proposed to terminate Ms Duncan’s employment.

[13] Later that day, Ms Duncan returned to the office to find out what was happening. She was called into Mr Pfeiffer’s office at 4:20pm, where they had the following conversation, noting that Kathy is Mr Pfeiffer’s daughter and Dianne is his wife:

“Mr Pfeiffer: I don’t know if you know but Kathy is not well. She is in Hospital.

Ms Duncan: Yes, she is gathering the paperwork so she can be admitted into hospital.

Mr Pfeiffer: Can I ask how you know this?

Ms Duncan: I actually called her this morning.

Mr Pfeiffer: Can I ask why?

Ms Duncan: Because she is my friend and I wanted to see how she was. I checked with Dianne the other day and she said it was ok for me to call her but not talk about work.

Mr Pfeiffer: I have decided to let you go. We all blame you for what happened with Kathy.

Ms Duncan: Excuse me.

Mr Pfeiffer: All the boys out the back don't like you. Did you know this?

Ms Duncan: After 11 years you are bringing this to my attention now? I am not sure how this effects the way I do my job which mind you I am very good at [it] John Pfeiffer.

Mr Pfeiffer: They all don't like you and the last few weeks things haven't been going well.

Ms Duncan: What do you mean? The costings?

Mr Pfeiffer: You know about the costings, do you?

Ms Duncan: Yes, it is part of my job to be aware of how jobs cost. I have to sign off on jobs when they don't cost well.

Mr Pfeiffer: Well, things are not going well.

Ms Duncan: Again, you bring this to my attention after 11 years John Pfeiffer.

Mr Pfeiffer: AJ should have been bringing to your attention about the costings.

Ms Duncan: Yes, she did and she was good at her job and so is your daughter. I am also very good at my job. I have been here long enough to see what you do to your staff and know my time has come for it to happen to me.

Mr Pfeiffer: I knew you would not take responsibility. You never take responsibility.

Ms Duncan: Responsibility for what? The decision you have made? Which now effects the current situation the company.

Mr Pfeiffer: When you are good your good and when you are bad you are bad.

Ms Duncan: Again, after 11 years you are bringing this to my attention John Pfeiffer. Please allow me to collect my personal belongings and leave the premises.

Mr Pfeiffer: I knew you would not take responsibility.

Ms Duncan: Please allow me to collect my belongings and leave the premises quietly. I do not wish to hear anything further you have to say.

Mr Pfeiffer: You have always been like this Diane.

Ms Duncan: It is not ok to speak to people like this and again allow me to collect my personal belongings and leave the premises quietly.”

[14] Ms Duncan was paid four weeks in lieu of notice on account of her years of service with the Respondent and being less than 45 years of age. After requesting a separation certificate she was issued one on 2 December 2022. She is upset by the contents of the separation certificate, declaring that she was dismissed for unsatisfactory work performance and noting:

- Volume calculations often out
- Late for work
- Attention to detail

[15] A statement of service was also issued on 2 December 2022. It is a neutral statement, declaring the period of employment and duties performed.

Ms Duncan’s evidence at the determinative conference

[16] Ms Duncan said during the determinative conference that the dismissal came as a surprise to her. She understood that she was dismissed on account of Kathy being in hospital and the male workers “out back” not liking her. Ms Duncan is of the view that there was no valid reason for the dismissal.

[17] She confirmed she was notified of the reason of dismissal when she was dismissed, however was not given an opportunity to respond to any reason related to her capacity or conduct.

[18] Ms Duncan said that she was not unreasonably refused by the employer the opportunity to have a support person present to assist at any discussion relating to the dismissal as she had not known the meeting would occur.

[19] Ms Duncan further stated she had not been warned of the “unsatisfactory performance”. Mr Pfeiffer told her in the conversation that things had not been going well, referring to costings, however this had never been brought to her attention.

[20] Ms Duncan accepted that since there was no dedicated human resource in the business, the Respondent may not have used best human resources practices in dismissing her.

[21] Ms Duncan stated that she was engaged by the Respondent for 11.5 years and in that time she had never been given a warning, verbally or in writing. She hardly took any sick days, and she was dedicated to the company and wanted it to succeed. She stated that she has worked in the industry for 23 years.

[22] In respect to her relationship with the removalists, Ms Duncan said there was always a bit of tension between the salesperson and the removalists out the back, but none of which was an issue, or thought to be an issue. Not once was anything said to Ms Duncan by the Operation Manager or by Mr Pfeiffer.

[23] In respect to her personal relationship with Mr Pfeiffer, Ms Duncan considered it had been strong until around April 2022, when a sales support woman left the company, and the general manager who had been there for 12 years, left the company. Ms Duncan became the longest-standing employee in the front office and she was running it as well as doing her job, helping new staff and training new staff. Ms Duncan said since April 2022 there were two occasions when she expressed frustration, and on one occasion she ended up in tears because she felt overwhelmed. She stated that at all times she maintained respect for Mr Pfeiffer, and never disrespected him.

[24] Ms Duncan found alternative work, commencing on 5 December 2022. The work is full-time in her husband's business in a role he created for her. She is paid \$65,000 per annum.

The Respondent's failure to file submissions

[25] On 22 December 2022, I issued directions to the parties in relation to the filing of material for hearing of this matter. The Respondent's material was due to be filed on 2 February 2023, however the Respondent did not file any material. Accordingly, my chambers contacted Mr Pfeiffer on 3 February 2023 seeking an update as to why material for the Respondent was not filed in accordance with my directions. Mr Pfeiffer responded later that day, advising as follows:

“Attention: Chambers Hunt

Please accept my sincere apologies for not having responded earlier about the issue between Diane Duncan V Ashtons Removals.

Being the owner of Ashtons Removals and therefore the Respondent in this case, it is my intention to provide the court with documentary evidence to show that the applicant who had many years of experience working for our company, had up to her dismissal, become very inaccurate in her job by not quoting correctly, and therefore costing our company large amounts of money. Despite the applicant being well aware that Ashtons Removals has always compared what the actual costings were of every removal we completed, with the quotation that the applicant prepared, it is obvious the applicant had lost her ability to do her job correctly.

Regarding witnesses, the only other person who is likely to accompany myself, is my wife Dianne Pfeiffer, however she has not ever worked full time in our company. She has only ever done small jobs such as posting the mail and doing the banking on some occasions. She is attending purely to ensure I arrive safely at the Commission on time that day and also to ensure I return home ok as well.

Kind regards,

John Pfeiffer
Company Owner”

[26] Shortly thereafter, Mr Pfeiffer sent further correspondence stating as follows:

“Attention: Chambers Hunt

Further to my previous email sent earlier this afternoon, also attached is a copy of the ‘Costings’ that we have for the last few months that Dianne Duncan worked for us at Ashtons Removals.

It was obvious to us all, that she had either lost interest in her job, or was not being careful enough to retain her employment. In particular her attention to detail had obviously become a major problem and the men who were part of our operations teams, were very upset because, the lack of attention to detail often made their task much more difficult.

I conducted a survey among a number of our team members and it was an unanimous decision that the company could no longer rely on her doing her job satisfactorily.

Kind regards

John Pfeiffer
Company Owner”

[27] In consideration of Mr Pfeiffer’s email, I caused my chambers to write to Mr Pfeiffer, copying in Ms Duncan, on 6 February 2023, directing that he file a witness statement:

“Dear Parties,

The Commissioner acknowledges receipt of two of Mr Pfeiffer’s email, as attached, responding to why material for the Respondent was not filed on 2 February 2023.

In its email, the Respondent provided brief statements as to why the Applicant was dismissed and advised that it intends to file documentary evidence. However, the only documentary evidence filed in the Commission is the pdf document titled “Costings”. The Commissioner further notes that it is not clear whether the Respondent’s emails are intended to be witness statements of Mr Pfeiffer.

The Commissioner advises that she has issued directions requiring the Respondent to file witness statements and materials, and the deadline has now passed. Only with leave of the Commission will further evidence be accepted by the Commission. Please note, the Commissioner will not accept a volume of oral evidence on the day of the hearing. Parties MUST file written evidence prior to the hearing so that the Commissioner is aware of the evidence of the parties, and the other side is aware of the evidence. When witnesses attend and give evidence, they do not read from their witness statement as that would not be an efficient process. The purpose of attending a hearing in-person is to allow for cross-examination of each side’s witnesses and to allow a very small amount of oral evidence on the day. The Commissioner is also likely to ask questions of witnesses.

The Respondent is assisted in this way to prepare a witness statement:

1. Have the person making the statement go to a work document and save it.
2. Number paragraphs as the statement builds.
3. Commence the statement with stating the witnesses' name, age and occupation.
4. Complete the statement in the first person. For example, I said to Diane, "This is how you do it." She responded, "No, that's not how I'm going to do it." I then said to her, "xxxxxxx"
5. The statement simply needs to be signed. It does not need to be sworn before a JP. The Commissioner will have the witness take an affirmation or an oath on the day of the hearing to swear to its truthfulness.
6. If a witness is going to rely on what other people (other than the Applicant) said to them, that constitutes hearsay. The Commissioner is unlikely to allow hearsay evidence. Other individuals should give evidence if it is material. That is, they should prepare their own witness statement and it should be filed. They would need to be available to cross-examined on the day of the hearing. The Commissioner will consider a request for cross-examination by telephone for those witnesses.

The Commissioner amends the directions and will give the Respondent until **10:00am (AEST), Thursday, 9 February 2023** to file witness statements and supporting documents. The Applicant will now be given until **10:00am (AEST) Thursday, 16 February 2023** to file reply material. The hearing of 20 February 2023 remains listed."

[28] The Respondent did not reply by the deadline of 9 February 2023. Accordingly, my chambers followed up with the Respondent providing a further opportunity to file material. In the same email, the Respondent was cautioned that if it failed to file material, I may not accept any further evidence from the Respondent during the hearing without leave being granted. The Respondent failed to meet this deadline.

[29] At the determinative conference, I asked Mr Pfeiffer why he did not file a witness statement, as I had directed he do so following from his email on 3 February 2023. Mr Pfeiffer responded:

"I apologise. I did not realise that. I don't know what happened there. I know that my inbox has got about 200 emails on it, but I thought I had complied with all the requirements. I apologise."

[30] I said to Mr Pfeiffer that could not have been so, as he had seen the directions requiring that he file witness statements. The email on 6 February 2023 further reminded Mr Pfeiffer, very firmly, that he had not provided a witness statement and explained how he could go about preparing a witness statement. Mr Pfeiffer said he did not recall reading that email and does not know what happened. When shown the email sent on 10 February 2023, providing him a further opportunity to file a witness statement, Mr Pfeiffer responded that he does not recall seeing that email either.

[31] Mr Pfeiffer offered the following explanation for why he had not complied with the many directions made by me:

“The only thing I can think of is because we parted company with [Ms Duncan], I was going then out every day to do the job that she was doing, to do what we call inspections, going to see people at their residence to find out how much stuff they’ve got, to talk to them, work out a price, and I did that for nearly three months.

I’ve just put on somebody else now and so I’m now trying to catch up, but that’s obviously happened when I was out on the road doing inspections and I didn’t see it.

Now, the only thing I can think of is that the person who has recently stolen \$30,000 from me has possibly deleted those things before I’ve seen it when I’ve been out on the road, and that’s a distinct possibility.”

[32] Mr Pfeiffer confirmed that the emails from Chambers were sent to his email. The person he alleged to have stolen \$30,000 from him had convinced him that she had not been able to borrow money from a financier, however had already taken possession of a car. Mr Pfeiffer thought she was a “nice girl” and offered to pay for it and she could refinance it and pay him back. However, Mr Pfeiffer said that she has flatly refused to go to another financier and has been paying Mr Pfeiffer back at the rate of \$300 a week. This individual has since left the business, and Mr Pfeiffer claims that she still owes him \$20,000. I suggested to Mr Pfeiffer that it hasn’t been determined that the person stole from him, and instead he had leant her money for which she owes him money.

[33] It is Mr Pfeiffer’s belief that this person may have deleted emails from his inbox.

[34] I pointed out to Mr Pfeiffer that in his email of 3 February 2023, he declared that he intended to provide more information. I asked him when it was he had intended to do so? Mr Pfeiffer answered that he was still on the road every day doing quotes. He stated that he did not deliberately ignore the Commission and apologised for not filing material. He considered that something “dodgy” had been going on.

Evidence of Mr Pfeiffer

[35] Mr Pfeiffer confirmed during the determinative conference that at the time of Ms Duncan’s dismissal, the Respondent had employed 18 people. It now employs 15 people.

[36] Given Mr Pfeiffer had not filed a witness statement prior to the determinative conference, it became necessary to extract from him the reasons for the dismissal and other evidence. Mr Pfeiffer had not read Ms Duncan’s material prior to attending the Commission, and accordingly I adjourned to allow Mr Pfeiffer an opportunity to read Ms Duncan’s witness statement.

[37] On resumption of the determinative conference, Mr Pfeiffer confirmed that Ms Duncan’s account of the dismissal at [13] was correct, and he did make statements such as:

“I have decided to let you go. We all blame you for what happened with Kathy.”¹

and

“All the boys out the back don’t like you. Did you know this?”²

[38] On 25 October 2022, Mr Pfeiffer called a meeting of his removalist staff, together with another employee, Ms Candace Facer. The meeting consisted of six employees, together with Mr Pfeiffer. He discussed with them Ms Duncan’s performance. He gave the following evidence:³

Mr Pfeiffer: Yes. We had a meeting - six of us had a meeting earlier that day to talk about Diane Duncan's issues and we had a unanimous vote, including from Candace Facer, that we would part company with Di, do the appropriate thing, because she was not doing what - halfway down the page - it's the - let me count - seven times that the paragraph - the sentence starts with her name. It says Diane - 'Yes, it is part of my job to answer - prepare jobs costs.' Can you find - - -

Commissioner: No, I'm still back at - - -

Mr Pfeiffer: Yes, well - - -

Commissioner: So this is the morning of 25 October. You have a meeting with six people.

Mr Pfeiffer: Yes, we did.

Commissioner: And you all decide that Ms Duncan needs to be dismissed.

Mr Pfeiffer: Yes. It was a unanimous decision.

Commissioner: Do you think by telling me it's a unanimous decision that's impressing me?

Mr Pfeiffer: It wasn't just my idea. Everyone who was at that meeting agreed that it was the right thing to do.

Commissioner: The right thing to do.

Mr Pfeiffer: For the company, yes, emphatically.

[39] Mr Pfeiffer stated that Ms Duncan’s attitude wasn’t the ‘right attitude’ and he considered the longer she stayed, the worse she was getting. He said that was definitely the opinion of the staff members he had a meeting with. He declared:⁴

“.....I am good at making decisions when I've got to make them, and this was a serious one, so that's why I got six people together.”

[40] Mr Pfeiffer stated that it was Ms Facer who called Ms Duncan to warn her of her impending dismissal. Mr Pfeiffer stated that when Ms Duncan returned to the office, she was

shaking, as she knew she was going to be dismissed. He considered that Ms Duncan was pre-warned of her dismissal, and that made the dismissal worse. He was upset with Ms Facer for having pre-warned her, and considered she out of line in doing so, particularly as she had voted to dismiss Ms Duncan.

[41] Mr Pfeiffer speculated that the reason why the unfair dismissal application had been made was because Ms Duncan was upset, and being pre-warned by Ms Facer of the dismissal played a part in that. I asked Ms Duncan during this exchange why she was upset? She stated:⁵

“Because I was unfairly dismissed.”

[42] Mr Pfeiffer confirmed that Ms Duncan had not received warnings in the past. He considered that she could check records and know how many mistakes she had been making.

[43] Mr Pfeiffer filed material on 3 February 2023, referred to at [26] with ‘costings’ of job quoted and jobs performed. The costings document included data on:

- 23 jobs in October 2022;
- 23 jobs in November 2022; and
- 8 jobs in December 2022.

[44] On the material provided, four jobs in October 2022 lost money. In November 2022, 12 jobs lost money, and in December 2022, three jobs lost money. Of some of the biggest losses in November 2022, the notation states, ‘Quoted by Talyah’. Ms Duncan said in evidence she did not quote that job, and she would not have quoted all of the jobs performed in November and December 2022. Mr Pfeiffer’s evidence is that he quoted many jobs following Ms Duncan’s dismissal in late October 2022.

[45] In respect of some of the November 2022 jobs where the loss on the job was near 2%, the notation made is that the removalists had to get fuel which then took time. I asked during the determinative conference how this is usually borne by the Respondent? It seems that if the removalists fill up the vehicle with fuel during a job, it can make that particular job unprofitable on account of time they took to fuel the vehicle, instead of being an expected cost across all jobs.

[46] I asked Mr Pfeiffer how Ms Duncan did pricing job in August and September 2022? We had the following exchange:⁶

Commissioner: I’ve just asked was she okay in August and September.

Mr Pfeiffer: Yes.

Commissioner: Probably okay, but then in October 2022 her costings are out and she’s got this situation with Kathy and she must be dismissed. You’ve made that decision. That’s what it - it’s all tied with Kathy, don’t you think?

Mr Pfeiffer: Well, it was a big part of the whole exercise. Not solely. The costings were what made the decision for me, because the figures for November and December were pathetic.

Commissioner: But November, December, hadn't happened by this stage. You dismissed her on 25 October. You wouldn't have had this spreadsheet in front of you, and there's a few errors, obviously. It's in the red. I don't know, do you have an idea for what's a good margin?

Mr Pfeiffer: Was it 31 October that you left?

Commissioner: It was 24 October.

Mr Pfeiffer: Well, now, that's interesting.

[47] The following further evidence was given:⁷

Mr Pfeiffer: Can I ask if someone knows where there's reference to the date that she left?

Commissioner: It's on the F2 and it will be on the F3 as well. So page 5 of the court book, 25 October, and then you will have confirmed that at page 55. At page 57 you've confirmed that the dismissal was 25 October. There will be the separation certificate that's been sent to Centrelink.

Mr Pfeiffer: All right. Well, that's interesting. I didn't - something's happened here, because I thought the November figures were Di's and now that proves they're not.

Commissioner: She's suggesting she may have quoted some.

Mr Pfeiffer: Yes. The jobs get put back. That's right. I'm sorry. Yes, they're probably all her jobs that she did until she left.

Commissioner: She said some are not.

Mr Pfeiffer: Well, two.

Commissioner: But in any event, you wouldn't have known the November and December jobs, the actual costs, because the men haven't hit the road.

Mr Pfeiffer: That's right. That's a good point.

Commissioner: When you on 25 October dismiss her, the most you've got here is four in the red, so it doesn't appear to me that a solid reason was the costings in October.

Mr Pfeiffer: No, it was very much her fault that my daughter ended up in hospital.

Commissioner: So that's the sound reason, the true reason, for the dismissal.

Mr Pfeiffer: No, it's both. It is definitely both, because we don't normally lose money on jobs. Why would we bother doing it if we're going to lose money on it? That's a very important part of the job.

Commissioner: 'The men out the back hate her.' Why do they hate her? Because of Kathy?

Mr Pfeiffer: Because she often does not put details down about the right equipment to take. They need to take a trolley because there's a piano and then if they don't know there's a piano in the job, well, then they don't take it, and when it's difficult accesses we have to send more than two men, and if that's not put on the paperwork the guys get out there and realise they've got a problem. And there's a dozen and one things that make it difficult if it's not quoted properly.

[48] I had the following exchange with Mr Pfeiffer as to why Ms Duncan was not provided with any warnings:⁸

Commissioner: Why didn't you warn her?

Mr Pfeiffer: Cripes.

Commissioner: Have you had to dismiss other employees?

Mr Pfeiffer: No, never, not in the 45 years I've been at Ashtons Removals.

Commissioner: Have you ever sought any external advice about the right way to go about disciplining somebody?

Mr Pfeiffer: It's one-sided, your attitude. It's not taking into consideration that I've got 101 things to do almost every day, and if I haven't done it for a few days it's not a good enough excuse.

Commissioner: No, my question was have you sought external advice, because - - -

Mr Pfeiffer: No.

Commissioner: - - - human resources is a profession. People give advice about how to manage employee relations with their employees. If you've never dismissed somebody in 45 years, then - - -

Mr Pfeiffer: I've dismissed people.

Commissioner: You have?

Mr Pfeiffer: Yes, I have.

Commissioner: Why did you say just earlier you haven't?

Mr Pfeiffer: I don't remember sacking someone. It's always been a decision between two people that's been best for both parties.

Commissioner: This, Ms Duncan claims, is not best for her, being dismissed after 11 years, no warnings. I'm not sure why you're laughing.

Mr Pfeiffer: Well, she could have been - realised if she had have done what she's always done and checked the jobs to make - she says here, 'Yes, it is part of my job to be aware of how the jobs cost.'

Commissioner: Have you ever drafted a warning letter to an employee?

Mr Pfeiffer: No.

Commissioner: Why not?

Mr Pfeiffer: Because they're supposed to do it.

Commissioner: So if they don't, they just get sacked.

Mr Pfeiffer: Well, she had so many times to do it and just didn't.

Commissioner: Then the right thing to do is to pull her in and counsel her and say, 'I need to give you a warning.'

Mr Pfeiffer: Okay. There was another issue.

Commissioner: 'If you don't improve, I might need to give you a second warning, and if you don't improve, I might need to dismiss you after that.' That's - - -

Mr Pfeiffer: There was another issue.

Commissioner: Sorry, do you understand that that is what human resources - - -

Mr Pfeiffer: That is logical.

Commissioner: It is.

Mr Pfeiffer: Yes.

[49] Mr Pfeiffer stated that the reason why his daughter, Kathy, was hospitalised was on account of Ms Duncan's ultimatum. The Respondent had employed an employee I shall refer to as Jane (not her real name). Ms Duncan would give Jane paperwork to input when Ms Duncan returned from quoting jobs. Ms Duncan considered that Jane was not doing the work correctly and informed Kathy, who was General Manager at the time, that Jane needed to be dismissed or Ms Duncan would leave.

[50] Kathy dismissed Jane without informing Mr Pfeiffer, and as a consequence, Kathy had to work seven days a week for about three weeks to keep up with the work. Kathy became very stressed and had a nervous breakdown. Mr Pfeiffer questioned why it was permissible for Ms Duncan to insist Jane be dismissed, but not permissible when the same happened to her?

[51] In further questioning from me, I learned that Jane had only been with the Respondent for around three to four months. Mr Pfeiffer said that he felt sorry for Jane, but then added:

"... [Jane] has got a serious mental problem. She's not all there, unfortunately. She's a nice girl but she's not all there. Now she's suing me for various things as well."

[52] When I noted that Kathy could have called Ms Duncan's alleged bluff when she gave an ultimatum, threatening to resign, Mr Pfeiffer replied that he was not present during the conversation. His account is that as a consequence of being without Jane, Kathy was put under extreme pressure. Mr Pfeiffer gave evidence that he has since reemployed Jane.

[53] I pointed out to Mr Pfeiffer that he had brought someone back who had been in the business for three or four months, in which Mr Pfeiffer also claimed was 'not right in the head', yet had dismissed someone with 11.5 years' service when he and a group of people said on 25 October 2022, "*She needs to go.*" Mr Pfeiffer said that it made sense to him.

[54] In reply evidence, Ms Duncan stated that she never made an ultimatum to Kathy to dismiss Jane or she would leave.⁹ Her evidence is that Kathy asked her to come upstairs to discuss Jane and put together a plan of action as Kathy was not happy with Jane's performance. Ms Duncan conceded that she did not like the way Jane worked.

[55] As to whether the Commission should find that there was a valid reason for the dismissal, Mr Pfeiffer offered the following:¹⁰

Mr Pfeiffer: There was definitely a valid reason. The six people that met and discussed it - and I didn't run the whole meeting. Everyone had the opportunity to have their tuppence worth. Everyone was in agreement with the concept of sacking Di.

Commissioner: Is that fair?

Mr Pfeiffer: Yes. Explicitly, yes.

Commissioner: Do you think that happens in workplaces around Australia?

Mr Pfeiffer: It was because of her attitude and her - just not attention to detail.

[56] Mr Pfeiffer stated that Ms Duncan was late to work four days out of five for many years, by about five to ten minutes. He did not warn her other than an occasional discussion where she would apologise and blame her delay on dropping her children to school.

Consideration

[57] A dismissal may be unfair, when examining if it is ‘harsh, unjust or unreasonable’ by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:¹¹

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

[58] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.¹² I will address each of the criteria set out in s.387 of the Act separately.

s.387(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)

[59] When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

“In its context in s.170DE(1), the adjective “valid” should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must “be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly.”

[60] 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.¹³

[61] Mr Pfeiffer accepts that he informed Ms Duncan on 25 October 2022 that the reasons for her dismissal were:

- “We all blame you for what happened with Kathy”
- “All the boys out the back don’t like you. Did you know this?”
- The ‘costings’
- “...when you are bad you are bad.”

[62] During the determinative conference, Mr Pfeiffer stated that Ms Duncan had been late to work for years and accepts that he did not provide any formal warnings to her.

[63] The main reason for the dismissal was that Mr Pfeiffer blamed Ms Duncan for his daughter, Kathy, being admitted to hospital having suffered a nervous breakdown. Whilst Kathy was a colleague of Ms Duncan’s, Mr Pfeiffer’s reaction to his daughter being hospitalised was unfair to Ms Duncan. At the highest, if Kathy did regret dismissing Jane, resulting in her work obligations becoming overbearing and having a negative impact on her mental health, it was her decision as General Manager to dismiss Jane. It appears that Mr Pfeiffer had no prior knowledge of the decision, and Ms Duncan denies making an ultimatum to Kathy. Without Kathy giving evidence as to whether Ms Duncan did make an ultimatum to her, I accept Ms Duncan’s evidence.

[64] There is insufficient evidence to draw any causal connection to Kathy’s hospitalisation and Ms Duncan’s actions. For Mr Pfeiffer to draw such a connection was inappropriate, but understandably affected by his loving relationship with his daughter. Having found that there is insufficient evidence to draw a causal connection to Kathy’s hospitalisation, Ms Duncan’s actions cannot constitute a valid reason for the dismissal.

[65] With respect to Mr Pfeiffer’s statement that the removalists out back all hate Ms Duncan, this may be true. He had conducted a vote of his employees that morning to determine if Ms Duncan would be dismissed. It is a shocking thing for Mr Pfeiffer to have done, having a cohort of staff decide upon Ms Duncan’s future. It is a disturbing, primitive act, unacceptable in the 21st century. Mr Pfeiffer considered it was an appropriate course of action. At the determinative conference, he declared that he is good at making decisions and having the vote of employees was a good decision.

[66] I do not accept that a vote conducted by removalists out back, determining that Ms Duncan should be dismissed, constitutes a valid reason for the dismissal. Even if the employees ‘hate her’ as Mr Pfeiffer put it, it is not a valid reason for the dismissal.

[67] Mr Pfeiffer stated during the determinative conference that dismissing Ms Duncan was the appropriate thing to do on account of costings being unprofitable on jobs. At the time of the dismissal, only four jobs in October 2022 had been performed where they did not return a profit. Three of those losses were sizeable, with losses of around 23%-35%. I have taken this into account.

[68] Mr Pfeiffer was clearly confused in his filing of material with respect to costings and his evidence given during the determinative conference. He appeared to be muddled when attributing November and December 2022 losses when those jobs had not been performed when Ms Duncan was dismissed in late October 2022. Mr Pfeiffer conceded that was a good point I

had raised. It clearly demonstrates that there was not a sound reason for the dismissal in late October 2022 on account of jobs performed in November and December 2022.

[69] Even if those costings for November and December 2022 are taken into account when regard is had for knowledge of an employee's conduct during the employment but not known until post-employment, Ms Duncan cannot be held responsible for all of the jobs where a profit was not met. Some of the quotes were conducted by another employee, and on Mr Pfeiffer's evidence, some could have been quoted by him. Some of the jobs became unprofitable on account of the removalists filling up the vehicle with fuel. The operating model does not make sense if the time taken to fuel up a vehicle can send one job from being in the black to into the red. The largest loss in November 2022, where the loss is approximately \$3,000, was not quoted by Ms Duncan.

[70] I do not accept that Ms Duncan's costings in October 2022 were so poor as to warrant the termination of her employment. When I inquired as to her costings in August and September 2022, Mr Pfeiffer jumped to the profit results in November and December 2022 and said they were pathetic, so that demonstrates why she had to be dismissed. When I pointed out they would not be known, Mr Pfeiffer gave, in my view, the true reason for the dismissal, and that is when he said, "*No, it was very much her fault that my daughter ended up in hospital*" in the dialogue below:

"Commissioner:	When you on 25 October dismiss her, the most you've got here is four in the red, so it doesn't appear to me that a solid reason was the costings in October.
Mr Pfeiffer:	No, it was very much her fault that my daughter ended up in hospital.
Commissioner:	So that's the sound reason, the true reason, for the dismissal.
Mr Pfeiffer:	No, it's both. It is definitely both, because we don't normally lose money on jobs. Why would we bother doing it if we're going to lose money on it? That's a very important part of the job."

[71] Having determined that the October 2022 costings were not a sound reason to warrant the termination of Ms Duncan's employment, I determine that it was not a valid reason for the dismissal.

[72] Per Mr Pfeiffer's statement to Ms Duncan that when she is bad she is bad, Mr Pfeiffer did not elaborate on that statement. I consider it to have been a spiteful and gratuitous remark made to Ms Duncan when she was dismissed. Mr Pfeiffer did not offer up any examples of when Ms Duncan was supposedly 'bad'.

[73] As to the occasions Ms Duncan was said by Mr Pfeiffer to have been late to work, no evidence was given other than Mr Pfeiffer's statement during the determinative conference. If Ms Duncan was late to work on as many occasions as Mr Pfeiffer claimed, which would be in the hundreds, I expect she would have been properly counselled. Mr Pfeiffer did not suggest

to Ms Duncan that her alleged tardiness was a reason for the dismissal, yet claimed it was on the separation certificate.

[74] Even if I were to find it did form a reason for the dismissal, but Ms Duncan was not informed of the reason, I am not satisfied it constitutes a valid reason for the dismissal. Mr Pfeiffer stated that the conduct continued for many years. Dismissing Ms Duncan for being regularly late to work when it was not stated as a reason for the dismissal would be an unfair overreaction in respect of conduct that I consider Mr Pfeiffer had largely accepted, if it were indeed true.

s.387(b) – Whether the person was notified of that reason

[75] Ms Duncan was informed that the reason for the dismissal was regarding Kathy's hospitalisation, the men out the back 'hating her', her costings, and the statement about being 'bad'. I am satisfied that she was notified of the reason for the dismissal.

[76] Ms Duncan was not informed that a reason for the dismissal included being late for work until she received the separation certificate.

s.387(c) – Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person

[77] Ms Duncan was not given any opportunity to respond to any reason related to her capacity or conduct. Mr Pfeiffer declared early in the conversation that he was dismissing her.

s.387(d) – Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal

[78] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[79] There is no positive obligation on an employer to offer an employee the opportunity to have a support person. The Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at [1542] states the following:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”

[80] Ms Duncan did not ask for a support person to be in attendance and accordingly there was no refusal by Mr Pfeiffer.

s.387(e) – Was there a warning of unsatisfactory work performance before dismissal

[81] Mr Pfeiffer claims to have provided verbal warnings to Ms Duncan in respect of her arriving late to work. This reason for the dismissal is not the main reason for the dismissal. It has very little relevance to the dismissal on account of the other reasons why she was dismissed.

[82] Ms Duncan was not provided any warnings in respect of her issues with costing jobs.

s.387(f) – Whether the respondent’s size impacted on the procedures followed and s.387(g) – whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[83] The Respondent does not have a dedicated human resource management specialist, and I am satisfied this did impact on the procedures followed by the Respondent. No procedural fairness was afforded to Ms Duncan at all. The Respondent’s size did impact on the procedures followed.

s.387(h) – Other matters

[84] I consider it appropriate to have regard to Ms Duncan’s length of service of 11.5 years and the very sudden and spiteful way I consider she was dismissed from her employment. The decision to dismiss her appears to me to have been irrational and an unfair emotional response from a father in respect of his daughter’s medical situation. For Ms Duncan to learn that supposedly the men out the back all hate her would have also been distressing and unfair to her.

[85] Ms Duncan was also forewarned by another employee that she was about to be dismissed. Mr Pfeiffer was upset by this, including on account of the fact that the person who told Ms Duncan of her imminent termination also voted to have her dismissed. If Mr Pfeiffer was prepared to risk including six staff members on the decision to dismiss Ms Duncan, having one of them forewarn her is a foolish risk of his own making.

Conclusion

[86] I have determined that there was not a valid reason for the dismissal.

[87] I consider that the Respondent informed Ms Duncan of most of the reasons for the dismissal, and later informed her of the final reason for the dismissal.

[88] I have determined that Ms Duncan was not given an opportunity to respond to the reasons for the dismissal that were put to her.

[89] There was no unreasonable refusal by the Respondent to allow Ms Duncan a support person.

[90] Ms Duncan was not issued any warnings of unsatisfactory work performance before the dismissal. If there were verbal warnings in respect of Ms Duncan’s punctuality, Mr Pfeiffer allowed, on his account, the conduct to go unaddressed on hundreds of other occasions.

[91] The size of the Respondent's enterprise is relatively small and impacted on its processes. I accept that there was an absence of a dedicated human resource specialist which did impact on the procedures followed.

[92] I determine that Ms Duncan's dismissal was harsh, unjust and unreasonable.

Remedy

[93] Section 390 of the Act reads as follows:

“390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
 - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
 - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.”

[94] Ms Duncan is a person protected from unfair dismissal for the Act's purposes and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether she can be reinstated.

[95] Ms Duncan has found other suitable employment and has no desire to be reinstated. I am satisfied it is inappropriate to order reinstatement.

Compensation

[96] Section 392 of the Act provides:

“392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

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

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

- (a) the amount worked out under subsection (6); and

- (b) half the amount of the high income threshold immediately before the dismissal.
- (6) The amount is the total of the following amounts:
 - (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
 - (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.”

Authorities

[97] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul’s Licensed Festival Supermarket*.¹⁴ That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;¹⁵ *Jetstar Airways Pty Ltd v Neeteson-Lemkes*¹⁶ and *McCulloch v Calvary Health Care (McCulloch)*.¹⁷

[98] I have had regard to the above authorities.

The effect of the order on the viability of the Respondent

[99] The Respondent did not submit that an order of compensation would affect the viability of the Respondent.

The length of Ms Duncan’s service

[100] Ms Duncan was employed for a period of approximately 11.5 years. This is a very long period of time.

The remuneration that Ms Duncan would have received, or would have been likely to receive, if she had not been dismissed

[101] I consider that Ms Duncan would have likely to have remained employed for at least a period of one year. She was a skilled and loyal employee. She had not been addressed in respect of her costings being out and when asked about her previous months’ costings, it is clear that this did form the substantial reason for the dismissal; Kathy’s situation did.

[102] It was entirely unfair for Mr Pfeiffer to place blame on Ms Duncan on account of Kathy's hospitalisation, and a rational employer would have been grateful that an employee as skilled and experienced as Ms Duncan could maintain business continuity in the face of the temporary loss of Kathy.

[103] I consider that one year is the likely period of time on account of the fact that Ms Duncan had become entitled to long service leave and it is a valuable entitlement in addition to four weeks of annual leave per annum. Ms Duncan had no intention of leaving the employment, and one year is an appropriate period to reassess life's experiences, goals and location for work.

[104] I consider that Ms Duncan would have received remuneration of \$87,750 per annum for one year's employment.

The efforts of Ms Duncan (if any) to mitigate the loss suffered because of the dismissal

[105] I am satisfied that Ms Duncan made every effort to mitigate her loss by applying for appropriate roles suitable to the geographical area and the skills and experience she possesses. I note that she secured suitable alternative employment approximately six weeks later at the rate of \$65,000 per annum.

The amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation and the amount of any income reasonably likely to be so earned by Ms Duncan during the period between the making of the order for compensation and the actual compensation

[106] Ms Duncan was paid four weeks' pay in lieu of notice on dismissal. This is recorded on the separation certificate as an amount of \$6,840.

[107] In the period 5 December 2022 to 24 October 2023 (that being one year from the date of the dismissal), Ms Duncan is likely to earn in her new employment the amount of \$65,000 per annum. The period is six weeks short of one year, therefore the amount is 46 weeks. The total remuneration likely to be earned in the new employment is \$57,500.

Other relevant matters

[108] I have already taken into account Ms Duncan's lengthy period of service in determining how likely she would have remained in the employment had she not been dismissed. I have also taken into account the relative small size of the business in determining how much compensation should be awarded.

[109] I do not consider there are other relevant matters affecting the amount of compensation to be awarded.

Misconduct reduces amount

[110] Section 392(3) of the Act requires that if the Commission is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person then the Commission

must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[111] The section requires that consideration be given by the Commission, amongst other things, as to whether a person's misconduct contributed to the decision to dismiss an employee even if the Commission has found that there was no valid reason for the person's dismissal. However, if there was no valid reason for the dismissal that may be relevant to the Commission's decision as to the appropriate amount by which the amount of compensation should be reduced.¹⁸

[112] I am not satisfied that Ms Duncan engaged in any misconduct. Accordingly, I cannot be satisfied a reduction should be made.

Shock, distress etc. disregarded

[113] I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Ms Duncan by the manner of the dismissal.

Compensation Cap

[114] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the applicant, or to which the applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[115] The high income threshold immediately prior to the dismissal was \$162,000, and the amount for 26 weeks was \$81,000. The amount of compensation the Commission will order does not exceed the compensation cap nor the amount that Ms Duncan was entitled to during the 26 weeks immediately before the dismissal.

Payment by instalments

[116] I am mindful that the sum to be ordered may not be readily available to the Respondent within 14 days, which is my usual period of time to allow for payment when ordering compensation. Accordingly, I will order the compensation to be made in four payments as specified in the order.

Order of compensation

[117] I have determined that Ms Duncan would have been likely to receive \$87,750 in remuneration if she had not been dismissed. From this amount there will be a deduction of \$6,840 on account of four weeks' payment made to her, and a further \$57,500 deduction on account of remuneration earned and to be earned by her in the period I consider she would have remained employed by the Respondent.

[118] The amount to be paid to Ms Duncan is \$23,410 gross, less tax as required by law.

[119] In addition, the Respondent is to pay superannuation at the rate of 10.5% being an amount of \$2,458.05 into Ms Duncan's superannuation fund.

[120] The above amounts are to be paid as follows:

- (a) \$7,800 gross, less taxation by 11 April 2023;
- (b) \$7,800 gross, less taxation by 26 April 2023;
- (c) \$7,810 gross, less taxation by 9 May 2023; and
- (d) \$2,458.05 superannuation into Ms Duncan's superannuation account by 23 May 2023.

[121] An Order of compensation [[PR760648](#)] will be issued concurrently with this decision.



COMMISSIONER

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<PR750997>

¹ Transcript PN318.

² Transcript PN322.

³ Transcript PN218 – 228.

⁴ Transcript PN507.

⁵ Transcript PN526.

⁶ Transcript PN404 – 411.

⁷ Transcript PN427 – 441.

⁸ Transcript PN257 – 286.

⁹ Transcript PN549.

¹⁰ Transcript PN452 – 457.

¹¹ (1995) 185 CLR 410, [465].

¹² *Sayer v Melsteel* [[2011\] FWAFB 7498](#) at [20].

¹³ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

¹⁴ (1998) 88 IR 21.

¹⁵ [[2013\] FWCFB 431](#).

¹⁶ [\[2014\] FWCFB 8683](#).

¹⁷ [\[2015\] FWCFB 2267](#).

¹⁸ *Crawford v BHP Coal Pty Ltd* [\[2017\] FWC 154](#), [345] – [346]; *Read v Gordon Square Child Care Centre Inc.* [\[2013\] FWCFB 762](#), [83].