

[2024] FWC 1538

The attached document replaces the document previously issued with the above code on 14 June 2024.

Details of Changes:

A typographical error in paragraph [69] has been corrected.

The word 'evidence' has been replaced with 'conduct' in paragraph [76].

Associate to Commissioner Simpson

Dated 14 June 2024



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Petra Molokac

v

Evolving Support Services Pty Ltd
(U2024/3071)

COMMISSIONER SIMPSON

BRISBANE, 14 JUNE 2024

Application for an unfair dismissal remedy – Applicant dismissed for Serious Misconduct – Dismissal Unfair – Compensation Awarded.

[1] On 18 March 2024, Ms Petra Molokac (**Ms Molokac / the Applicant**) applied to the Fair Work Commission (**the Commission**) under s.394 of the *Fair Work Act 2009* (**the Act**) for an unfair dismissal remedy, alleging she was unfairly dismissed from her employment with Evolving Support Services Pty Ltd (**the Respondent**).

[2] I listed the matter for a directions hearing on 17 April 2024. The matter was listed for hearing on 29 May 2024.

[3] Ms Molokac appeared at the hearing represented by Shane Glassby. The Respondent was represented by its Director, Ms Letia Donnelly. At the commencement of the hearing the parties consented to it being conducted as a determinative conference. Ms Donnelly was asked if she wished to challenge what was said in the statements provided by Carolyn Bilby,¹ Kasane Bilby,² Elizabeth Considine,³ Melissa Johnson⁴ and Kornelia Wood.⁵

[4] These statements were primarily in the form of character references. Kornelia Wood gave evidence that Ms Molokac retrieved items from the property of the Respondent that belonged to Ms Molokac including place mats, and any documents she may have taken were Ms Molokac's own documents. Ms Donnelly said she did not see the statements as relevant and did not wish to cross examine any of those persons. I advised I would allow the statements to be taken into account as they were.

[5] The parties both agreed only Ms Molokac and Ms Donnelly were required to give evidence and they both were sworn in and gave evidence concurrently. The Applicant relied on the content from her Form F2 Application setting out a chronology of events,⁶ and its attachment, documentary evidence, written submissions and oral submissions and evidence. Ms Molokac also relied on material filed in response to the Respondent's material at page 128 to

134 of the Court Book,⁷ and responses to the Respondent's Form F3 at pages 40 to 43 of the Court Book.⁸

[6] The Respondent relied on its Form F3 Response,⁹ documentary evidence, written submissions and oral submissions and evidence. Ms Donnelly also provided a chronology of events at page 101 and 102 of the Court Book.¹⁰

[7] The Applicant was dismissed from her employment on the Respondent's initiative on 15 March 2024. The Application was filed on 18 March 2024, within 21 days of dismissal. The Respondent's Form F3 stated that it had 75 employees at the time of termination and is therefore not a small business. There are no jurisdictional issues to consider.

Relevant legislation

[8] Section 385 of the Act states:

“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.”

[9] It was not in dispute that the Respondent is not a small business and the Small Business Fair Dismissal Code does not apply to this dismissal. Ms Molokac satisfies the minimum employment period of six months in order to be entitled to bring this application. There was no suggestion the termination was a case of redundancy.

[10] The question for determination is whether Ms Molokac's dismissal was harsh, unjust or unreasonable pursuant to s.387 of the Act, which states:

“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.”

Background

[11] Ms Molokac commenced employment with the Respondent on 22 May 2023 as a disability support worker.

[12] Ms Molokac was moved from working with her ordinary clients to another client on 13 March 2024 due to allegations the Respondent claimed had been made by her colleagues concerning bullying.

[13] Ms Molokac collected material from the site of her original client on 14 March 2024. Following this, Ms Molokac received a medical certificate stating that she was not able to work for the period she had been rostered with the alternative client until 18 March 2024. She notified the Respondent via SMS.

[14] On 15 March 2024, the Respondent issued Ms Molokac a termination letter and summarily dismissed her on the basis of accusations of serious misconduct.

Submissions and Evidence

[15] Ms Molokac submitted that her dismissal was harsh, unjust and unreasonable and that there was no valid reason for dismissal.

[16] Ms Molokac submitted that the Respondent did not make the summary dismissal on the basis of a genuine belief that she had committed a crime.

Alleged Bullying

[17] The Respondent submitted that Ms Molokac messaged the team WhatsApp group calling staff “useless”. The Respondent submitted that the message has since been deleted however screenshots were taken by staff within the team. Ms Molokac said this message was posted by mistake and deleted on 14 February 2024 as it didn’t come across in the right way. Ms Molokac said unfortunately, this message was seen by one team member who brought it to her attention as the Team Member assumed that Ms Molokac was referring to her even though Ms Molokac had not named her in that message. Ms Molokac said she apologised to the employee, and the employee acknowledged her apology. Ms Molokac said three of the WhatsApp group members are the management and office team.

[18] Ms Molokac said she did not understand how she could have created a hostile working environment as all of the staff were working alone with their clients. The only time that they met each other was at the handover which normally took anywhere between 5 to 10 minutes and her handovers were at 6am so they were pretty quick.

[19] Ms Molokac said as a team leader she was required to make sure that the house was running smoothly and that all the team members were carrying out the required duties and that they do work as a team. Ms Molokac said she had brought these duties up in numerous messages in WhatsApp as that was the only contact they had with each other.

[20] Ms Molokac said the messages that Ms Donnelly provided were from 14 February 2024 where she came on shift and none of the duties had been done, so she sent a message to everyone through WhatsApp to make sure that they could keep on top of them and that they should not leave all the housework to one person as they should be working as a team.

[21] Ms Molokac also attached a list of the WhatsApp group members, of which 3 are from the management and office team. Ms Molokac said Ms Donnelly and the Service Manager Ms Elissa Brown were part of this group so if these messages were considered as bullying it should have been raised with her any time prior to her termination as she knew they all saw the messages Ms Molokac had posted on a regular basis to the team. Ms Molokac said these messages were not bullying but directions and trying to get all the team to work together. Ms Molokac said that was part of her job and she knew she did it well.

[22] Ms Molokac said she had a meeting with Ms Brown and Mr Mark Lepri the Director on 29 February 2024 where she said she was told by Ms Brown that she was doing a great job and she acknowledged Ms Molokac’s efforts and organisation, and no bullying concerns were raised at this meeting at all.

[23] I asked Ms Donnelly in her oral evidence whether this issue was related to the reasons for termination. Ms Donnelly explained that one of the staff, Ms Young, met with Ms Brown and they had a confidential meeting regarding happenings in the home, between herself and Ms Molokac and other staff members who have since come forward about bullying. Ms Donnelly confirmed statements she referred to from other staff had nothing to do with the reason for termination and therefore it was unnecessary to provide them to the Commission.

[24] In her oral evidence Ms Donnelly confirmed the reason for dismissal was the act of Ms Molokac entering the Respondent’s property on 14 March and taking property which was not

hers. Ms Donnelly confirmed the allegations concerning bullying were not the reason for termination. In relation to the concern raised by Ms Young, Ms Donnelly said the Respondent made a decision not to discipline Ms Molokac over the issue but to move her from that team and provide her work at a similar location and the same number of hours of work.

Monday 11 March 2024

[25] Ms Molokac said on Monday 11 March 2024 at 3.59pm she received a text message from the Respondent letting her know that her start time for Saturday had changed from 4pm to 12pm. Ms Molokac said at 4.02pm she received a text message from Ms Brown asking her to start at 12pm on Saturday instead of 4pm.

[26] Ms Molokac responded to both of these text messages straight away trying to get clarification about the starting time and also the reason for starting 4 hours earlier. Ms Molokac said she did not receive any response on that day.

Tuesday 12 March 2024

[27] Ms Molokac said on Tuesday 12 March 2024 at 9.18am she sent a text message to Ms Brown asking her to respond regarding her message from the day before as she has not responded. Ms Molokac said Ms Brown had responded that the time was 12pm and to take the client to a Harry Potter concert.

Wednesday 13 March 2024

[28] Ms Molokac said on Wednesday 13 March 2024 at 11.49 am she received an email from Ms Donnelly stating a change of address for her shifts whilst the Respondent completed an investigation relating to allegations that had been made within the team against her. The email also stated that the Respondent would invite Ms Molokac to a disciplinary meeting soon. Ms Molokac said she had no idea where this came from and what it was all about. Ms Molokac said on Wednesday 13 March 2024 at 11.59 am she replied to Ms Donnelly asking for the allegations and no response was received. Ms Molokac said in her oral evidence that her relationship with the other staff in the house she had been working was great. Ms Molokac said on the Wednesday she had a look at the new address for her shifts and her evidence was to the effect that she discovered that the Respondent had rostered her to do 3 overnight shifts with a client who exhibited certain behaviours which concerned her and she would be doing overnight shifts at that house on her own. There was some evidence around this matter however it is peripheral to the important facts in the matter and unnecessary to deal with any further.

[29] Ms Donnelly said on 13 March 2024 at 10am, Ms Young attended a meeting with Ms Brown disclosing allegations of bullying and a hostile working environment created by the actions of Ms Molokac. Ms Young did not give evidence. Ms Molokac said she was not made aware of any allegations until 25 March 2024 through an email sent to the Commission by the Respondent. Ms Molokac said that it appeared Ms Donnelly was claiming she was bullying multiple team members but apparently on this day only one team member had a meeting, and no evidence is provided of what the claims actually were.

[30] Ms Donnelly said at 11:49am on 13 March she emailed Ms Molokac to advise of a location change for her shift on 14 March, due to allegations of bullying which would be outlined in the letter to be sent once created. Ms Donnelly said Ms Molokac was removed from accessing the group chat due to the allegations received. Ms Molokac said the email did not mention that the allegations were of bullying, and just mentioned “allegations”. Ms Molokac said she asked in writing for the allegations to be explained to her but there was no reply from Ms Donnelly at all.

[31] Mr Glassby raised an issue that the Respondent had made a reference to Ms Molokac having been stood down. Ms Donnelly accepted that Ms Molokac had not been stood down from her role as a team leader, and what had happened was a change of location. I asked Ms Donnelly if Ms Molokac was ever directed not to re-enter the house she had been working in. Ms Donnelly responded that she believed it was a given.

Thursday 14 March 2024

[32] Ms Molokac said on Thursday 14 March 2024 at 10.30am she went to the home where she had worked for the previous ten months to collect her personal belongings and return a garage door remote control. Ms Molokac said at 6.14pm she obtained a medical certificate as she was not feeling well enough to go to work for the next 4 days. Ms Molokac said at 6.29pm she emailed Ms Donnelly requesting an explanation about what was going on and received no response. At 8.44pm Ms Molokac sent a text message to the Respondent’s ‘Oncall’ number letting them know she would not be coming to work for the next 4 days as she was not feeling well. Ms Donnelly said this message was acknowledged by the Respondent at 9.20pm by the Service Manager.

[33] Ms Molokac submitted that the items she retrieved from the property on 14 March 2024 were owned by her, and she furnished receipts as evidence. She submitted that she retrieved them as part of preparing for the work the Respondent had allocated to her to perform at a different property as the work involved overnight shifts. Ms Molokac said she accessed them in the ordinary course of her work, rather than by ‘breaking and entering’ as the Respondent alleged. Ms Molokac asserted that the Respondent had a significant delay in lodging a police report on 20 March 2024 because they did not genuinely believe that Ms Molokac had committed a crime, nor that it endangered the clients.

[34] Ms Donnelly said that at 6:29pm on 14 March, Ms Molokac emailed her following up the letter outlining the allegations. Ms Molokac said in response she never received any letter outlining the allegations. Ms Donnelly maintained in her oral evidence that the garage door remote control was not returned on 14 March and the Respondent only had possession of it a week earlier. Ms Molokac said it was returned and she left it in the kitchen draw where all the remotes are kept. Ms Molokac said the staff would have found it in the draw. Ms Donnelly said placemats were returned at a later date, and she assumed the garage remote control was returned with the placemats or she has otherwise accessed the property outside of times when the clients were home. In cross-examination Ms Donnelly accepted that the placemats were posted to the property.

[35] I asked Ms Donnelly during her oral evidence what the position of the Respondent was as at the time of the determinative conference as to what other items were taken by Ms Molokac.

Ms Donnelly said the Respondent could not be sure as to what Ms Molokac had removed. Ms Donnelly said whether any items were removed that belonged to the Respondent, it maintained that Ms Molokac had committed criminal trespass. Ms Donnelly said it is well known that employees are to remove themselves from the workplace because they are no longer covered by Workcover. Ms Donnelly said she believed it is in a work handbook.

[36] It was accepted by Ms Donnelly in the course of her oral evidence there would be occasions when Ms Molokac would have been in the house on her own if on shift and waiting for the clients to return from an outing however she said in those circumstances Ms Molokac had a legal right to be in the home because she was on a rostered shift.

[37] Ms Donnelly gave evidence that it had not been made aware by Ms Molokac that she had personal property at the house, and she could have contacted the Respondent and asked if she could collect it, and someone could have met her at the property so she could do that.

Friday 15 March 2024

[38] Ms Donnelly said at 8.33am on Friday 15 March, Sarah Cannavo, Client Coordinator, responded to Ms Molokac's text, requesting Ms Molokac follow the Respondent's policy when unavailable for a shift.

[39] Ms Donnelly said at 8:55am Ms Brown emailed a draft disciplinary letter to Ms Donnelly for approval. Confirmation was given and the disciplinary letter was not emailed to Ms Molokac due to her being on personal leave at the time. Ms Molokac said she has never seen a disciplinary letter.

[40] Ms Molokac said she had never taken sick leave before and the procedure is not written in a contract, and she assumed that texting is preferred as Ms Donnelly and everyone else from the office would always text if they required anything, so she didn't understand how the policy applied to one person but not the other. Ms Molokac said if she was aware of the policy, she would have given the Respondent a phone call, but she was not.

[41] Ms Molokac said at 4.26pm that day while she was in bed sick sleeping, she woke up to a text message from Ms Donnelly asking her to confirm when she entered the Respondent's property to retrieve items that have been removed. Ms Molokac said at 4.57pm she tried to call Ms Donnelly to have a conversation and the call was declined. Ms Molokac said at 4.50pm she received a Serious Misconduct and Termination Letter dated 13 March 2024 but received 15 March 2024, without any warning or chance to defend herself.

[42] Ms Donnelly said at 3:30pm Ms Brown called her to advise that Ms Molokac had entered the property whilst the property was unattended and removed items from the home. Ms Donnelly said the items missing were not known at the time, however staff on-site confirmed that Ms Molokac had not attended whilst the clients or staff were home.

[43] Ms Molokac said she went back to the house on 14 March to collect her personal belongings and everything she required for her next shift which was the following day at a different location. Ms Molokac said all items removed belonged to her and she provided evidence of the ownership.

[44] Ms Molokac said she went to the property in the morning of 14 March as she was thinking of ‘the girls,’ and didn’t know what to tell them if they would see her as they would be very upset if they saw that she was packing up all her stuff. Ms Molokac said she was a very big part of both of their lives, and they had both struggled a lot since she was terminated. Ms Molokac said as of now both are no longer clients of the Respondent.

[45] Ms Molokac said she knew the routine of the two clients as she worked with them for 10 months, her entering the property wasn’t a secret and she didn’t see anything wrong with her going to the house to collect her belongings. Ms Molokac said she thought she was allowed to go to the house and was not aware or been told by anyone that she was not allowed to enter the house.

[46] Ms Donnelly said at 3.53pm Ms Brown emailed her confirming her initial investigation and outcome, confirming that Ms Molokac had attended the home whilst no one was home and removed ‘numerous items.’ Ms Molokac said she did not understand how Ms Brown would even know what she had taken as none of them including Ms Donnelly had any idea what had belonged to her or the Respondent. Ms Molokac said they have asked a staff member to write up a list of things she thought was missing but she was not aware that the majority of items belonged to Ms Molokac. Ms Molokac said she has been told that on numerous occasions after her termination, that she was blamed for anything that staff could not find at the house, including things that the house never even had.

[47] Ms Donnelly said she texted Ms Molokac at 4:26pm requesting confirmation of when Ms Molokac entered the home. Ms Molokac accepted this but said Ms Donnelly never gave Ms Molokac a chance to explain the circumstances. Ms Donnelly said at 4:50pm she emailed a termination letter to Ms Molokac for Serious Misconduct outlining the allegations as “Break & enter”. Ms Donnelly said this has now been determined as incorrect, and the crime committed was “Criminal Trespass”. Ms Donnelly said between 5:00pm and 6:00pm Ms Molokac attempted to contact Ms Donnelly numerous times via phone call.

Saturday 16 March

[48] Ms Donnelly said on 16 March 2024 a staff member advised the team via WhatsApp that the clients birthday party planning items were missing, and all staff needed to work together to put together a new one. Ms Donnelly said items owned by the Respondent were used in the creation of the planning items.

[49] Ms Molokac said she was not sure what the planning items were and what items had been used that belonged to the Respondent to create these planning items. Ms Molokac said there has been no evidence provided by the Respondent. Ms Molokac referred to WhatsApp group messages where she said she informed everyone what had been done by her regarding a client’s party. Ms Molokac said it was everyone’s responsibility to read these messages so she didn’t understand how she was getting blamed for this when she did as much as she could to start the Birthday planning. Ms Molokac said she took the client to buy her an outfit with her own money and the client’s mother purchased all of the decorations so she was not sure what type of involvement the Respondent had with organising the party, and they did not organise the party at all.

[50] Ms Molokac said none of the directors or office staff attended the party, and she wanted to be there so much but was not allowed to see the client at all and that upset the client.

Sunday 17 March 2024

[51] Ms Molokac said on Sunday 17 March 2024 at 3.54pm she requested a breakdown of the allegations.

Monday 18 March 2024

[52] Ms Molokac said on Monday 18 March 2024 at 10.56am she received an email from Ms Donnelly, and she responded via email the same day.

Wednesday 20 March 2024

[53] Ms Donnelly said on 20 March 2024 at 10:00am she reported the incident to the Queensland Police Service for investigation. Ms Molokac asserted that the police report the Respondent lodged on 20 March 2024 was unsubstantiated. Ms Molokac said Ms Donnelly reported this incident 6 days after she had visited the property to retrieve her items. Ms Molokac said she attended the North Lakes police station on 14 April 2024 and was informed the case had subsequently been closed by the Queensland Police due to lack of evidence.

[54] Ms Donnelly said at 7:35pm on 20 March a person, assumed to be Ms Molokac, attempted to access Ms Molokac's company email address which contained confidential company information. Ms Molokac said this was actually an honest mistake, and she had already been terminated for 10 days. Ms Molokac said she has a couple of outlook accounts on her main page, and her personal account was mistaken for her account that was created with the Respondent. Ms Molokac said she had tried to log in but it would not work so she requested a password change so she could access her account as she was not sure why she could not access it. It was only then that she realised she was trying to log into a wrong account, and there was nothing malicious about this.

Wednesday 17 April 2024

[55] Ms Donnelly said that on 17 April 2024 an email confirmed Ms Molokac removed placemats from the client's home and had since returned these via post as a gift to the clients. Ms Molokac said the email from a family member of a client clearly shows that she is explaining to Ms Donnelly that nothing had been stolen that belonged to the girls and that the placemats were Ms Molokac's and did not belong to anyone else and Ms Molokac posted them to the girls as a gift as she knew they liked them. Ms Molokac specifically submitted that having posted red placemats she retrieved to the client is not evidence that she had stolen them, but rather that she gave them to the client as a gift in light of no longer working with them. Ms Molokac provided the email from the family member of the client which agreed that Ms Molokac was the owner of the red placemats who gifted them to the family.

SUBMISSIONS

[56] Ms Molokac asserted that the Respondent did not follow any appropriate protocol in supposedly investigating the alleged theft that was the subject of the summary dismissal. Ms Molokac asserted the Respondent did not even make her aware of the alleged bullying which the Respondent submitted justified the summary dismissal until the Respondent asserted it to the Commission on 25 March 2024 when refusing to attend a Commission conciliation.

[57] Ms Molokac refuted the accusation of the Respondent that she took any property of the Respondent, nor any material related to planning the client's birthday. She asserts that the distress of the client stemmed from the Respondent's actions to prevent Ms Molokac attending the client's birthday party, and that the Respondent's instructions to staff not to engage with Ms Molokac and not giving her the ability to perform any handover was the primary reason for any issues with the party. She particularly objected to the Respondent's assertion that its service manager took responsibility for organising the party.

[58] Ms Molokac suggested that further acts of poor management by the Respondent as demonstrated by its poor handling of the handover around her termination caused the clients that Ms Molokac supported to cease working with the Respondent.

[59] Ms Molokac provided that she gave the Respondent ample opportunities to communicate the allegations to her or to respond to what allegations were put to her, but the Respondent unreasonably refused to engage. She asserts that the termination letter being dated 13 March 2024 is evidence that the termination was determined without any genuine investigation or opportunity to respond and was not due to the conduct of the Applicant.

[60] Ms Molokac submitted that the conduct of the Respondent in only providing the allegations of theft while Ms Molokac was on sick leave, and then providing the termination letter in response to Ms Molokac's request for further information was unreasonable.

[61] The Applicant asserted that there was no valid reason for dismissal and the dismissal was harsh, unjust and unreasonable.

[62] The Respondent submitted that its dismissal of Ms Molokac was not harsh, unjust or unreasonable. It submitted that Ms Molokac was terminated without notice due to risking the health and safety of clients with a disability and putting the company at risk of disrepute due to criminal actions within the workplace.

[63] The Respondent submitted that Ms Molokac did not deny entering the property whilst no one was home, stating in her 'Form F2' that she entered the property at 10:30am on the morning of 14 March. The Respondent submitted that Ms Molokac was the Team Leader for this house and was aware of the routine of the clients and staff and was aware that no one would be home after 10:00am on this day, being a Thursday. It was submitted that without the allegations of theft, entering a property or place of business without consent is a crime in and of itself 'Criminal Trespass'. The Respondent submitted that while Ms Molokac only claims to have removed personal items, Ms Molokac had previously disclosed to Ms Barrett that she had removed staff and client personal information including phone numbers. The Respondent submitted that Ms Molokac also removed paperwork, posters and other items owned by the Respondent and Ms Molokac may have claimed to have owned these items as she created them

or printed them whilst on duty, however the items used, and the information contained remains the property of the Respondent.

[64] Ms Molokac said all she removed from the house were her personal belongings and everything that she required for her next overnight shift at the different location. Ms Molokac said she has never created any paperwork or posters whilst on duty, and whatever she has created was with her own research and off duty at home. Ms Molokac said she has created a couple of posters but only for making her shifts easier as she is a very organised person, and her husband laminated and printed stuff for her at his work. Ms Molokac said the house did not have a printer so she could not have printed anything at work.

[65] Nearing the end of the determinative conference, Ms Donnelly raised for the first time that in Ms Molokac's performance she had breached 'minor policies' like uniform, and her response has previously been 'aggressive'. Ms Donnelly said whilst this is not relevant to the reason for termination it impacted how the Respondent handled the situation moving forward when the more serious issue arose. Ms Donnelly acknowledged it may have been ideal to follow up with a phone call before termination however it was serious, and it was a matter in the workers handbook. I asked the Respondent if they could produce a copy of the Handbook. The Respondent agreed to do so after the determinative conference concluded. The Respondent provided a copy of the Handbook with an email that submitted that there are numerous sections in it indicating a standard of behaviour including maintaining privacy, not accessing company items/ places of work outside of work hours and specifically states "prevent misuse, loss, remove, change, unauthorised access and disclosure to or use by any other person or organisation" on page 23, and noting that Ms Molokac had signed an acknowledgement concerning the Handbook.

[66] Ms Donnelly submitted that in a workplace such as an office or retail space it would not be permitted to access it outside of operational hours. As the home was not within its operational times, access to the premises would require permission to be accessed. In addition, Ms Molokac was notified a change of location prior to her accessing the premises outside of hours without approval further indicating a breach in policy & professional boundaries. Ms Molokac submitted in response that the handbook she received and signed did not state in any point that employees are not allowed to enter the house outside their hours and there is not a section dedicated to this issue in the handbook. Ms Molokac repeated that she was not notified at any point not to enter the house and she has not breached any policies and professional boundaries.

CONSIDERATION

Section 387(a) Valid Reason

[67] In relation to the matter raised by the Respondent near the conclusion of the determinative conference that there were instances of earlier performance issues, this was never raised at any earlier point, and I do not intend to afford it any weight.

[68] Ms Molokac made attempts to contact Ms Donnelly about the matters that were the reason for termination and Ms Donnelly elected not to engage directly with Ms Molokac about the issues before moving to terminate her employment. It became apparent in the course of the determinative conference that the Respondent's primary reason for termination was that Ms

Molokac entered the house at a time when she was not on a rostered shift, and without the express permission of the Respondent.

[69] Ms Molokac was dismissed while she was on sick leave. Mr Glassby asked Ms Donnelly why the Respondent never contacted Ms Molokac about the reason for dismissal before dismissing her. Ms Donnelly said it was the Respondent's policy not to contact staff while they are on sick leave. It is a twisted logic to submit as the Respondent effectively did, that it would be inappropriate to contact an employee about a disciplinary issue 'because' they are on sick leave, but it would still be appropriate to terminate that employee while they are on sick leave in relation to the same disciplinary issue without giving them an opportunity to respond to that reason.

[70] The evidence supports the conclusion that the property removed by Ms Molokac from the Respondent's premises belonged to Ms Molokac and not the Respondent. I am not satisfied from the evidence that Ms Molokac did not return the garage remote control until a later time as alleged. It reflects poorly on the Respondent that it had accused Ms Molokac of theft but when it came to the point of those allegations being tested the Respondent made very little attempt to substantiate these serious allegations.

[71] The evidence supports the conclusion that Ms Molokac had a very good relationship with the two clients in the home where she worked as attested to by material filed which was not challenged. Ms Molokac said in her evidence she was concerned about having to see the clients in circumstances where she was packing up her belongings as she believed they would be upset by that.

[72] Ms Donnelly's own evidence was that the issue concerning alleged bullying did not form part of the Respondent's reason for termination. In any event there is no probative evidence before the Commission that would support a conclusion that Ms Molokac engaged in bullying of any other staff. Ms Molokac provided evidence concerning the circumstances surrounding one comment left on a WhatsApp Group message in February 2024 that she removed herself. Ms Donnelly confirmed Ms Molokac was not stood down from duties at the time of her termination and remained a working team leader who had been rostered into a different home.

[73] It is perfectly plausible that Ms Molokac deliberately chose to collect her own property from the house at a time when the two clients were not home in order to avoid causing them distress as they had developed a close relationship with her over the previous ten months. Ms Molokac had possession of the garage door remote control and there was no suggestion from the Respondent that this was not appropriate. The remote control would obviously need to be returned if she was not going to be rostered at this home in the immediate future as was clear. I prefer the evidence of Ms Molokac that she returned the garage door remote control by placing it in a kitchen draw on the 14 March at the same time as she collected her own property. The Respondent's claim that the garage door remote control was not returned until a later date is speculative and not supported by any probative evidence other than hearsay evidence that Ms Donnelly said staff told the Respondent that they did not find it until a week later.

[74] Ms Molokac said she knew the routine of the two clients as she had worked with them for the preceding 10 months, and her entering the property wasn't a secret and she didn't see

anything wrong with her going to the house to collect her belongings. Ms Molokac said she thought she was allowed to go to the house and was not aware or been told by anyone that she was not allowed to enter the house. It is apparent that up until 14 March it was the custom and practice that Ms Molokac would visit the property as part of the ordinary course of her duties and had been provided the means to enter the property by the Respondent. At the time Ms Molokac was advised of the change to her location no one from management had issued an explicit direction that she could not return to the property where she had been working for 10 months. Ms Molokac had also not been given any specific particulars as to the reason for her being moved to another location. I have read the Handbook provided by the Respondent and I cannot find any explicit direction contained in it in relation to the issue relied upon to terminate Ms Molokac's employment.

[75] I do not accept that Ms Molokac engaged in criminal trespass. It appears from the evidence that the Police have not pursued the complaint made by the Respondent. It is clear for 10 months up to 14 March 2024, Ms Molokac had the consent of the Respondent to visit the property day in and day out to perform her duties as directed. Ms Molokac had spent her own money to purchase a range of items for the benefit of the two clients living at the property, and at no time did the Respondent explicitly rescind its consent for her to visit the property. Had it done so, and Ms Molokac then deliberately refused to comply with such a direction the circumstances would be different. It is clear the reason for her visiting the property was merely to collect her own possessions, and to return the Respondent's garage remote control.

[76] In relation to the matter raised by the Respondent that Ms Molokac attempted to access its Information Technology system 10 days after her termination, Ms Molokac provided evidence explaining that this was a mistake given that she had two outlook accounts on her home computer. This occurred well after the decision to terminate Ms Molokac, her explanation is plausible and I do not intend to afford the matter any weight in reaching a conclusion. I have weighed all of the evidence concerning whether the Respondent had a valid reason for dismissal related to Ms Molokac's conduct and I have reached the conclusion that it did not.

Section 387(b) Whether Ms Molokac was notified of the reason

[77] Ms Molokac was advised of the reason for her termination by letter on 15 March 2024.

Section 387(c) Opportunity to respond to any reason related to capacity or conduct

[78] Ms Donnelly accepted that Ms Molokac was given no opportunity to respond to the reason for termination. It is extraordinary that the Respondent decided to summarily dismiss Ms Molokac on the grounds it relies upon without giving her any opportunity to respond to those grounds whatsoever. It is quite likely that had the Respondent done so it would have learned that its conclusions regarding alleged theft were wrong.

Section 387(d) Unreasonable refusal of a support person

[79] Given the way the termination occurred without notice, and without an opportunity for Ms Molokac to engage in any discussion relating to her dismissal there was no opportunity for the consideration in section 387(d) to arise.

Section 387(e) Whether Ms Molokac had been warned of any unsatisfactory performance before dismissal

[80] Section 387(e) is a neutral consideration as the dismissal did not relate to Ms Molokac's performance, and was only related to her conduct.

Sections 387(f) and (g) the degree to which the size of the Respondent and the absence of a dedicated human resources specialist or expertise impacted on the procedures followed

[81] The Respondent had approximately 75 employees at the time of Ms Molokac's dismissal. Considering that number of staff it would be expected that the Respondent would have arranged access to some form of human resources advice but according to Ms Donnelly it does not appear to have either internal or external human resources advice. It is very likely had it sought such advice from a person with expertise in human resources matters it would not have proceeded to terminate Ms Molokac in the manner it did.

Section 387(h) Any relevant matters

[82] It is apparent that the unfounded criminal allegations made against Ms Molokac, and the termination of her employment without notice or opportunity to respond to any allegations has caused her considerable distress pointing to the dismissal having had a harsh impact on her.

CONCLUSION ON WHETHER UNFAIR

[83] I have considered all of the matters that I am required to take into account as set out above. I have concluded that the Respondent did not have a valid reason to dismiss Ms Molokac based on the evidence, and the process it followed in effecting the dismissal was procedurally flawed and had a harsh impact on Ms Molokac. Based on these conclusions I am satisfied that the dismissal was harsh, unjust and unreasonable.

REMEDY

[84] Ms Molokac was employed with the Respondent for approximately 10 months. Ms Molokac did not seek reinstatement, however, did seek compensation. On that basis I do not intend to consider the primary remedy of reinstatement when it is not sought. Ms Molokac was terminated on 15 March 2024 and was not paid any notice pay. The Respondent submitted that Ms Molokac's base rate of pay was \$34.50. The base rate of pay did not reflect Ms Molokac's actual earnings as she earned different rates of pay as she worked nights and shifts that attracted penalties.

[85] Ms Molokac was a full-time employee working 38 hours a week. Ms Molokac indicated that her gross weekly income was in the order of \$2,400 once penalties were taken into account. Ms Molokac and Ms Donnelly both agreed that they were content for the Commission to proceed on the basis that \$2,400 gross pay per week was a fair assessment of Ms Molokac's actual weekly rate of remuneration.

[86] Ms Molokac said she had no intention of leaving her employment and was happy in her job. Ms Donnelly said that she could not predict the future however she said given Ms Molokac's attitude she could not see a longstanding employment relationship.

[87] Ms Molokac said several weeks after her termination one of the clients in the house where she had worked for the Respondent decided to leave and Ms Molokac was approached to work with this former client of the Respondent. Ms Molokac gave evidence that she started her new work as an independent contractor with this former client of the Respondent from 26 April 2024, and she was performing the same number of hours of work, and her earnings in this new role are very similar to her employment with the Respondent, and the new arrangement was an ongoing working arrangement.

[88] Both parties accepted that the period of unemployment was therefore a period of six weeks. Adopting the approach in *Sprigg v Paul Licensed Festival Supermarket* (1988) 88 IR 21, I assess Ms Molokac is likely to have remained in employment with the Respondent for at least another 12 weeks. This amounts to an estimate of the remuneration that Ms Molokac would have received had she not been dismissed of \$28,800 by multiplying \$2,400 by 12 weeks.

[89] As stated above, Ms Molokac evidence was that her remuneration in her new engagement was commensurate with her income earned at the Respondent. That amount of earnings needs to be deducted from the amount of compensation awarded. On that basis I will deduct the amount of \$14,400 which equates to six weeks of remuneration at a commensurate amount to that earned at the Respondent, reducing the amount of compensation to \$14,400.

[90] Ms Molokac gave evidence that she was distraught and anxious in the weeks after her dismissal. I am inclined to accept that this was the case, and this would have impacted on her efforts to seek other employment. Ms Molokac has made efforts to mitigate her loss by entering the new working arrangement within six weeks of her termination. I do not intend to make any further deductions in relation to mitigation. I also do not intend to reduce the amount any further on the basis of contingencies, or any other matters.

[91] The amount of \$14,400 does not exceed the compensation cap. I have determined to order that Evolving Support Services Pty Ltd pay Petra Molokac the amount of \$14,400 gross taxed according to law and 11% superannuation paid into Petra Molokac's nominated superannuation account within 21 days of the date of this decision. An order to this effect will be issued separately and concurrently with this decision.



COMMISSIONER

Appearances:

Ms Petra Molokac and Mr Shane Glassby for the Applicant.

Ms Letia Donnelly for the Respondent.

Hearing details:

2024

By Microsoft Teams Video

29 May.

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¹ Exhibit 1

² Exhibit 3

³ Exhibit 2

⁴ Exhibit 5

⁵ Exhibit 4

⁶ Exhibit 6

⁷ Exhibit 7

⁸ Exhibit 8

⁹ Exhibit 9

¹⁰ Exhibit 10