



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Skei Batton

v

The Environment Centre NT Inc

(U2023/8548)

COMMISSIONER RIORDAN

DARWIN, 6 MARCH 2024

Application for an unfair dismissal remedy

[1] On 7 September 2023, Ms Skei Batton (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was dismissed by the Environment Centre NT Inc (**the Respondent**) on 28 August 2023.

[2] In its Form F3 – Employer Response, the Respondent raised a jurisdictional objection to the application on the basis that it is a small business employer and had complied with the Small Business Fair Dismissal Code.

Background

[3] The Applicant was employed by the Respondent as the Finance and Office Manager, from 26 July 2022 until the date of her dismissal.

[4] At 12:39pm on 20 July 2023, Ms Allana Brown, Biodiversity Policy Officer, sent email correspondence to the Applicant with the subject line ‘Reimbursing volunteers for fuel costs’:

“Hi Skei,

Next Thursday 27 July we are doing the nature laws ad shoot. We have 3 sets of volunteers who are travelling from Darwin to various locations over the course of the day to be in the ad for us (Corrobboree billabong, Mary River campground, Kakadu). I’d like to get your advice please on what process I need to follow to be able to reimburse their fuel costs?

What information do you need – vehicle/distance etc? Do we have a form I can provide to our volunteers to fill out?

Thanks so much,
Allana”

[5] At 2:17pm on 20 July 2023, the Applicant sent reply correspondence stating:

“Hi Al,

Those sound like production costs to me – Just let the producers of the video sort it out. Realistically they should have included all their costs in their quotes so all we would be doing is paying their invoice when they present it to us.

Kind regards

Skei Batton
Finance & Office Manager”

[6] Ms Brown responded to the Applicant as follows:

“Hi Skei,

No, these costs are not covered – they are ECNT volunteers whose expenses ECNT must cover.

Can you please let me know the best way to do this?

Thanks,
Allana”

[7] The Applicant further responded to Ms Brown as follows:

“Hi Al,

Well, that’s going to depend on the volunteers – eg:

- Who are they?
- What basis are they requesting payment on – eg receipts based expense reimbursement or via invoice? – (and following that answer – what are your budget limits?)
- Have they already been onboarded to ECNT accounting systems as an existing Debtor or Creditor?
- Do they fit the definition of a Related Party?
- Based on the answer to the previous question, could the payments be constructed as a Reportable Fringe Benefit?

Without that information I am unable to answer your questions, including – do we have a form for that because there could be multiple forms that could be applicable but selecting the right one depends on the answers to the questions above.

I would suggest the quickest way to get an answer is –

- Tell me who are the volunteers?
- What have you asked each of them to do?
- What is the budget you have allowed for the activities you are asking them to perform?

Cheers.

Skei Batton
Finance & Office Manager”

[8] Further to this correspondence, Ms Kirsty Howey, Executive Director, emailed the Applicant stating:

“Hi Skei,

I’m very keen to see this worked out promptly. Allana has been doing an incredible amount of work to get filming to happen next week.

As you will be aware, there is a standing expense code in the budget each year for volunteer costs (6-3100). This is taken out of the Operational Budget job code.

The budget is not yet finalised for 2023-2024, however, I recommend utilising this expense code and job code.

Al, if you could please advise the names of the volunteers that would be great. From a finance perspective, I’m not aware of any legal reason why ECNT could not simply reimburse these expenses if a tax invoice for fuel costs is produced utilising the above job code and expense code.

Kind regards,

Kirsty

Kirsty Howey
Executive Director”

[9] On Sunday, 23 July 2023, Mr Robby McKenzie, Treasurer, also responded to this email chain stating:

“Good Afternoon All,

I’m only just getting round to responding to a few emails that I meant to get out last week.

Skei, can I confirm that we have gone with Kirsty’s direction on this? Being such a small NFP, we need to keep volunteers on side and ensuring we can re-imburse things like fuel when they are going out of our way to support us is critical for us to continue to get these people engaging on our behalf.

We have re-imbursed people for these types of things in the past, I can’t see this being any different for re-imbursing a staff member (with the exception that we don’t have them in our payment system).

Regards,

Robby.”

[10] At 9:11am on Monday, 24 July 2023, the Applicant sent further correspondence stating:

“Good morning all,
I am trying to be as clear as possible about this.

The issue isn’t whether or not I am in any way reluctant to go with any direction to pay for costs incurred by any party whilst carrying out work on behalf of ECNT.

As explained 3 times last week. I don’t need to be given instructions on expense codes or job codes for such a simple transaction. What I need is the NAMES AND BANK ACCOUNT DETAILS of the people you want me to pay. I physically cannot process any transactions without this information. Nobody can.

I was asked a vague question last week about reimbursement processes by a staff member. The methods for paying fuel reimbursements for staff is different to how to pay Suppliers. Depending on the supplier requiring payment there could also be variations in details for each supplier so there is not 1 specific process for making such a payment. The answer could change slightly from 1 person to the next.

BUT IF YOU TELL ME THE NAMES OF THE PEOPLE WHO ARE INVOLVED IN THIS PROJECT I CAN BEGIN TO ANSWER THE REST OF THE QUESTION.

As I type this out – I still haven’t been provided with this critical piece of information.

IF I CAN’T IDENTIFY THE PERSON, I CAN’T PREPARE A DEPOSIT TO THEIR BANK ACCOUNT.

PLEASE PROVIDE ME WITH THE NAMES.

Skei Batton
Finance & Office Manager”

[11] On Monday, 24 July 2023, a Finance Sub-Committee meeting was conducted which the Applicant attended, as well as Ms Kirsty Howey, Director and Mr Robby McKenzie, Treasurer. Matters were raised at this meeting relating to the Applicant’s performance and conduct.

[12] The Applicant left the office following the meeting on 24 July 2023.

[13] On Tuesday, 25 July 2023, Ms Howey sent the following correspondence to the Applicant:

“Dear Skei,

I am writing following our meeting yesterday, notes of which are attached.

I note that you left ECNT premises immediately after our meeting, and have not returned. In your absence, I have ensured that tenants at 4/98 Woods St have emptied their offices, and that removalists and the carpet company have had access to the office to undertake the planned recarpeting of these premises.

There are a number of urgent tasks to be carried out following yesterday's meeting. They are:

- Complete the budget once we receive the budget template from Accounting for Good – this must be signed off by the Finance Committee by 9 August 2023 at the latest (one week in advance of the board meeting). A draft must be provided to the Finance Committee by 7 August 2024;
- Compile relevant audit documents for the audit by 31 July 2024 for sign off by the Finance Committee;
- Provide the estimate of wages declaration for Gallagher by tomorrow, 26 July.

Please confirm by return email that these tasks will be completed by you. If you are not able to complete these tasks, please let me know immediately and I will make contingency plans.

I wish to let you know that I consider your conduct yesterday, and that contained in the attached email, to be unprofessional and unacceptable. I advise that I plan to meet with the Employment Committee of ECNT as soon as possible to discuss this matter, and will be in touch after this meeting.

Please let me know as soon as possible what your intentions are regarding the above matters, including whether you intend to return to work at ECNT.

Kind regards,

Kirsy

Kirsty Howey
Executive Director”

[14] Ms Howey's correspondence attached correspondence from the Applicant dated 24 July 2023.

[15] Ms Howey sent correspondence to the Applicant at 7:39am on 26 July 2023, seeking an “*immediate response*” from the Applicant. Ms Howey sent further correspondence at 3:07pm on 26 July 2023, again seeking a response from the Applicant.

[16] On Saturday 29 July 2023, Ms Howey issued the Applicant with a ‘Notice of warning and investigation’ letter dated 28 July 2023, which stated:

“Dear Skei,

Notice of warning and investigation regarding alleged misconduct and poor performance which may result in dismissal

I am writing to:

- (a) advise you that ECNT is undertaking an investigation as to whether in its view your recent conduct (described below) constitutes misconduct justifying your dismissal or other disciplinary action;
- (b) warn you that you are not performing the role of Finance and Office Manager as required by your contract, and that if your performance and conduct do not improve, you may be dismissed;
- (c) direct you to attend a meeting between you and the ECNT Employment Committee on Tuesday 1 August 2023 at 3pm to give you an opportunity to respond to the information contained in this letter (you are advised to bring an independent support person to this meeting);
- (d) give you an opportunity to respond in writing to the information contained in this letter and arising from the meeting by close of business on 4 August 2023;
- (e) advise you that following the meeting, ECNT will finalise the investigation and make a determination as to whether your conduct constitutes misconduct warranting your dismissal or other disciplinary action.

In my view you may have engaged in misconduct by:

- (a) being absent from work without leave from 1pm on 24 July 2023, 25 July 2023, 26 July 2023 and 27 July 2023.
- (b) repeatedly failing to carry out lawful and reasonable directions from me between 21 July 2023 and today's date, resulting in serious and imminent risk to the reputation, viability and profitability of the organisation;
- (c) engaging in unprofessional behaviour towards me and the Treasurer at a meeting on 24 July 2023.

The specifics of this conduct include:

- (a) being absent from work without leave from 1pm on Monday 24 July 2023, and ignoring repeated communications from me asking for you to explain your absence. I have received no communication from you since you departed at 1pm on 24 July 2023;
- (b) refusing to follow my lawful and reasonable directions asking you to confirm that urgent, time-sensitive work fundamental to your role would be completed by you on time, namely:
 - a. the preparation of the organisation's audit (deadline 31 July);
 - b. the preparation of the organisation's budget (deadline 7 August);
 - c. the preparation of the organisation's wages declaration for the purposes (deadline 31 July);
- (c) engaging in unprofessional behaviour towards me and the Treasurer at the Finance Committee meeting on 24 July 2023, including by yelling, swearing, slamming a door and walking out of the office in response to reasonable questioning regarding your behaviour and performance.

I note that your failure to follow these directions – or respond to any communications from me – has threatened our organisation's ability to comply with legal requirements regarding completion of our audit, workers compensation, payroll and budgetary

preparation and management. This puts ECNT legal compliance and reputation at risk. ECNT may also incur significant additional costs to ensure that these requirements are met.

I also wish to advise you that I am concerned that you are not performing the role of Finance and Officer (sic) Manager as required by the performance measures in your contract including:

- Drafting the annual budget for board approval;
- Preparing and analysing project budgets;
- Making recommendations to the organisation on budget expenditures;
- Manage and acquit financial aspects of grants and project budget;
- Organise board meetings and ensure the correct procedures are following regarding notification of meetings, distribution of Board papers etc;
- Manage and respond to emails on ECNT's administration email account;
- Develop, implement and review all ECNT policies and procedures and contribute to a healthy workplace through the identification and management of risks.

I hereby warn you that you need to improve your performance and conduct or risk being dismissed. If you require training or mentoring to improve your performance, then ECNT is happy to provide it, including through our the (sic) firm Accounting for Good or our bookkeeper Sharon Curran. This can be discussed at the meeting on 2 August 2023.

You are directed to attend a meeting at a venue to be nominated by you (but by default at ECNT's office) on Tuesday 1 August 2023 at 3pm to give you an opportunity to respond to the information in this letter. You are advised to bring an independent support person to this meeting. Please confirm by return email that you will attend this meeting.

If you do not attend the meeting, or respond in writing to the allegations contained in this letter by 4 August 2024, then the investigation may be concluded in the absence of this information, and there is a risk of dismissal.

Yours sincerely,

Kirsty Howey, Executive Director, ECNT"

[17] On 31 July 2023, the Applicant wrote to Ms Howey by email and attached a medical certificate covering the period 30 July 2023 to 2 August 2023. The Applicant wrote to Ms Howey as follows:

"Dear Kirsty,

Please find attached medical certificate confirming that I am unfit to attend work before 3/08/2023.

I will be responding to your letter however please note that your correspondence has overlapped action that I had already initiated last week through the Fair Work Ombudsman. I am not currently able to drive whilst I am on heavy pain killers and I will be prioritising meeting with an Industrial Liaison Officer (Samantha Ahmat) prior to accepting an invitation to meet with you and the Employment Committee.

I am seeking third party mediation and I urge you to respect this process by not contacting me at home or outside work hours until arrangements can be made for my safe return to work.

Sincerely

Skei Batton”

[18] On Tuesday, 1 August 2023, the Applicant was stood down on full pay whilst the investigation took place:

“Dear Skei,

Unfortunately the doctor’s name and signature is not legible on the document you attached. I would appreciate it if you could please resend for my consideration, together with a leave form.

Nonetheless, on the basis you appear to be seeking personal leave from 31 July to 2 August (inclusive) and in an effort to accommodate your wishes, I have rescheduled the meeting with the Employment Committee for Friday 4 August at 1pm at ECNT’s office or a place to be nominated by you (including online if you cannot drive). You are directed to attend this meeting, and Samantha Ahmat is welcome to attend. Any failure to attend will be considered a further failure to follow a reasonable and lawful direction from me, and may result in disciplinary action or dismissal.

I note you have provided no explanation for your absence last week. Your absence without leave or any explanation has created considerable and urgent financial and legal risk for ECNT, not least of which is the potential of ECNT to fail our audit. I have therefore had to make urgent contingency staffing arrangements to alleviate these risks and ensure that the payroll, audit and budget processes, as well as everyday financial and administrative tasks, can be completed. Staff and volunteers will be in the office this week to assist me to complete these tasks. I have no confidence that you will return to work on 3 August, given your unexplained absence to date. I must act to protect the organisation, and in its interests.

I therefore advise you that you are stood down on full pay while ECNT’s investigation takes place, and on the basis that your role is being covered by other staff and consultants during this period.

Your pay will be processed today by Sharon. You will not be paid for your absence from work on 24, 25 and 26 July.

Kind regards,

Kirsty

Kirsty Howey

Executive Director”

[19] On Thursday, 3 August 2023 the Applicant wrote to Ms Howey by email:

“Hi Kirsty,

As I have an unresolved back injury I am unwilling to take the stairs to the ECNT office. Emily from NT Working Women’s Centre has offered their office for tomorrow’s meeting as she will be my support person.

At this stage I am willing to attend but I intend to provide my response to the allegations raised in the letter and subsequent meeting in writing by Friday 11 August 2023.

By having 5 business days to submit the written response it ensures that I am able to receive advice about my situation.

I am also writing to seek clarification as to when my stand down period ends.

Regards
Skei”

[20] A meeting was conducted as proposed on 4 August 2023.

[21] On Saturday, 5 August 2023, Ms Howey wrote to the Applicant and Ms Emily Kilpatrick, Industrial Liaison Officer, NT Working Women’s Centre, by email:

“Dear Skei and Emily,

Thank you for meeting yesterday. My record of the meeting is attached. I am sending this email on a Saturday as I did not have time to do so yesterday due to workload associated with the audit. I do not expect you to either read or respond to this email until normal work hours commence on Tuesday (following the public holiday).

I confirm that we agreed in the meeting to your request to an extension of time until midday on 11 August 2023 to respond to my letter dated 30 July 2023. No more extensions will be provided. If you do not respond by that date, the investigation may be concluded in your absence.

I also confirm that your stand down period will continue until the investigation is concluded, and a decision made by ECNT regarding this matter.

At the meeting, I went through a number of documents which have previously been provided to you by email. These documents contain the substance of the allegations put to you in the letter of 30 July 2023. I am attaching copies of the correspondence referred to in the meeting. I note that this email correspondence was forwarded to your personal email address.

I note that in addition to this correspondence, I also sent text messages to your phone as follows:

- 26 July 2023 at 3.09pm: “Dear Skei – can you please respond to the emails I have sent as a matter of urgency? It is very important I have clarity.”

- 29 July 2023 at 12.02pm: “Dear Skei – I have just emailed a letter notifying you of a warning and investigation regarding your alleged misconduct and performance which may result in termination of your employment. I direct you to attend a meeting at ECNT or a venue to be nominated by you at 3pm on Tuesday 1 August. I have sent the email to [redacted] and [redacted]. Please confirm you have received this text message. Regards, Kirsty.”

The first communication I received from you Monday 31 July 2023 (see email chain below).

I have not yet received any substantive response to the following specific allegations of misconduct contained in the letter:

- Being absent from work without leave from 1pm on Monday 24 July 2023, and ignoring repeated communications from me asking for you to explain your absence.
- Refusing to follow my lawful and reasonable directions asking you to confirm that urgent, time-sensitive work fundamental to your role as Finance and Officer (sic) Manager would be completed by you on time, namely:
 - The preparation of the organisation’s audit (deadline 31 July);
 - The preparation of the organisation’s budget (deadline 7 August);
 - The preparation of the organisation’s wages declaration for the purposes (deadline 31 July);
- Engaging in unprofessional behaviour towards me and the Treasurer at a Finance Committee meeting on 24 July 2023, including by yelling, swearing, slamming a door and walking out of the office in response to reasonable questioning regarding your behaviour and performance.

I assert that your failure to follow these directions – or respond to any communications from me until 31 July 2023 – threatened our organisation’s ability to comply with legal requirements regarding completion of our audit, workers compensation, payroll and budgetary preparation and management. This puts ECNT legal compliance and reputation at risk. ECNT has also incurred significant additional costs to ensure that these requirements are met.

It is these specific allegations I ask you to respond to in writing by 11 August 2023.

Kind regards,

Kirsty

Kirsty Howey
Executive Director”

[22] At 9:37pm on Friday, 11 August 2023, the Applicant wrote to Ms Howey as follows:

“As agreed. 2 documents attached.

Skei.”

[23] On Thursday, 17 August 2023, Ms Howey sent an email to the Applicant attaching the investigation findings, which confirmed the Respondent's decision to terminate the Applicant's employment with two weeks' pay in lieu of notice. However, Ms Howey also offered the Applicant the opportunity to resign and attached to the correspondence a proposed 'Settlement Agreement and Deed of Release'.

[24] On Monday, 28 August 2023, the Applicant wrote to Ms Howey stating:

"To Kirsty

On 17 August 2023 you notified me about your intention to terminate my employment with ECNT.

On 28 August you invited me to a meeting to give me "verbal notice" of my termination. As I am unable to attend the meeting, I am requesting that the notice be provided to me in writing.

Sincerely

Skei Batton"

[25] Ms Howey responded on that same date, attaching the Applicant's Termination Letter and confirming that her final pay would be made as soon as possible.

[26] The Applicant's Termination Letter, dated 28 August 2023, provided:

"Dear Skei

Termination of your employment

I am writing to you about the termination of your employment with the Environment Centre NT Inc (ECNT).

I refer to previous correspondence regarding an investigation into your alleged misconduct, and about the proposed termination of your employment with ECNT, namely:

- (a) My letter to you dated 29 July 2023 notifying you of a warning and investigation regarding alleged misconduct which may result in dismissal, and directing you to attend a meeting on 1 August 2023;
- (b) Your email to me dated 31 July 2023 attaching a medical certificate purporting to cover the period 30 July to 2 August 2023 (inclusive);
- (c) My email to you dated 1 August 2023 notifying you that the meeting had been rescheduled to 4 August 2023 at 1pm, and standing you down on full pay during the investigation;
- (d) Your email to me dated 3 August 2023 advising that you proposed to attend the meeting, and advising that you intend to provide a response to the allegations by Friday 11 August 2023;

- (e) A meeting between you, Emily Kilpatrick, me, Robin Knox and Michael Fonda at the NT Working Women's Centre at 1pm on 4 August 2023;
- (f) An email from me to you and Emily Kilpatrick attaching relevant documents dated 5 August 2023;
- (g) An email from Emily Kilpatrick to me, copying you in, acknowledging receipt of the documents dated 8 August 2023;
- (h) An email from you to me, copying in Emily Kilpatrick dated 11 August 2023 attaching a response to the allegations, and a record of conversation of the meeting on 4 August 2023;
- (i) A letter to you from me sent by email, copying in Emily Kilpatrick dated 17 August 2023 providing you with my detailed findings of my investigation into your alleged misconduct, notifying you of my intention to terminate your employment with two weeks pay in lieu of notice, and offering you the opportunity to respond and resign with four weeks pay in lieu of notice subject to the execution of a Deed of Release and Settlement, with such offer remaining open for acceptance until midday on Monday 21 August 2023.

I have not received any correspondence or contact from you since 11 August 2023, including in response to my letter dated 17 August 2023.

Following the investigation, I have found that you had engaged in misconduct of a very serious nature, in breach of your employment contract with ECNT (including our Code of Conduct). Your conduct comprised wilful and deliberate behaviour that is inconsistent with the continuation of your employment contract, including ECNT's Code of Conduct which forms part of your contract.

The specifics of the misconduct comprise the following:

- (a) Engaging in unacceptable and unprofessional behaviour towards me and the Treasurer at a Finance Committee meeting held between 12pm and 1pm on 24 July 2023, including by yelling and swearing at the Treasurer and Executive Director, slamming the door and walking out of the office in response to reasonable questioning regarding your conduct and performance;
- (b) Being absent from work without leave from 1pm on Monday 24 July 2023, and then on 25 July 2023, 26 July 2023 and 27 July 2023, and ignoring repeated communications by email and text from the Executive Director asking you to explain your absence;
- (c) Refusing to following my lawful and reasonable directions by email and text message between 24 and 27 July 2023 asking you to confirm that urgent, time-sensitive work fundamental to your role as Finance and Officer (sic) Manager would be completed by you as agreed at a meeting on 24 July 2023, namely:
 - a. The preparation of the organisation's audit (deadline 31 July);
 - b. The preparation of the organisation's budget (deadline 7 August); and
 - c. The preparation of the organisation's wages declaration for the purposes (deadline 31 July).

My detailed findings in relation to these specific allegations, as well as other claims and assertions made by you in the course of the investigation, were provided to you by letter dated 17 August 2023 and are annexed to this letter.

ECNT is a small business within the definition of the Fair Work Act, and has limited financial resources and staffing. Your misconduct and absence without leave had serious consequences for ECNT. In particular, it occurred during a period in the year where a number of time sensitive and critical tasks were due to be completed, for which you had primary responsibility as Finance and Office Manager. This included the provision of documents to the auditor following the end of financial year, the preparation of the organisation's budget for the next financial year, and the completion of a wages declaration for the purposes of renewing ECNT's workers' compensation. Your absence without leave also had the potential to impact the financial position of other ECNT staff, since you also have primary responsibility for payroll. Your misconduct threatened ECNT's ability to comply with legal requirements regarding completion of our audit, workers compensation, payroll and budgetary preparation and management. This put ECNT legal compliance and reputation at serious risk, and has created significant stress for the organisation and its staff. ECNT has also incurred additional costs to ensure that these requirements are met.

I find that you have been afforded procedural fairness by ECNT during the course of the investigation into your misconduct in being provided multiple opportunities to respond to the specific allegations, both in writing and in person, between 28 July 2023 and today's date. In this regard, I note that all of your requests for extensions of time to respond to these allegations, including to attend a meeting regarding the allegations, have been agreed to by ECNT. I also note that you have had the assistance of Emily Kilpatrick from the NT Working Women's Centre throughout the investigation.

Based on your length of service, your notice period is two weeks. I have decided to provide you with two weeks pay in lieu of notice. Your employment will thus terminate immediately, with the last day of your employment being 28 August 2023.

You will also be paid your accrued entitlements and any outstanding pay, up to and including your last day of employment. This includes the balance of any time off instead of overtime accrued but not yet taken, and superannuation.

I ask you to please return any keys or other property belonging to ECNT by the end of this week in a manner to be determined by you. If you have any personal belongings to collect, please let me know.

You may seek information about minimum terms and conditions of employment from the Fair Work Ombudsman. If you wish to contact them you can call 13 13 94 or visit their website at www.fairwork.gov.au.

Some termination payments may give rise to waiting periods for any applicable Centrelink payments. If you need to lodge a claim for payment you should contact Centrelink immediately to find out if there is a waiting period.

Yours sincerely,

Kirsty Howey
Executive Director”

[27] The matter was heard by Video via Microsoft Teams on 18 December 2023. The Applicant was represented by Ms Emily Kilpatrick, Northern Territory Working Women’s Centre. The Respondent was represented by Ms Kirsty Howey, Executive Director of the Respondent.

[28] The Applicant gave evidence on her own behalf at the Hearing. The following persons gave evidence for the Respondent at the Hearing:

- Ms Kirsty Howey, Executive Director of the Respondent;
- Ms Allana Brown, Biodiversity Policy Officer for the Respondent;
- Ms Robin Knox, Chair of the Board and a member of the Employment Committee for the Respondent; and
- Mr Robert McKenzie, Defence Community Relationship Officer with Defence Health Limited and a Board Member and Treasurer for the Respondent.

Statutory Provisions

[29] The relevant sections of the FW Act relating to an unfair dismissal application are:

“396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

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

381 Object of this Part

(1) The object of this Part is:

- (a) to establish a framework for dealing with unfair dismissal that balances:
 - (i) the needs of business (including small business); and
 - (ii) the needs of employees; and
- (b) to establish procedures for dealing with unfair dismissal that:
 - (i) are quick, flexible and informal; and
 - (ii) address the needs of employers and employees; and
- (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

Note: The expression “fair go all round” was used by Sheldon J in *in re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

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

384 Period of employment

(1) An employee's *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

- (a) a period of service as a casual employee does not count towards the employee's period of employment unless:
 - (i) the employment as a casual employee was on a regular and systematic basis; and
 - (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and
- (b) if:
 - (i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and
 - (ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and
 - (iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the new employer.

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.

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.

388 The Small Business Fair Dismissal Code

- (1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.
- (2) A person's dismissal was consistent with the Small Business Fair Dismissal Code if:
 - (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
 - (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.”

[30] The Small Business Fair Dismissal Code provides:-

“The Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.”

Applicant's Submissions

[31] The Applicant submitted that she is a 48-year-old Kungarrakun woman who has been living in the Northern Territory her whole life. The Applicant submitted that, as a Traditional Owner, she has been involved in the Aboriginal Land Rights movement since the beginning of the Finnis River Land claim which started when she was a child. The Applicant submitted that she has a deep connection to country which holds our natural landscape as sacred, making environmental protection an obligation, not an option. The Applicant submitted that it was for these reasons that she was excited to join the Respondent, as she was able to work towards fighting for a future where the Northern Territory's nature thrives.

[32] The Applicant submitted that throughout her employment, she worked extensively to establish and continually improve financial policies, processes, and procedures for the Respondent, to ensure that they were meeting their obligations, including as a charity organisation.

[33] The Applicant submitted that when asked whether she enjoyed her work she would always answer yes; that is, until the finance sub-committee meeting on 24 July 2023.

[34] The Applicant submitted that in this meeting, she explained that she could not process payments to reimburse volunteers without details such as the volunteer's name and bank account details. She submitted that Ms Kirsty Howey, Director and Mr Robby McKenzie, Treasurer did not appear to understand this and the discussion became heated. The Applicant

submitted that Ms Howey criticised her performance and conduct and spoke in an unprofessional and inappropriate manner. The Applicant submitted that she felt overwhelmed and unsafe due to Ms Howey's conduct and contacted a board member and member of the employment sub-committee, Ms Robin Knox, in relation to the meeting.

[35] The Applicant submitted that on 29 July 2023, she received a warning letter by email stating that her performance needed improvement and that an investigation would be conducted. The Applicant submitted that she was not provided any time to improve the alleged performance issues, with an investigation commencing the following business day.

[36] The Applicant submitted that a significant lack of procedural fairness was afforded to her during the investigation, including that Ms Howey conducted the investigation, despite her involvement in the meeting with on 24 July 2023.

[37] The Applicant submitted that in the Respondent's 'Investigation into alleged misconduct – findings' document, the Respondent stated that the meeting on 24 July 2023 included, "...*reasonable questioning regarding your conduct and performance.*" The Applicant disagreed that this meeting was the correct forum to bring up conduct and performance concerns. The Applicant submitted that she was not given any prior notice of this meeting to assist her in preparing and responding to it, or for arranging a support person. Further, the Applicant was not advised prior to the meeting that it was a performance management meeting. The Applicant submitted that she was told it was a Finance Committee meeting and that was why Mr McKenzie was in attendance.

[38] Regarding the investigation conducted by the Respondent, the Applicant submitted that she communicated her concerns about the impartiality of the Respondent's investigation in writing to Ms Howey on 11 August 2023.

[39] The Applicant submitted that as a result of its investigation, the Respondent found that she "...*engaged in misconduct of a very serious nature warranting termination of (her) employment.*" The Applicant disagreed that her conduct could be considered serious as it does not meet the Small Business Fair Dismissal Code definition, which provides that serious misconduct includes, "*theft, fraud, violence and serious breaches of occupational health and safety procedures.*" The Applicant submitted that in the allegation letter, there is no allegation of theft, fraud, violence or serious breaches of occupational health and safety procedures. The Applicant submitted that it was only when she confirmed in her investigation response letter that she had sworn in the meeting by saying "*Whatever! Do whatever the fuck you want to do and dump whatever shit in my lap your going to do. I don't care!*", that the Respondent decided her conduct could be deemed as serious.

[40] The Applicant submitted that swearing was an accepted workplace behaviour at the Respondent's business, and, therefore, her words cannot provide a valid reason for dismissal, consistent with the decision in *Symes v Linfox Armaguard Pty Ltd* [2012] FWA 4789.

[41] Further, the Applicant submitted that this was an isolated act of disobedience, particularly in the context where the Applicant was feeling overwhelmed and bullied by Ms Howey's conduct. The Applicant relied here on the decision in *Bruce v AWB* (2000) FCA 1281, submitted that the behaviour cannot be deemed serious misconduct.

[42] As an additional matter, the Applicant noted that in her response letter to the Respondent, she stated that the Respondent could not reasonably performance manage her about work that had not yet fallen due. The Applicant relied here on the decision in *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 as demonstrating that an employer cannot dismiss an employee because they suspect breaches of duties will happen in the future.

[43] For all of the above reasons, the Applicant submitted that her dismissal by the Respondent was harsh, unjust or unreasonable because she was not provided procedural fairness in the process leading up to her dismissal and the dismissal was a disproportionate response to the alleged conduct relied on by the Respondent as the reason for dismissal. The Applicant relied on the decision in *Bi-Lo Pty Ltd v Hooper* (1994) 53 IR 224 at 229, in which a Full Bench of the Industrial Commission of South Australia stated:

“...Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just. Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee’s work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.”

[44] The Applicant submitted that the Respondent failed to complete a thorough and unbiased investigation into the allegations against her.

[45] The Applicant submitted that the alleged behaviour does not constitute serious misconduct as described by the Small Business Dismissal Code. The Applicant submitted that as the Respondent dismissed her on the grounds of serious misconduct, it has therefore failed to comply with the Code.

[46] The Applicant submitted that the Commission should determine her dismissal by the Respondent was unfair.

Respondent’s Submissions

[47] The Respondent submitted that the Applicant’s application should be dismissed on the following grounds:

“a. The Fair Work Commission has no jurisdiction to hear the claim because the dismissal was consistent with the Small Business Fair Dismissal Code; and/or

b. The termination was not harsh, unjust or unreasonable.”

Jurisdictional objection: compliance with Small Business Fair Dismissal Code

[48] The Respondent submitted that it is a small business within the meaning of the FW Act, as it has less than 15 employees. It submitted that at the time of the Applicant’s dismissal, it had 7 employees.

[49] The Respondent submitted that in accordance with the Small Business Fair Dismissal Code, it gave the Applicant a reason why she was at risk of dismissal in the correspondence of 28 July 2023, which notified the Applicant that the Respondent was undertaking an investigation as to whether her conduct constituted misconduct warranting her dismissal. The Respondent submitted that the alleged misconduct was clearly set out in the letter as follows:

“1. Being absent from work without leave from 1pm on 24 July 2023, 25 July 2023, 26 July 2023 and 27 July 2023, and ignoring repeated communications from the Executive Director asking her to explain her absence;

2. Refusing to follow the Executive Director’s lawful and reasonable directions asking her to confirm that urgent, time sensitive work fundamental to her role would be completed by her employee on time, namely:

- a. The preparation of the organisation’s audit (deadline 31 July 2023);*
- b. The preparation of the organisation’s budget (deadline 7 August 2023);*
- c. The preparation of the organisation’s wages declaration (deadline 31 July 2023);*

3. Engaging in unprofessional behaviour towards the Executive Director and the Treasurer at a Finance Committee meeting on 24 July 2023, including by yelling, swearing, slamming a door and walking out of the office in response to reasonable questioning regarding her behaviour and performance.”

[50] The Respondent submitted that it was noted in the letter that the Applicant’s failure to follow directions – or respond to any communications from the Executive Director – threatened the organisation’s ability to comply with legal requirements regarding completion of the audit, a workers compensation declaration, payroll and budgetary preparation, which was putting the organisation’s legal compliance and reputation at risk. The Respondent submitted that the letter also noted that the organisation would incur significant additional costs to ensure these requirements were met.

[51] The Respondent submitted that the letter advised that the Executive Director was concerned the Applicant was not performing the role of Finance and Office Manager as required by her contract and warned that she needed to improve her performance or risk being dismissed.

[52] The Respondent submitted that it gave the Applicant multiple opportunities to respond to the warning and provided the Applicant a reasonable chance to rectify the problem:

“a. The employee was invited to a meeting to discuss the meeting on 1 August 2023;

b. The employer acceded to the employee's request to postpone the meeting until 4 August 2023, and to hold it at the office of her representative, the Working Women's Centre;

c. The employer acceded to the employee's request to provide a written response to the allegations provided by 11 August 2023;

d. The employee (with a representative from the Working Women's Centre) and the employer (with representatives from the ECNT Employment Committee) met on 4 August 2023, where the particulars of her misconduct were raised directly with her;

e. The employee emailed the employer on 11 August 2023 attaching a response to the allegations;

f. The employer emailed the employee and representative on 17 August 2023 providing detailed findings of the investigation, notifying the employee of the intention to terminate her employment with two weeks pay in lieu of notice, and offering the employee the opportunity to respond and resign with four weeks pay in lieu of notice subject to the execution of a Deed of Release and Settlement, with such offer remaining open for acceptance until midday on 21 August 2023.

g. No response was provided to the offer dated 17 August 2023.

h. The employer emailed the employee with a letter terminating her employment on the grounds of misconduct with two weeks pay in lieu of notice dated 28 August 2023."

[53] The Respondent submitted that the Applicant had another person to assist her throughout the course of the investigation, including present at the meeting on 4 August 2023 where her possible dismissal was discussed.

[54] For all of the above reasons, the Respondent submitted that it complied with the Small Business Fair Dismissal Code.

Termination was neither harsh, unjust nor unreasonable

[55] The Respondent submitted that the Applicant was dismissed on the grounds of misconduct on 28 August 2023, with two weeks' pay in lieu of notice, following an investigation which commenced on 28 July 2023.

[56] The Respondent submitted that the investigation found the Applicant had engaged in misconduct, in breach of her employment contract with the organisation, including the Code of Conduct. The investigation found that this conduct comprised wilful and deliberate behaviour that was inconsistent with the continuation of her employment contract, including the organisation's Code of Conduct which forms part of her contract.

[57] The Respondent submitted that the misconduct comprised the following:

“a. Engaging in unacceptable and unprofessional behaviour towards the Executive Director and the Treasurer at a Finance Committee meeting held between 12pm and 1pm on 24 July 2023, including by yelling and swearing at the Treasurer and Executive Director, slamming the door and walking out in response to reasonable questioning regarding her conduct and performance;

b. Being absent from work without leave for 3.5 working days from 1pm on Monday 24 July 2023, and then on 25 July 2023, 26 July 2023 and 27 July 2023, and ignoring repeated communications by text and email from the Executive Director asking her to explain her absence;

c. Refusing to follow the Executive Director’s lawful and reasonable directions (sic) by email and text message between 24 and 27 July 2023 asking her to confirm that urgent, time- sensitive work fundamental to her role as Finance and Office Manger would be completed as agreed at a meeting on 24 July 2023, namely:

- i. The preparation of the organisation’s audit (deadline 31 July 2023);*
- ii. The preparation of the organisation’s budget (deadline 7 August 2023);*
- iii. The preparation of the organisation’s wages declaration for workers compensation (deadline 31 July 2023).”*

[58] The Respondent submitted that the seriousness of the misconduct was exacerbated because the Respondent is a small business employer, with limited financial resources and staffing. The Respondent submitted that the Applicant was the only staff member responsible for finance and payroll. Her misconduct occurred during a period in the year where a number of time sensitive and critical tasks were due to be completed, for which the Applicant had primary responsibility. The Respondent submitted that this included the provision of documents to the auditor following the end of financial year, the preparation of the organisation’s budget for the next financial year, and completion of a wages declaration for the purposes of renewing ECNT’s workers’ compensation. The Respondent submitted that the Applicant’s absence without leave also had the potential to impact the financial position of other ECNT staff, since she had primary responsibility for payroll.

Applicant’s employment and context for the dismissal

[59] The Respondent submitted that the Applicant was employed on a two-year contract for four days a week on 26 July 2022. The Applicant’s salary at the time of her dismissal was \$85,034.39 (prior to 1 July 2023, her salary was \$82,960.38).

[60] The Respondent submitted that the Applicant’s responsibilities were described in her contract as follows:

“You will have the following responsibilities:

1. Lead financial management and reporting

- Support the Co-Director, other senior staff and the Board on financial management, particularly drafting the organisation’s annual Budget for Board*

approval, monthly and longer-term financial reporting, and financial forecasting

- *Assist our bookkeeper in financial operations using MYOB including payroll and donation reconciliations*
- *With the Co-Directors, manage financial control, prepare and analyse organisational and project budgets, develop financial reports, and make recommendations to the organisation on budget expenditures.*
- *Manage and acquit financial aspects of grants and project budget.*

2. *Establish and monitor sound financial systems*

- *Regularly monitor income and expenditure for the organisation, including individual campaigns and projects, to meet all legislative requirements and contractual obligations.*
- *Provide financial information and manage grant acquittals.*
- *Continuously review and drive the improvement of financial systems, financial reporting and financial accountability.*

3. *Support the Co-Directors, staff and the Board on office and administrative tasks*

- *Manage regulatory reporting, insurance and building leases*
- *Implementation and maintenance of office systems to ensure the effective running of the office, including IT backups and archive.*
- *Organise Board meetings and ensure the correct procedures are followed regarding notification of meetings, distribution of Board papers etc.*
- *Supervision and the maintenance of all office equipment, supplies and office building generally.*
- *Ensure sound information management practice, including implementation of best practice in managing security and integrity of information.*
- *Support the Co-directors in human resource tasks.*
- *Manage and respond to emails on ECNT's administration email account.*
- *Develop, implement and review all ECNT policies and procedures and contribute to a healthy workplace through the identification and management of risks*

The position is required to deliver against these above outcomes and will form the basis for performance reviews or job references.”

[61] The Respondent submitted that from 1 March 2023, the Applicant moved to full-time work by email agreement with the Executive Director.

[62] The Respondent noted that the Applicant had been employed for just over 12 months at the time of her dismissal.

[63] The Respondent submitted that all of its employees are required to carry out all lawful and reasonable instructions. It noted that its Code of Conduct states that staff must comply with the following standards of work:

“(a) Work cooperatively as a member of the team;

(b) Treat everyone with respect and courtesy;

(c) Not be absent from duties without an appropriate reason.”

[64] The Respondent submitted that it has clear policies in relation to leave and time in lieu. In particular, all leave and time in lieu must be approved in advance by the Executive Director.

[65] The Respondent submitted that during the Applicant’s employment, there were a number of instances of poor conduct and repeated breaches of the Respondent’s policies. The Respondent submitted that the Applicant demonstrated a pattern of refusing to follow directions from the Executive Director, particularly in relation to leave/time in lieu entitlements, and either being absent from work without leave, or refusing to take leave when directed to do so.

[66] The Respondent submitted that there were also issues relating to the Applicant’s performance, and failure to perform key performance measures as stipulated in her contract. The Respondent submitted that considerable affordances were made for the Applicant, despite these deficiencies in her performance.

Valid Reason

[67] The Respondent submitted that the Applicant’s contentions in her unfair dismissal application *“provide a misleading account of the matters which led to her termination, are evasive, raise many irrelevant claims, and fundamentally fail to substantiate her claim of unfair dismissal”*.

[68] Regarding the events of 24 July 2023, the Respondent provided further details as follows.

[69] The Respondent submitted that immediately prior to the Finance Committee meeting of 24 July 2023, there were two incidents involving the Applicant and her conduct, which were necessary and appropriate to raise at the Finance Committee meeting, namely:

“a. The employee had failed to attend a scheduled meeting at 8.30am on 24 July 2023 with an external consultant, Accounting for Good. The context for Accounting for Good’s engagement by ECNT was that the employee had not updated or maintained ECNT’s budget during her employment at ECNT, nor advanced preparation of the 2023-2024 budget in any meaningful way, which was a significant and ongoing concern to both the Executive Director and the Board and a financial risk to the organisation. The meeting had been arranged by email on 21 July 2023. Accounting for Good had been engaged by ECNT to prepare a budget template for ECNT’s 2023-2024 budget. In addition to failing to attend the meeting on the morning of 24 July 2023, the employee had also failed to provide a chart of accounts to Accounting for Good as requested on numerous occasions in the preceding weeks, necessitating the Executive Director providing a list to them over the intervening weekend. The Treasurer sent an email impressing upon the employee the importance of attending the meeting with Accounting for Good on 24 July 2023.

b. A dispute had arisen the week before between an employee, Allana Brown and the employee regarding the process by which reimbursements for fuel expenses would be paid to volunteers for a project Allana was delivering. The employee's reluctance to process reimbursements, or provide guidance to staff regarding how this process should be implemented, had become an ongoing issue at ECNT. In this particular case, an email exchange involving Allana Brown, Kirsty Howey and the employee had caused Allana to call the Executive Director on 21 July 2023 to advise that she was upset about the employee's passive aggressive and obstructive tone in her emails. The Executive Director raised her concerns verbally with the employee in her office briefly on 21 July 2023, before sending an email shortly afterwards with a direction for how the matter should be resolved. The Treasurer subsequently sent an email asking the employee to comply with my direction on the matter, noting the importance of ensuring ECNT volunteers are reimbursed. On the morning of 24 July 2023, during the meeting with Accounting for Good which the employee failed to attend, the employee sent a further email to all recipients disagreeing with the Executive Director's direction, and strongly disputing the Executive Director's characterisation and proposed resolution of the issue. The tone of this email was rude, obstructive and aggressive."

[70] The Respondent submitted that at the meeting of 24 July 2023, the following matters were discussed:

"a. The employee's progress towards preparation for the organisation's audit (a deadline for the employee to prepare relevant documents internally to the Executive Director for review by 31 July was agreed, given that documents needed to be provided to the auditor by 5 August 2023);

b. The employee's progress towards preparation for the organisation's budget (a deadline for the employee to prepare the budget in collaboration with the Executive Director and the external consultant Accounting for Good by 7 August was agreed). Concerns were raised by the Executive Director regarding the employee's failure to attend the meeting at 8.30am that morning with Accounting for Good, or to provide a chart of accounts to the consultant as agreed by the employee some weeks earlier;

c. The preparation of the organisation's wages declaration for the purposes of the workers compensation renewal (a deadline of 31 July was agreed); and

d. Concerns regarding the conduct of the employee in an email exchange between 21 and 24 July 2023 regarding the reimbursement request by Allana Brown."

[71] The Respondent submitted that these matters were appropriate for a manager to raise and discuss at this meeting, and directly relevant to the Applicant's role as Finance and Office Manager. The Respondent submitted that the Finance Committee meeting was not a disciplinary meeting; it was a scheduled Finance Committee meeting where tasks essential to the Applicant's job were raised, including some recent concerns regarding the Applicant's conduct and performance. The Respondent submitted that it was the Executive Director's prerogative as manager of the Applicant to raise these concerns, which were reasonable management actions.

[72] The Respondent submitted that the Applicant was argumentative throughout the meeting, and at the end of the meeting and in response to reasonable questioning by the Executive Director regarding the tone and content of the email exchange, the Applicant stood up, repeatedly swore and yelled very loudly at Mr McKenzie and the Executive Director using phrases such as “*Do whatever the fuck you want to do, I don’t care*”. The Respondent submitted that the Applicant then slammed the door very loudly and left the building.

[73] The Respondent submitted that the Applicant’s behaviour was rude, aggressive and intimidating, and was unprofessional, unsatisfactory and inappropriate for the workplace. The Respondent submitted that the Applicant’s conduct was inconsistent with her employment contract and the Respondent’s Code of Conduct. Further, the Respondent submitted that the Applicant’s response was completely disproportionate to the issues raised at the meeting.

[74] The Respondent submitted that, while the Applicant has asserted that the meeting was a “*bullying meeting*”, this was rejected by the Respondent. The Respondent submitted that it was the Applicant’s behaviour that was intimidating and aggressive, and not the behaviour of the Executive Director. The Respondent asserted that the Executive Director remained calm, professional and reasonable throughout the meeting, which was corroborated by two contemporaneous accounts of the meeting, being written records by Ms Howey and Mr McKenzie. The Respondent submitted that these accounts should be preferred to the Applicant’s version of events.

[75] The Respondent submitted that following the events of 24 July 2023, the Applicant showed no remorse about her behaviour, did not concede it was unsatisfactory or problematic and made no attempt to apologise.

[76] As to the matter of reimbursements, the Respondent submitted that the Applicant has misrepresented the nature of the dispute, claiming that the crux of the dispute was regarding whether the names of volunteers to be reimbursed needed to be provided to Ms Brown. The Respondent submitted that this is an incorrect characterisation, designed to deflect attention from the primary issues. The Respondent submitted that the principal issue was the Applicant’s insubordination to both the Executive Director and the Treasurer, and the rude and combative tone adopted in her email exchange. The Respondent submitted that the Applicant has claimed that the Respondent directed her to engage in unethical or possibly unlawful conduct by asking her to reimburse “*anonymous*” volunteers. The Respondent submitted that this is incorrect. The Executive Director’s direction to resolve the matter dated 21 July 2023 in fact requested Ms Brown to provide the Applicant with the names of the volunteers to be reimbursed, but directed the Applicant to allocate the expenses against particular budget items, consistent with the Respondent’s finance procedures.

[77] The Respondent submitted that the Applicant has made a range of allegations about the circumstances leading to the meeting on 24 July 2023, including raising a highly sensitive issue regarding the arrest of a staff member, an inaccurate allegation of bullying involving Ms Brown and another former staff member, among many other matters. The Respondent rejected the Applicant’s characterisation of these matters, and submitted they are not relevant to the issue of the Applicant’s misconduct.

[78] As to the Applicant's absence from work without leave from 24 – 27 July 2023, the Respondent submitted that the Executive Director made numerous attempts to contact the Applicant regarding her absence, including:

“a. Email to work email address dated 25 July (forwarded to personal email address on 26 July);

b. Email to work email address dated 26 July (forwarded to personal email address on 26 July);

c. Text messages to The employee's personal email on 26 and 29 July;

d. Letter of warning and investigation sent on 29 July 2023.”

[79] The Respondent submitted that the Applicant made no contact with the Executive Director until 31 July 2023, when she provided a medical certificate covering the period 30 July to 2 August 2023 (inclusive) and stated she would respond to the letter dated 28 July 2023. The Respondent submitted that the medical certificate did not give a reason for the Applicant's absence and did not cover the period of the employee's absence between 24 and 27 July 2023.

[80] The Respondent submitted that the Applicant has provided no credible explanation for her absence from work between 24 and 27 July 2023. Further, it submitted:

“a. The employee does not dispute that she made no contact with the Executive Director until 31 July 2023.

b. The employee does not assert that she was unable to attend work due to illness or other valid reason between 24 and 27 July (inclusive). No medical reason has been provided for her absence on these days.

c. The Executive Director took all possible steps to ascertain the employee's whereabouts between 24 July 2023 and 27 July 2023, including sending 4 emails and a text messages. The employee did not respond to any of these attempts to contact her.

d. The employee had previously been warned for being absent from work without leave for a week (in March 2023). The employee's absence from work without leave on that occasion meant that the budget review was not completed on time in that case (indeed, it was never completed by The employee). An email to The employee raising this issue is attached, and relevantly states:

“Dear The employee,

I am writing to raise the following matters with you.

First, I don't believe leave forms have been lodged for your leave this week, nor have I provided written approval for your leave this week. As you are well aware (including because it is a requirement for all staff, which you administer), approval must be sought from me prior to taking any leave. I note this has been

an issue before, with TOIL being accrued by you without approval being sought beforehand. I am concerned that this is becoming an ongoing pattern.

Secondly (and relatedly), I am concerned the 6 month budget review will not be completed by the board meeting next week, after being deferred after the 15 February 2023 board meeting. As I have advised you, this is an extremely important process for a number of reasons including:

- to understand our current financial position, including budget overspend/underspend and make adjustments if needed before the EOFY;*
- to begin planning for the budget for the next financial year;*
- as a key board reporting performance measure.*

Initially, I advised the board and you that the budget review would need to be completed in advance of the 15 February 2023 board meeting. While we met on 8 February, only some progress was made. I therefore advised the board at the 15 February 2023 meeting that the budget review would be ready before the 15 March 2023 meeting. I have subsequently tried to set up meetings on 15 February 2023 and on Friday last week to progress the Budget review, but you have not been available for these meetings.

This week, you are on leave for the whole week without formal approval, and I don't return to work until 14 March. I have limited availability to meet prior to the board meeting and in any case, it is not sufficient time to complete the review, have it reviewed by Robby, and provide it to the board.

This matter has impacted my ability to report to the board, and manage the financial position of ECNT.

Can we please discuss early on 14 March 2023.”

e. The employee claims that on Monday 24 July 2023, she sent ECNT Secretary and member of the Employment Committee Robin Knox a message, and that this was tantamount to notifying ECNT's "human resource department" of her absence. ECNT rejects this claim. The substance of the communication with Robin Knox has never been disclosed by The employee, nor evidence provided of it. Robin Knox disputes that the employee said she was taking leave. In any case, it is not sufficient or permissible to contact a member of the Employment Committee regarding leave requests or absences. The Employment Committee provides advice to the Executive Director on employment matters, but has no responsibility for hiring and firing. The Executive Director has sole responsibility for employment, although she obtains advice from the Employment Committee from time to time on employment matters as required. That the Executive Director has final responsibility for all human resources matters was well known to the employee, is stipulated in her employment contract and the EBA, and is accepted ECNT and general human resource policy and practice.”

[81] The Respondent submitted that the Applicant, however, has provided multiple additional, conflicting accounts for her absence from work.

[82] In relation to the Applicant refusing to carry out lawful and reasonable directions, the Respondent submitted that the Applicant was sent four separate emails (two of these were forwarding emails to her personal email address) and a text message on 25 and 26 July asking her to confirm that urgent and time-sensitive tasks fundamental to her role would be completed by her on time, namely:

“a. The preparation for the organisation’s audit (deadline 31 July);

b. The preparation for the organisation’s budget (deadline 7 August);

c. The preparation of the organisation’s wages declaration for workers compensation (deadline 31 July)”

[83] The Respondent submitted that these deadlines were agreed to by the Applicant at the Finance Committee meeting on 24 July 2023, which she attended and notes of which were provided to her on 25 July 2023.

[84] The Respondent submitted that the Applicant was on notice that the Executive Director considered her failure to respond to these communications to be a very serious matter which could impact her employment. The Respondent submitted that the seriousness of the Applicant’s failure to respond to these directions was made explicit in emails to her dated 25 and 26 July 2023.

[85] The Respondent submitted that the Applicant has provided no credible explanation for her failure to respond to these directions and has not disputed that she received these emails or directions. The Respondent submitted therefore, it is reasonable to conclude that her failure to respond was wilful and deliberate.

[86] Further, the Respondent reiterated that the deadlines were time-sensitive and urgent, and involved tasks for which the Applicant had primary responsibility as the Respondent’s Finance and Office Manager. The Respondent submitted that the Applicant’s failure to follow these directions to confirm she would complete the work in time threatened the Respondent’s ability to comply with its legal requirements, put its reputation at serious risk, and caused significant additional costs to ensure the requirements were met. The Respondent submitted that it was required to engage a bookkeeper and Accounting for Good to perform the Respondent’s finance obligations, as well as casual office and operational staff to fill the gaps.

[87] The Respondent submitted that the Applicant has made unsubstantiated claims that she made contact with the Fair Work Ombudsman on and following 24 July 2023. However, it submitted that no details have been provided about the alleged action, and further, contact with the Fair Work Ombudsman would not have alleviated the Applicant’s responsibility to respond to lawful directions from the Executive Director, nor to account for her absence from work in accordance with normal human resources processes.

[88] The Respondent submitted that at no time during the multiple interactions and opportunities detailed above did the Applicant concede any wrongdoing, apologise, or substantively address the particulars of the alleged misconduct.

Procedural Fairness

[89] The Respondent refuted that the Applicant was not provided with procedural fairness during the course of the investigation.

[90] The Respondent submitted that in accordance with the chronology of events and correspondence exchanged (as outlined in paragraphs [4]-[26]), it establishes that:

“(a) ECNT has provided procedural fairness to the employee throughout the investigation.

(b) ECNT has at all times been clear and consistent about the incidents comprising the alleged misconduct;

(c) The employee was provided with a number of opportunities to respond to and provide an explanation for the alleged misconduct, which she failed to do;

(d) all requests by the employee for extensions of time to respond to allegations have been acceded to.

(e) The employee has had the assistance of the NT Working Women’s Centre throughout the investigation.”

Compensation

[91] The Respondent submitted that in the event the Applicant’s dismissal is found to have been unfair, her claim for compensation far exceeds the legal limit. The Respondent submitted that the very most the Applicant could claim is the amount she would normally have received from the Respondent in the six months before the dismissal (being approximately \$41,480.19).

[92] However, the Respondent submitted that the following matters should result in a finding that, even if an unfair dismissal claim is substantiated, the Applicant should receive no compensation:

“a. The employee had a work history characterised by poor conduct, behaviour and performance, as set out in this response.

b. The employee’s misconduct contributed to her dismissal.

c. The employee has provided no evidence of any attempt to seek alternative employment.

d. ECNT has restructured the organisation, such that there is no longer a Finance and Officer Manager role. Specifically, ECNT has outsourced its finance department to Accounting for Good.

e. ECNT would seek to deduct from any amount of compensation payable an amount equivalent to the 3.5 days of work the employee was absent without leave (24 to 27 July), the 21.5 hours of unauthorised time in lieu The employee took in June 2023, and the costs borne by the employer in covering The employee's role while she was absent without leave. ECNT reserves the right to provide evidence of these losses if this becomes relevant.

f. The employee did not attempt to reduce the effect of the dismissal. The employee has repeatedly failed to address or substantively answer the allegations of misconduct, despite being given multiple opportunities. The employee was offered the option of resigning with four weeks notice, but did not respond to or take up this offer. There is no evidence that The employee has made any effort to take deliberate, positive steps to find a new job."

Response to additional claims

[93] The Respondent submitted that the Applicant has made a number of confusing and circuitous new claims in her application for unfair dismissal, which appear to be designed to deflect attention from the substantive allegations. Some of these claims are responded to below:

"a. The employee claims that ECNT said they would recognise her professional service for the purposes of registration as a BAS agent, but never did. The employee raised this at the interview prior to her engagement, however, never raised it subsequently again with ECNT.

b. The employee claims that the advertisement for an Executive Administrative Officer showed she had been managing two positions. This is refuted. The Board agreed to advertise the position of Executive Administrative Officer primarily to support the Executive Director, who was carrying a considerable workload, including due to The employee's failure to perform the basic requirements of her position. In any case, this position was never filled, as a decision was made to restructure the organisation completely as described above.

c. As mentioned above, the claims regarding arrest, an allegation of bullying involving are irrelevant to the issue of The employee's misconduct and contain numerous inaccuracies.

d. The employee claims that ECNT modified the allegations that form the basis of the investigation from when first notifying The employee to delivering investigation outcomes in the termination letter. ECNT asserts that all that was changed was the order of the substantive allegations.

e. ECNT rejects that the Employment Committee acts as a HR Department for the reasons given above. The Employment Committee provides advice to the Executive Director as requested and required. They do not supplant the clear employment responsibilities of the Executive Director.

f. ECNT rejects the employee's mischaracterisation of the Finance Committee, including that she was ineligible to attend. The terms of reference for the Finance Committee are (sic) show the employee was a member.

g. ECNT rejects the employee's characterisation of the conduct of the investigation as bullying behaviour. No particulars are given of this serious claim. This allegation was not raised at all during the investigation."

Applicant's Submissions in Reply

[94] In her reply submissions, the Applicant relied on the decision in *Shaw v Pat Thomas Memorial Community House Inc* [2012] FWA 8303, in which it was stated:

*"To comply with the Small Business Fair Dismissal Code there must be a valid reason based on employees conduct or capacity and the employee must be warned that he or she risks being dismissed if there is no improvement and the employee must be given an opportunity to respond to the warning and given a chance to rectify the problem."*¹

[95] The Applicant submitted that any reasons used to substantiate dismissal must be given to an employee before the decision is made to terminate their employment² and in explicit and plain and clear terms.³

[96] The Applicant submitted that per the 'Investigation into alleged misconduct – findings' letter, Ms Howey said:

"Given my findings of serious misconduct, it is not necessary for me to continue to conclude the investigation regarding my concerns about your performance more broadly, nor take any further action regarding this matter. I do not make any findings regarding this matter."

[97] The Applicant submitted that as any 'unsatisfactory performance' was not investigated nor given as the reason for her dismissal, it should not be a relevant factor. Similarly, the Applicant submitted that as no conclusive finding was presented to her about the alleged absenteeism, nor was not given as a reason for dismissal, it should not be a relevant factor in the dismissal.

[98] The Applicant submitted that even if the Respondent was able to substantiate the allegation of absenteeism, in *Thompson v Zadlea Pty Ltd T/A Atlas Steel* [2019] FWC 1687 Commissioner Gregory at [49] explained that:

"... processes would normally be expected to be a part of what could reasonably be expected in the context of an employer coming to a conclusion that an employee has renounced their employment contract by abandoning their employment."

[99] The Applicant submitted that she left the Respondent's office after an incident which occurred in the meeting on 24 July 2023. The Applicant submitted that she considered the incident serious enough to contact Ms Knox, board member and employee committee member,

the same day. The Applicant submitted that she received no text messages or calls from Ms Howey during this period of absence.

[100] The Applicant submitted that, due to illness, she gave the Respondent a medical certificate for the next week. The Applicant submitted that by giving the Respondent a medical certificate, she affirmed her employment contract.⁴

[101] The Applicant maintained that she had an impeccable work record prior to this matter. The Applicant submitted that prior to 29 July 2023, she had never had any formal disciplinary action taken against her, nor any adverse performance reviews or conduct issues.

[102] The Applicant submitted that she was a committed, hardworking and high achieving employee who was terminated for not showing:

“... contrition in her written response, demonstrated no desire to find a constructive way forward, and instead doubled down on her fixation on the reimbursement issue, as well as a lengthy defence of her performance in the role. She never substantially acknowledged or conceded the very serious organisational challenges created regarding the audit and budget in her absence. Had Skei shown remorse, or properly acknowledged the issues raised, the result of the investigation would have been very different, although it would have been necessary to place Skei under performance management.”

Other relevant factors

[103] The Applicant submitted that in the Full Bench decision of *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 it was stated that:

“A failure to comply with a lawful and reasonable policy is breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal.”

[104] The Applicant submitted that in the meeting on 24 July 2023, Ms Howey discussed the ‘reimbursement issue’ and then asserted that the Applicant failed to follow a ‘reasonable management direction’. The Applicant filed and referred to the Respondent’s ‘Financial Procedures’ Policy (**the Policy**) which she submitted is outdated policy documentation, and states:

“The ECNT's finances are managed on the basis of 'jobs'.

Jobs are approved and distinct ECNT programs, projects or activities against which payments are made and expenditures and activities reported. Each job has a unique job code.”

[105] The Applicant submitted that this means that any associated costs for a ‘job’ would be noted under one code. The Applicant submitted that if she followed Ms Howey’s instruction to

use the volunteer costs expense code and the Operational Budget job code, she would have breached the 'payment coding' term of the policy.

[106] Further, clause 1.4 of the Policy states that:

"Staff members are able to authorise payments to suppliers of up to \$100 where they have been approved as part of a project or campaign budget. Only the Director can approve expenditure over \$100..."

[107] The Applicant submitted that as Ms Brown has stated that the payments were for volunteers and not suppliers, she does not have the authority to approve the expense, nor does she have access to a policy which includes explicit instructions to gain approval for volunteer expenses. The Applicant submitted that the Policy does not have any clauses related to volunteer expenses, instead it describes processes for staff and supplier expenses.

[108] The Applicant submitted that in email correspondence of 20 July 2023, Ms Howey states that:

"I'm not aware of any legal reason why ECNT could not simply reimburse these expenses if a tax invoice for fuel costs is produced utilising the above job code and expense code."

[109] The Applicant submitted that as Ms Howey was expecting invoices, it suggested that the 'volunteers' were actually suppliers. The Applicant submitted that if she proceeded with this direction, she would have breached clause 1.4 of the Policy as she had not received an invoice or been shown evidence that Ms Howey approved the expenses.

[110] The Applicant submitted that email correspondence from Mr McKenzie on 23 July 2023 contradicts Ms Howey's instructions with Mr McKenzie saying that *"... I can't see this being any different for re-imbursing a staff member (with the exception that we don't have them in our payment system)."* The Applicant submitted that by treating staff members the same as volunteers it seems that Mr McKenzie asked her to follow clause 1.3 of the Policy. The Applicant submitted that as Mr McKenzie did not state that a receipt must be provided along with the reimbursement form, if she proceeded with this direction, she would have breached this clause.

[111] The Applicant submitted it is clear that prior to the finance sub-committee meeting on 24 July 2023, Ms Brown, Ms Howey and Mr McKenzie were not in agreement about whether the payees were volunteers or suppliers, whether the expense had been incurred and what evidence they should have sought prior to giving instructions to the Applicant.

[112] Further, the Applicant submitted that as shown by email correspondence from her on 24 July 2023 and the 'Notice of Warning and Investigation' issued to her on 11 August 2023, it was never the case that the Applicant refused to comply with a management direction, it was just that she needed more information to do so. The Applicant submitted that without the required information, she would not be able to direct Ms Brown as to which clause was applicable to her scenario as (quoting her email correspondence of 24 July 2023):-

“The methods for paying fuel reimbursement for staff is different to how to pay suppliers. Depending on the supplier requiring payment there could also be variations in details for each supplier so there is not 1 specific process for making such a payment. The answer could change slightly from 1 person to the next.”

[113] The Applicant submitted that both Ms Howey and Mr McKenzie were giving their approval for payment for an expense which had not occurred as filming only commenced on 27 July 2023. The Applicant submitted that as neither sought evidence of the expense – either by receipt or invoice – they could not be certain who had the delegation to approve the expense. The Applicant again noted that if she had proceeded with payment, she would have breached the ‘payment coding’ term and clauses 1.1, 1.2 and 1.3 of the Policy.

[114] The Applicant submitted, therefore, no reasonable person would find this management direction reasonable.

Remedy

[115] The Applicant submitted that the Respondent claims her position is no longer available due to restructure. The Applicant submitted that as such, financial compensation for the economic loss she has suffered is the Commission’s only available remedy.

[116] The Applicant submitted that s.390 of the FW Act provides that the Commission may order a remedy if:

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

Consideration

[117] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses.

[118] It is not in dispute, and I find, that the Applicant is protected from unfair dismissal, submitted her application within the statutory timeframe and was not made genuinely redundant. I note that the Respondent is a Small Business and that an objection has been raised on this basis. This is addressed below.

[119] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines (Byrne)*⁵ is of significance:

“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.”

[120] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan (AMH)*⁶ held:

“The above extract is authority for the proposition that a termination of employment may be:

- unjust, because the employee was not guilty of the misconduct on which the employer acted;*
- unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or*
- harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct”.*

[121] Further, a Full Bench of the AIRC in *King v Freshmore (Vic) Pty Ltd*⁷ said:

“[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination”.

[122] I now turn to the criteria for considering harshness as provided in s.387 of the Act.

Section 387(a) - Valid Reason

[123] The meaning of the phrase “valid reason” has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:⁸

“In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee’s capacity or performance or based on the operational requirements of the employer. ...

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 reason 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, commonsense way to ensure that” the employer and employee are each treated fairly...”.

[124] In *Rode v Burwood Mitsubishi*,⁹ a Full Bench of the Australian Industrial Relations Commission held:

“... the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.”

[125] In *Qantas Airways Ltd v Cornwall (Cornwall)*¹⁰ the Full Court of the Federal Court of Australia said:

*“The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason. **However, conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which accompany it may qualify or characterize the nature of the conduct involved.**”*

(My emphasis)

[126] I am satisfied that the Applicant’s reaction to the request from Ms Brown was highly emotional and belittling. To treat a fellow employee in this manner cannot be condoned. The Applicant’s attempt to now explain her conduct via a technical analysis of policies is not sustainable. The Applicant was asked a simple question. It deserved a simple answer, without histrionics or condescending capitalisation. I have taken this into account.

[127] I am satisfied that the Applicant’s conduct in the meeting on 24 July 2023 was belligerent and disrespectful. The Applicant was not a junior employee with little or no experience. The Respondent had every right to question her work performance. The Applicant’s reaction was unnecessary, unbecoming and an overreaction. For a senior employee to stand up, swear, storm out of the office and slam the door is reprehensible behaviour. I have taken this into account.

[128] The Applicant did not attend work for 3.5 days following the meeting on 24 July 2023. The Respondent attempted to contact the Applicant on numerous occasions during the period – without success. I do not accept the proposition that the Applicant did not receive any of these communications. Even if she did not receive these emails and texts, the Applicant knew of the time critical period in relation to the audit, the budget and the upcoming Board meeting. It is not appropriate or fair to the Respondent for the Applicant to simply “disappear”. The Respondent would have been well within its rights to question whether the Applicant had simply abandoned her employment. The Applicant now claims that she was suicidal during this period. I note that the Applicant did not advise the Respondent at any stage of these feelings. Surprisingly, in response to a question from me, the Applicant advised that she did not seek medical attention during this period on the basis that it was not a high priority. I am satisfied that the Applicant knew that her absence could frustrate and disadvantage the Respondent. I have taken this into account.

[129] For these reasons, I find that the Respondent had a valid reason to terminate the Applicant.

Section 387(b) - Notified of the Reason

[130] The Applicant was notified of the reasons for her dismissal. I have taken this into account.

Section 387(c) - Opportunity to Respond

[131] The Applicant was provided an opportunity to respond. I have taken this into account.

Section 387(d) - Any refusal of a support person

[132] There was no refusal of a support person by the Respondent. I have taken this into account.

Section 387(e) - Unsatisfactory performance

[133] It is obvious that the Applicant was not confident about performing the tasks that were assigned to her in relation to the audit and the budget. This is not surprising. The Applicant is not a qualified accountant but was studying part time to achieve her Diploma. The Applicant should have been provided with more support for these tasks. It would appear that the situation simply became too overwhelming. I have taken this into account.

Section 387(f) - Size of Employer

[134] It is not in dispute that the Respondent is a small business. I have taken this into account.

Section 387(g) - Dedicated HR specialists

[135] It is not in dispute the Respondent does not employ any HR specialists, and that the Executive Director undertook the HR function in this matter. I have taken this into account.

Section 387(h) - Any other matter

[136] The Applicant was entitled to a fair disciplinary process. The Executive Director was a witness and complainant to the behaviour of the Applicant. As such, the Executive Director should not have conducted the investigation or made the decision to terminate the Applicant. The investigation should have been conducted by an independent third party or a member of the Board. The Board should have made the decision on the Applicant's employment future. The Executive Director assumed the role of "judge, jury and executioner". This was not appropriate and denied the Applicant procedural fairness. I have taken this into account.

[137] The Respondent has raised an objection on the basis that it is a small business and that the dismissal of the Applicant complied with the Small Business Fair Dismissal Code. However, that does not mean that the employer can avoid its obligations in relation to procedural fairness. I have taken this into account.

[138] I have taken into account that the Applicant is a single mother and a survivor of domestic violence.

Conclusion

[139] Despite having previously found that the Respondent had a valid reason to terminate the Applicant, I am satisfied that the lack of procedural fairness afforded to the Applicant necessitates a finding that the Applicant's termination was harsh.

[140] I am satisfied that the Applicant did not receive her statutory entitlement to a "fair go".

[141] As a result, I am satisfied and find that the Applicant was unfairly dismissed.

Remedy

[142] Having found that the Applicant has been unfairly dismissed, I now turn to the issue of an appropriate remedy.

[143] The relevant provisions of the Act in relation to a remedy for an unfair dismissal are:

“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.”

“391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) 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 reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.”

“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.”

[144] The Applicant seeks compensation.

[145] I am satisfied and find that the payment of compensation is the appropriate remedy in this circumstance.

[146] Section 392(2) of the Act identifies criteria that the Commission must taken into account in determining the appropriate level of compensation to be awarded to the Applicant.

Section 392(2)(a) – effect of order on employer's viability

[147] I am satisfied and find that my order will not have an effect on employer's viability.

Section 392(2)(b) – length of service

[148] The Applicant was employed by the Respondent for 13 months.

Section 392(2)(c) – remuneration received if not dismissed

[149] The Applicant would have continued to receive her salary.

Section 392(2)(d) – effort to mitigate loss

[150] The Applicant has been unable to find alternative employment.

Section 392(2)(e) – amount of remuneration received by the Applicant

[151] The Applicant has received no remuneration since her dismissal.

Section 392(2)(f) – amount likely to be earned

[152] The Applicant has received no remuneration since her dismissal.

Section 392(2)(g) – any other matter

[153] I am also required to have regard for the criteria known as the ‘Sprigg formula’ which emanates from the Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket*.¹¹ This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.¹²

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

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination. Workers’ compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

[155] In *Hanson Construction Materials v Pericich*,¹³ a Full Bench of the Commission held that:

“[39]...Sprigg is a useful servant, but is not to be applied in a rigid determinative manner. In deciding the amount of a compensation order the Act directs that the Commission ‘must take into account all of the circumstances of the case’ including the particular matters set out at s.392(2)(a)to(g).”

[156] I am satisfied that the Applicant's employment would have only lasted for another 8 weeks. The Applicant's irrational response to Ms Brown and her conduct at the Finance Committee meeting portray an employee who is frustrated and unhappy at work.

[157] I note that the Applicant was paid 2 weeks' pay in lieu of notice.

Conclusion

[158] I am satisfied and find that the Applicant should be paid an additional \$12,000 (less tax) plus superannuation.

[159] I so Order.

COMMISSIONER

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¹ *Shaw v Pat Thomas Memorial Community House Inc* [2012] FWA 8303 at [96].

² *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

³ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

⁴ *New South Wales v Shaw* (2015) 248 IR 206.

⁵ (1995) 185 CLR 410.

⁶ (1998) 84 IR 1.

⁷ [2000] AIRC 1019.

⁸ (1995) 62 IR 371.

⁹ PR4471.

¹⁰ (1998) 84 FCR 483.

¹¹ (1998) 88 IR 21.

¹² [2012] FWCFB 431.

¹³ [2018] FWCFB 5960.