



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Bianca Mamo

v

Life Streaming Pty Ltd
(U2023/8732)

COMMISSIONER CRAWFORD

SYDNEY, 27 MARCH 2024

*Application for relief from unfair dismissal – dismissal not consistent with Small Business
Fair Dismissal Code - dismissal unfair – compensation ordered*

Background

[1] Andrew MacDonald (**Mr MacDonald**) set up a business as a sole trader using the business name, Asset Footage, in around 2019. The business provided live streaming services for funerals and other events. Bianca Mamo (**Ms Mamo**) was employed in this business. Life Streaming Pty Ltd (**Life Streaming**) was incorporated on 21 September 2021 to carry on the live streaming operations of the Asset Footage business. Mr MacDonald is a director and employee of Life Streaming. Ms Mamo was the Company Secretary and an employee. The *Broadcasting, Recorded Entertainment and Cinemas Award 2020 (Award)* applied to Ms Mamo's employment with Life Streaming.

[2] Ms Mamo and Mr MacDonald were also in a close personal relationship for around six and a half years and lived together with their respective families until mid-August 2023.

[3] Ms Mamo was summarily dismissed by Life Streaming on 2 September 2023 for serious misconduct. The alleged serious misconduct involved:

- a. Making 12 unauthorised transfers from Life Streaming's bank accounts for personal reasons from 21 June 2023 to 16 August 2023.
- b. Changing the password to Life Streaming's email account on 17 August 2023 to prevent Mr MacDonald from accessing the account and to prevent Mr MacDonald from operating the business.

[4] On 12 September 2023, Ms Mamo made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that she was unfairly dismissed from her employment with Life Streaming.

[5] Life Streaming filed a Form F3 employer response form on 26 September 2023. In the employer response form, Life Streaming raised two jurisdictional objections. Life Streaming argued Ms Mamo had not completed the minimum employment period of 12 months¹ when she was dismissed on 2 September 2023. Life Streaming also argued the dismissal was consistent with the Small Business Fair Dismissal Code (**SBFDC**).

[6] Life Streaming subsequently accepted Ms Mamo had completed the minimum employment period but pressed its objection concerning compliance with the SBFDC.

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

[8] I issued directions for the filing of material and initially listed the application for determinative conference/hearing on 11 December 2023. That listing was vacated so that new directions could be set after Life Streaming withdrew its minimum employment period jurisdictional objection. The determinative conference/hearing was relisted for 28 February 2023 via video.

[9] Ms Mamo represented herself at the determinative conference/hearing on 28 February 2023. I granted permission for Life Streaming to be represented by Cameron Niven from Taylor Rose Lawyers. I was satisfied granting permission would enable the matter to be dealt with more efficiently, given its complexity.

[10] At the commencement of the proceeding on 28 February 2024, I indicated my provisional view was that the proceeding should be conducted as a determinative conference rather than a hearing because Ms Mamo was representing herself and is also a witness. The parties did not oppose my provisional view. The proceeding was conducted as a determinative conference.

[11] During the determinative conference on 28 February 2024, it emerged that additional relevant evidence from Ms Mamo regarding her earnings since dismissal could be provided, and that Mr MacDonald could provide additional evidence concerning transactions from Life Streaming's bank accounts. I decided to adjourn to allow this further evidence to be filed and to continue the determinative conference on 14 March 2024. This approach was not opposed by the parties.

[12] Ms Mamo continued representing herself at the determinative conference on 14 March 2024 and Mr Niven continued representing Life Streaming.

Material relied upon

Ms Mamo

[13] Ms Mamo relied on the following evidence in her support of her application:

- Ms Mamo's Form F2 unfair dismissal application dated 12 September 2023. I marked this as an exhibit because it contained evidence from Ms Mamo about her dismissal. I marked the application form **Exhibit A1**.

- Ms Mamo’s termination letter dated 2 September 2023. I marked the letter **Exhibit A2**.
- A letter from Life Streaming to Ms Mamo dated 24 August 2023 which outlines allegations of serious misconduct against Ms Mamo. I marked the letter **Exhibit A3**.
- An outline of submissions filed by Ms Mamo on 12 January 2024. The submissions contain evidence from Ms Mamo. I marked the submissions **Exhibit A4**.
- Reply submissions filed by Ms Mamo on 12 January 2024. The reply submissions contain evidence from Ms Mamo. I marked the reply submissions **Exhibit A5**.
- A bank statement for Ms Mamo’s St George bank account for the period of 2 August 2023 to 1 September 2023. I marked the statement **Exhibit A6**.
- An apprenticeship/traineeship training contract relating to Ms Mamo’s employment with Life Streaming dated 15 June 2022. I marked the contract **Exhibit A7**.
- An ABN record for Mr MacDonald. I marked the record **Exhibit A8**.
- Documents containing a series of screenshots of text messages between Ms Mamo and Mr MacDonald from 27 July 2023 to 16 August 2023. Ms Mamo has provided commentary on the messages on the same documents. I marked these documents **Exhibit A9**.
- A document containing further evidence from Ms Mamo regarding the end of her employment with Life Streaming. I marked this document **Exhibit A10**.
- A document containing screenshots of email account information including prompts to enter a password for the events@lifestreaming.au account. I marked this document **Exhibit A11**.
- A copy of emails between Ms Mamo and Mr MacDonald on 29 August 2023. The emails relate to the breakdown of their personal and professional relationships. Mr MacDonald invited Ms Mamo to attend a meeting on Saturday, 2 September 2023 concerning the allegations of serious misconduct. Ms Mamo declined to attend the meeting. I marked the emails **Exhibit A12**.
- A bank statement for Ms Mamo’s St George bank account for the period of 2 July 2023 to 1 August 2023. I marked the statement **Exhibit A13**.
- A covering explanatory document and a copy of a bank statement from Ms Mamo’s St George bank account for the period of 26 August 2023 to 25 February 2024. I marked these documents **Exhibit A14**.

[14] Ms Mamo was cross-examined on this evidence at both determinative conferences.

[15] Ms Mamo also made oral submissions during both determinative conferences. I have taken those submissions into account, in addition to the parts of the written material filed by Ms Mamo which would be characterised as submissions rather than evidence.

Life Streaming

[16] Life Streaming relied on the following evidence in opposing the application:

- Witness statement from Mr MacDonald dated 27 November 2023. The statement contained the following attachments:
 - AM 1: Screenshots of text messages between Mr MacDonald and Ms Mamo on or around 2 August 2023.
 - AM 2: Screenshots containing security information about Life Streaming's email account, a screenshot of an email forwarded from Life Streaming's email account to Ms Mamo and a text message between Mr MacDonald and Ms Mamo.
 - AM 3: NAB bank statements for Life Streaming's business account for the period of 22 April 2023 to 20 August 2023.
 - AM 4: NAB bank statements for Life Streaming's GST account for the period of 22 May 2023 to 20 August 2023.
 - AM 5: Emails exchanged by Mr MacDonald and Ms Mamo on 24 and 25 August 2023 concerning the breakdown of their personal and professional relationships.
 - AM 6: A copy of Ms Mamo's termination letter dated 2 September 2023.
 - AM 7: Screenshots of text messages between Mr MacDonald and Ms Mamo concerning the end of their personal and professional relationship.
 - AM 8: A copy of Ms Mamo's St George bank account statement for the period of 2 August 2023 to 1 September 2023.

I marked Mr MacDonald's statement, and the attachments, **Exhibit R1**.

- Second witness statement of Mr MacDonald dated 16 February 2024. The statement contained the following attachments:
 - AM 9: A copy of bank records which demonstrate Ms Mamo paid her wages from Life Streaming's business account on six or seven occasions.
 - AM 10: A screenshot of text messages between Mr MacDonald and Ms Mamo on 27 July 2023 regarding Life Streaming jobs on 28 July 2023 at Blacktown and Sans Souci.

- AM 11: A copy of extracts from Mr MacDonald's personal bank account which demonstrate he personally paid for flights taken by Ms Mamo and her children in July 2023.
- AM 12: NAB bank account statements for Life Streaming's business account for the period of 22 April 2023 to 20 August 2023.

I marked Mr MacDonald's second witness statement **Exhibit R2**.

- A third statement from Mr MacDonald dated 6 March 2024. The statement contained the following attachments:
 - NAB bank account statements for Life Streaming's business and GST accounts for the period of 16 February 2023 to 29 December 2023.
 - A document recording director loan transactions between Mr MacDonald and Life Streaming for the period of 6 March 2023 to 15 December 2023.
 - A document that records payroll transactions from Life Streaming to Ms Mamo for \$2,200.00 and \$500.00 on 26 July 2023.
 - A copy of several text messages and an email between Mr MacDonald and Ms Mamo in June, July, August and September 2023.
 - A Qudos bank statement that shows payments made by Mr MacDonald for a Volvo vehicle and a van.

I marked Mr MacDonald's third statement **Exhibit R3**.

[17] Mr MacDonald was cross-examined on his evidence by Ms Mamo at both determinative conferences.

[18] In addition to its Form F3 employer response form, Life Streaming relied on written submissions dated 27 November 2023, 16 February 2024 and 6 March 2024. Mr Niven also made oral submissions during both determinative conferences. I have taken all the written and oral submissions into account.

When can the Commission order a remedy for unfair dismissal?

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

- (a) Ms Mamo was protected from unfair dismissal at the time of being dismissed; and
- (b) Ms Mamo has been unfairly dismissed.

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

When is a person protected from unfair dismissal?

[21] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

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

When has a person been unfairly dismissed?

[22] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

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

Was Ms Mamo dismissed?

[23] There was no dispute and I find that Ms Mamo's employment with Life Streaming terminated at the initiative of Life Streaming effective 2 September 2023. Ms Mamo initially identified a dismissal date of 9 September in her Form F2 application. However, Ms Mamo accepted this was an error and that her summary dismissal took effect on 2 September 2023 in accordance with the termination letter.

[24] I am therefore satisfied that Ms Mamo has been dismissed within the meaning of s.385(a) of the FW Act.

Initial matters

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

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

[26] It is not disputed and I find that Ms Mamo's application was filed within the relevant 21-day period, and she was protected from unfair dismissal based on her length of service. Ms Mamo's employment with Life Streaming was covered by the Award and her earnings were well below the high-income threshold. Life Streaming has not argued Ms Mamo's dismissal was a case of genuine redundancy.

[27] There is no dispute between the parties that Life Streaming had only two employees prior to Ms Mamo's dismissal on 2 September 2023. As a result, Life Streaming falls within the definition of a "small business". Life Streaming has argued Ms Mamo's dismissal was consistent with the SBFDC. I must determine this issue before considering the merits of the application. However, I will first make some findings in relation to the evidence.

Findings on the evidence

[28] I find the following matters are clear from the evidence:

- a. Mr MacDonald and Ms Mamo were living together with their respective families when Mr MacDonald established a live streaming business, which he initially operated as a sole trader, and then operated via Life Streaming from when the company was incorporated on 21 September 2021.
- b. Mr MacDonald and Ms Mamo were concurrently in personal and professional relationships from when Ms Mamo's employment with Life Streaming commenced on 21 September 2021 until around 25 July 2023. Ms Mamo had service with Mr MacDonald operating as a sole trader prior to 21 September 2021.
- c. Mr MacDonald has a director loan arrangement with Life Streaming. Mr MacDonald loaned the business a total of \$60,859.89 from 6 March 2023 until 15 December 2023. During this period the loan was reduced by a total of \$33,359.50 because of money in Life Streaming's accounts being used for personal transactions, or because money was withdrawn from the business by Mr MacDonald.

- d. Mr MacDonald and Ms Mamo's personal relationship broke down on around 25 July 2023. Ms Mamo moved out of the family home on 13 August 2023. The breakdown of the relationship involved significant hostility which remained during these proceedings.
- e. Mr MacDonald issued a letter to Ms Mamo on 24 August 2023 which alleged she had made 12 unauthorised transactions from Life Streaming's bank accounts from 21 June 2023 until 16 August 2023. The letter also alleged Ms Mamo had attempted to prevent Mr MacDonald from operating the Life Streaming business on 17 August 2023 via changing the password for its email account.
- f. Mr MacDonald invited Ms Mamo to a meeting on 2 September 2023 to discuss the allegations of serious misconduct. Ms Mamo declined to attend the meeting for various reasons including because she considered the accusations were "fake". Given Ms Mamo's refusal to attend the meeting, Mr MacDonald sent the termination letter on 2 September 2023.

[29] Most other significant evidentiary matters are contested by the parties. I consider the critical issues are:

1. Whether I accept Mr MacDonald or Ms Mamo's evidence regarding the use of funds in Life Streaming's bank accounts for personal expenditure.
2. Whether I accept Ms Mamo's evidence about why she changed the password on Life Streaming's email account on 17 August 2023.

These matters are critical because they go to whether or not the alleged misconduct occurred and constituted a reason for dismissal.

Use of Life Streaming's funds for personal expenditure

[30] According to Mr MacDonald, it was always clearly understood by Ms Mamo that money held in Life Streaming's business and GST accounts could only be used for work-related purposes. Mr MacDonald indicated he would regularly seek advice from his accountant regarding whether certain transactions could be claimed as work expenses. If the accountant indicated a transaction could not be claimed as work-related, Mr MacDonald would generally make an adjustment via the director loan arrangement. Mr MacDonald referred to various messages and emails where he raised concerns about Ms Mamo's use of Life Streaming's funds in support of his position.

[31] According to Ms Mamo, Life Streaming was a small "Mum and Dad-type" business and there was considerable overlap between the business and personal transactions. For example, Ms Mamo gave evidence that her wage rate of \$2,200 gross per fortnight had been deliberately set to cover the rent payments of \$1,100 per week for the home Mr MacDonald and Ms Mamo lived in. This left Ms Mamo reliant on payments from Mr MacDonald's personal account or her side business to support herself and her family. Ms Mamo argued it had been common for Life Streaming funds to be used for personal expenditure by both Mr MacDonald and by Ms Mamo. Ms Mamo raised several transactions going to this point with Mr MacDonald during

cross-examination, including spending on meals and drinks at pubs, a uniform for Mr MacDonald's son and the purchase of a whiskey decanter set. Ms Mamo claimed Mr MacDonald was aware that Life Streaming's funds were used to purchase tickets for her trip to Europe because he was sitting next to Ms Mamo when she made the bookings. In relation to the expenditure of \$3,262.81 to Agoda for accommodation in London, Ms Mamo's evidence was that Mr MacDonald was concerned about the high price of this hotel, as opposed to being more broadly concerned that Life Streaming's funds were being used for accommodation expenses. Ms Mamo did not generally contest that the 12 transactions did not relate to the work of Life Streaming, although the situation was less clear in terms of whether the expenses for international travel could be claimed as work expenses.

[32] On balance, I prefer Ms Mamo's evidence to that of Mr MacDonald regarding whether she clearly understood that the money in Life Streaming's accounts could only be used for work-related expenditure. Although it is generally obvious that an employee cannot use their employer's money for personal expenses, the facts of this case make the assessment of Ms Mamo's behaviour far more complicated than would ordinarily be the case. I have significant doubts about the evidence Mr MacDonald gave regarding spending money on food and drinks associated with a Qantas event to try and generate business for Life Streaming while he was in the area. I also have significant doubts about Mr MacDonald's evidence that he used Life Streaming's money for the purchase of a whiskey decanter, which he then used for some time, only to later wash it and give it to a customer as a gift, because he became aware it was not a legitimate business expense. I am also conscious that Mr MacDonald had considerable notice that he would be cross-examined on various transactions by Ms Mamo and had an opportunity to review each transaction and identify an explanation for the transaction. Despite this notice, I did not find several of Mr MacDonald's explanations to be convincing. I also do not accept Mr MacDonald's evidence that Ms Mamo's wage rate was not set to precisely match the rental payments for the house they were living in. I think the suggestion that this was a coincidence lacks merit, particularly given Mr MacDonald paid himself \$2,200 from Life Streaming's business account on 28 August 2023. That transaction is consistent with Mr MacDonald now needing to make the rental payments of \$1,100 per week because Ms Mamo had moved out.

[33] I also consider the email Mr MacDonald sent Ms Mamo on 24 August 2023 to be significant.² Although some attempt is made by Mr MacDonald in the email to separate the employment and personal relationships, it is clear Mr MacDonald was proposing a resolution of their family law issues that included Ms Mamo walking away from her employment and company secretary position with Life Streaming. This email highlights the extensive overlap between the two relationships and that Mr MacDonald was effectively using the business and employment arrangements as leverage in family law negotiations. If Ms Mamo had agreed to the proposed property distribution with Mr MacDonald, it appears highly doubtful that she would have been dismissed by Life Streaming. It is also clear that Mr MacDonald was prepared to overlook the transactions if Ms Mamo agreed to resign from her employment.

[34] I accept Ms Mamo's evidence that the transactions identified by Mr MacDonald prior to the breakdown of their personal relationship are explained by the considerable overlap between the personal and professional relationships. I accept there was a significant degree of informality regarding the operation of the business because of the overlapping relationships. I consider the informality is highlighted by the fact Ms Mamo was apparently engaged as an apprentice, but Mr MacDonald's evidence included that he did all the work for the business and

Ms Mamo lacked technical competence. I consider the transactions around the time of the relationship breaking down to be part of the deteriorating personal relationship, as opposed to being deliberate misconduct by Ms Mamo as an employee of Life Streaming. I accept Ms Mamo's evidence that she felt desperate at this time and considered she needed to access whatever money she could from Mr MacDonald to support her children. Even though the money was transferred from Life Streaming's accounts, I find that the conduct occurred as part of the breakdown of the personal relationship, as opposed to being Ms Mamo's actions as an employee of Life Streaming. I make that finding in the context of my earlier finding that the boundaries between business and personal expenditure were not clear between Mr MacDonald and Ms Mamo. I accept the distinction is fine, but I consider Ms Mamo was acting as a disgruntled partner, as opposed to an employee that wanted to damage the Life Streaming business. Ms Mamo's emails on 29 August 2023 are consistent with this finding because she was raising concerns about Life Streaming losing clicks and interest on its Facebook page, despite the breakdown of the personal relationship and the allegations against her.

[35] I consider it is appropriate to note that it is clear from the bank account statements that most transactions in Life Streaming's accounts relate to business revenue and expenditure. It is also clear that Mr MacDonald takes the distinction between business and personal expenditure seriously and has set up a director loan arrangement to deal with any overlap between business and personal expenditure. However, I consider there was a reasonably flexible approach to these issues while the close personal relationship remained on foot, and that when the relationship ended, Mr MacDonald perhaps understandably determined the flexibility could not continue. I consider Ms Mamo's conduct as an employee must be assessed in that context. I do not accept conduct from an employee that was overlooked when a close personal relationship existed can then provide grounds for summary dismissal, simply because the personal relationship has ended. The situation may have been different if Life Streaming put Ms Mamo on notice that given the breakdown in her personal relationship with Mr MacDonald, Life Streaming would be applying strict rules regarding the use of its funds. Although the text messages Mr MacDonald sent Ms Mamo raising concerns about her expenditure after the personal relationship had ended are relevant, I do not consider they constitute notice of a change in approach from Life Streaming because they do not go far enough to identify that prior treatment of finances tolerated in the context of a personal relationship would no longer be tolerated once the personal relationship ended.

The password change for the email account

[36] Ms Mamo provided the following evidence concerning the allegation she had attempted to lock Mr MacDonald out of Life Streaming's email account:

“The email accusation is also incorrect, I have always had full access to events@lifestreaming.au. When I logged on, it requested a password, I went in and put in our password, it prompted me to ‘reset password’ to gain access, I followed the prompts. Within a short amount of time, I had lost all access to the business emails. I am not sure why the Respondent is stating the 17th, which doesn't make sense as I was working on a fundraiser for the business. I was was sending the email trying to send the email out with no idea that I was locked out and was trying to get this email out to the Fundraiser on the 23rd of August 2023. It was in my sent items and yet the recipient kept saying she hadn't received it. ... Seems I thought I had access but it was taken away

a while back, the only time I sent an email to know about this was to my daughters school for the fundraiser.

ii. In short, The Respondent had changed the password on me. I logged back in to continue my work and he then went into the back end of our domain and changed it forever, I have not tried to access it since. There was nothing sinister about me logging in. The Respondent had agreed for me to do this fundraiser, via our email and logo. The recipient then received our logo'd voucher via bianca.mamo@gmail.com

iii. Please see the prompt I got on the day I entered our password and am still getting daily from Google to 'update my password' for lifestreamin.au. I had no intention what so ever of locking The Respondent out. Annex G - Photo's of consistent Google Prompt's - to update password,"³

[37] However, Mr MacDonald provided evidence to establish the password for the email account was changed at 1:04pm by Ms Mamo and that she added her phone number as a recovery phone number.⁴ Ms Mamo forwarded eight emails to her private email account after she changed the password. Mr MacDonald was able to regain access to the account and rechange the password at 1:17pm.

[38] I do not accept Ms Mamo has provided a satisfactory explanation for why she changed the password to Life Streaming's email account on 17 August 2023 and then forwarded eight emails to her personal email account. Although Ms Mamo provided evidence that she had been previously requested to enter the password for the email account,⁵ I do not consider that explains why she changed the password on 17 August 2023. I consider the most likely explanation is Ms Mamo deliberately changed the password as part of the breakdown in her personal relationship with Mr MacDonald.

Was Ms Mamo's dismissal consistent with the Small Business Fair Dismissal Code?

[39] Life Streaming summarily dismissed Ms Mamo for alleged serious misconduct on 2 September 2023.

[40] In *Pinawin v Domingo* (2012) 219 IR 128, a Full Bench of then Fair Work Australia stated the following concerning the test to be applied for summary dismissal under the Small Business Fair Dismissal Code at [29]:

“There are two steps in the process of determining whether this aspect of the Small Business Fair Dismissal Code is satisfied. First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal.

Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.”

[41] I consider Mr MacDonald formed a view that Ms Mamo's employment with Life Streaming needed to end, given the breakdown in their relationship. Mr MacDonald stated in an email on 29 August 2023 that: "your employment as an apprentice can not continue in any case." Mr MacDonald gave evidence that he initially sought information about whether he could lawfully make Ms Mamo's position redundant. That is consistent with Mr MacDonald searching for a trigger to end the employment relationship because the personal relationship had ended in acrimonious circumstances. I consider Mr MacDonald then formed a view that Ms Mamo's expenditure from Life Streaming's account and her conduct in changing the password for its email account provided a sufficient trigger to end the employment relationship. Mr MacDonald then implemented what was effectively a show cause and dismissal process and terminated Ms Mamo's employment for serious misconduct on 2 September 2023.

[42] I accept the first step in the assessment of whether Ms Mamo's summary dismissal was consistent with the SBFDC is satisfied in this case. I accept Life Streaming through its director Mr MacDonald held a belief that Ms Mamo's conduct was sufficiently serious to justify immediate dismissal.

[43] However, I am not satisfied that Life Streaming's belief through its director Mr MacDonald was held on reasonable grounds. I have found that Ms Mamo's conduct in relation to the 12 transactions she processed from Life Streaming's account did not constitute misconduct within the employment relationship. I have found the transactions processed prior to the relationship breakdown were effectively condoned by Life Streaming, and that the subsequent transactions occurred as part of a family law dispute, rather than the employment relationship, given the extensive intermingling of the two relationships and Mr MacDonald's email dated 24 August 2023.

[44] Although I have found Ms Mamo deliberately changed the password for Life Streaming's email account on 17 August 2023, I consider that step was primarily taken against Mr MacDonald personally, as opposed to Life Streaming. The sending of eight emails by Ms Mamo to her personal account suggests to me she was positioning for a dispute about ownership of the business, as opposed to trying to damage the operations of Life Streaming. I consider Ms Mamo's emails on 29 August 2023 regarding concerns about Life Streaming's Facebook account to be consistent with this interpretation. Given the hostile breakdown of the close personal relationship between Ms Mamo and Mr MacDonald, I do not consider Ms Mamo's actions on 17 August 2023 provide reasonable grounds for a belief that the conduct was sufficiently serious to justify immediate dismissal.

[45] I also do not accept Life Streaming carried out what I would consider to be a "reasonable investigation into the matter." Given the hostile breakdown of the close personal relationship between Mr MacDonald and Ms Mamo, I do not consider it was appropriate for Mr MacDonald to be investigating Ms Mamo's conduct. I consider Mr MacDonald was not able to conduct an impartial and independent investigation process. Whilst I have considered that what is reasonable requires consideration of the experience and resources of the small business concerned,⁶ I nonetheless consider the circumstances dictated that an external party should have conducted the investigation so Mr MacDonald and Ms Mamo's evidence could be fairly assessed.

[46] I am not satisfied that Ms Mamo’s dismissal was consistent with the SBFDC because Life Streaming’s belief that Ms Mamo’s conduct was sufficiently serious to justify immediate dismissal was not based on reasonable grounds. I dismiss Life Streaming’s jurisdictional objection.

[47] Having considered each of the initial matters and found Ms Mamo’s dismissal was not consistent with the SBFDC, I am required to consider the merits of Ms Mamo’s application.

Was the dismissal harsh, unjust or unreasonable?

[48] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[49] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.⁷

[50] I set out my consideration of each below.

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

[51] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁸ and should not be “capricious, fanciful, spiteful or prejudiced.”⁹ However,

the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.¹⁰

[52] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.¹¹ 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.¹²

[53] I have found that Ms Mamo's conduct in processing 12 transactions from Life Streaming's bank accounts for personal purposes does not constitute misconduct in the employment relationship. I have found the conduct was effectively condoned by Life Streaming prior to the breakdown of the close personal relationship between Ms Mamo and Mr MacDonald. Life Streaming attempted to apply a different approach to the expenditure after the breakdown, without putting Ms Mamo on notice that this would occur. While past condoning of conduct is not automatically determinative of whether similar conduct later constitutes a valid reason for dismissal, it is a relevant consideration.¹³ I consider it to be a significant consideration in this case given the interrelatedness of professional and personal matters. I also consider Ms Mamo's actions after the relationship broke down to primarily have occurred as part of a broader family law dispute as opposed to the employment relationship.

[54] Although I have found Ms Mamo deliberately changed the password to Life Streaming's email account on 17 August 2023, I have found that this step was taken primarily against Mr MacDonald in his personal capacity as opposed to being against Life Streaming as a corporation. I am not satisfied Ms Mamo was attempting to cause damage to the company when she took this step.

[55] Given these findings, I do not accept there was a valid reason for Ms Mamo's dismissal.

Was Ms Mamo notified of the reason for dismissal?

[56] Proper consideration of s.387(b) requires a finding to be made as to whether Ms Mamo "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).¹⁴

[57] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,¹⁵ and in explicit¹⁶ and plain and clear terms.¹⁷

[58] As I am not satisfied that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.¹⁸

[59] However, if I had found there was a valid reason for dismissal, I would have found that Ms Mamo was notified of the reason for her dismissal prior to a final decision being made by Life Streaming. Mr MacDonald's letter dated 24 August 2023 put Ms Mamo clearly on notice of the allegations against her and constituted adequate notice of the reason for dismissal.

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

[60] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.¹⁹

[61] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.²⁰ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.²¹

[62] As I have not found that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.²²

[63] However, if I had found there was a valid reason for dismissal, I would have found that Ms Mamo was not given an opportunity to respond to the reason for her dismissal.

[64] An opportunity to respond must be genuine. An employer cannot merely pay 'lip service' to giving an employee an opportunity to respond to allegations.²³ Rather, an opportunity to respond "implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance."²⁴ Taking into account the breakdown of the personal relationship between Ms Mamo and Mr MacDonald, I am not satisfied in the circumstances Ms Mamo had a genuine opportunity to respond such that, had a valid explanation been provided, an alternative outcome was possible. I consider Life Streaming would have needed to engage an external party to consider any responses provided by Ms Mamo to the allegations of misconduct. Mr MacDonald was clearly compromised in terms of assessing Ms Mamo's responses because of the breakdown in their personal relationship. I do not consider it matters that Ms Mamo refused to attend the meeting on 2 September 2023, given this was a proposed meeting only with Mr MacDonald.

Did Life Streaming unreasonably refuse to allow Ms Mamo to have a support person present to assist at discussions relating to the dismissal?

[65] I do not consider Life Streaming unreasonably refused to allow Ms Mamo to have a support person at any meetings. Mr MacDonald's email dated 29 August 2023 indicated he was planning to arrange a support person if Ms Mamo confirmed she was attending the meeting. I consider it extremely unlikely that Ms Mamo would have been prevented from bringing a support person in those circumstances.

Was Ms Mamo warned about unsatisfactory performance before the dismissal?

[66] As the dismissal related to alleged misconduct rather than unsatisfactory performance, this factor is not relevant to the present circumstances.

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

[67] Life Streaming is a very small business and I accept this had an impact on the procedures followed in effecting the dismissal. However, the primary concern I have with the procedures is that they were conducted by Mr MacDonald and not an external party. Had the same procedures been followed by an external party, I consider it is likely they would have been adequate.

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

[68] I find that a lack of dedicated human resource management specialists contributed to a significant degree to the defects in the procedures followed by Life Streaming in effecting the dismissal. If Life Streaming had a HR Manager, it is extremely likely they would have conducted the investigation instead of Mr MacDonald and that would have cured my concerns about Mr MacDonald's involvement.

What other matters are relevant?

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

[70] Although it has been addressed in terms of the other factors to a considerable degree, I consider the breakdown of the close personal relationship between Ms Mamo and Mr MacDonald to be a relevant factor to the assessment of whether Ms Mamo was unfairly dismissed. That is particularly the case given Mr MacDonald and Ms Mamo were the only employees of Life Streaming.

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

[71] I have made findings in relation to each matter specified in s.387. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.²⁵

[72] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Ms Mamo was unjust and unreasonable because there was no valid reason for her dismissal.

[73] If I had found that there was a valid reason for dismissal, I would have found the dismissal was harsh given the close association between the events leading to dismissal and the breakdown in Mr MacDonald and Ms Mamo's personal relationship. It is virtually impossible to separate the personal and professional actions of both parties in this case.

[74] If I had found there was a valid reason for dismissal, I would have found the dismissal to be unjust and unreasonable because Ms Mamo was not provided with an opportunity to respond prior to the final decision being made, in circumstances whereby any responses were to be assessed by her former partner, Mr MacDonald.

Conclusion

[75] I am therefore satisfied that Ms Mamo was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[76] Being satisfied that Ms Mamo:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order Ms Mamo's reinstatement, or the payment of compensation to Ms Mamo.

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

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

Is reinstatement of Ms Mamo inappropriate?

[78] Ms Mamo does not seek reinstatement on the basis that the employment relationship has been irreparably damaged. I agree with this position.

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

[79] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one..."²⁶

[80] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.²⁷

[81] Ms Mamo has suffered financial loss in circumstances where I have found there was not a valid reason for dismissal. In all the circumstances, I consider that an order for payment of compensation is appropriate.

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

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

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

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

Effect of the order on the viability of Life Streaming's enterprise

[84] As of 31 December 2023, there was \$8,882.43 in Life Streaming's business account and no money in its GST account.²⁸ Life Streaming owes Mr MacDonald a director loan amount of \$27,500.39 as of 1 March 2024.

[85] I accept Mr MacDonald is in the process of returning to his previous role as a pilot and he does not intend to continue operating Life Streaming.

[86] I accept a compensation order of any amount is likely to impact the viability of Life Streaming's enterprise and this weighs in favour of a lower compensation order.

Length of Ms Mamo's service

[87] If I include Ms Mamo's previous work for Mr MacDonald when he was operating as a sole trader, the length of her service was around four years. I consider this to be a neutral factor.

Remuneration that Ms Mamo would have received, or would have been likely to receive, if Ms Mamo had not been dismissed

[88] As stated by a majority of the Full Court of the Federal Court, “[i]n determining the remuneration that the employee would have received, or would have been likely to receive... [the Commission must] address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination.”²⁹

[89] The assessment of how long Ms Mamo’s employment would have continued if she was not dismissed is complicated by the overlapping personal and professional relationships between Mr MacDonald and Ms Mamo. Mr MacDonald clearly had the view that the employment had to end one way or another and had initially explored redundancy. Ms Mamo gave evidence that she thought the business could have continued operating despite the personal separation if both parties acted professionally.

[90] Having observed the parties during the determinative conference, I do not consider there is any likelihood that Mr MacDonald and Ms Mamo could have continued operating the Life Streaming business after the breakdown of their relationship. I consider it is likely that Mr MacDonald would have made Ms Mamo’s position redundant and ceased operating the business.

[91] Taking all the evidence into account, I find Ms Mamo would likely have remained employed with Life Streaming for a further month while other alternatives to end the employment relationship were explored by Mr MacDonald.

[92] The parties agreed Ms Mamo earned \$1,100 gross per week from her employment with Life Streaming.

[93] I calculate the remuneration Ms Mamo would have been likely to receive working for Life Streaming from 2 September 2023 to 2 October 2023 to be \$4,400 gross plus superannuation.

Efforts of Ms Mamo to mitigate the loss suffered by Ms Mamo because of the dismissal

[94] Ms Mamo must provide evidence that she has taken reasonable steps to minimise the impact of the dismissal.³⁰ What is reasonable depends on the circumstances of the case.³¹

[95] Ms Mamo gave credible evidence that it has been difficult for her to find other work since being dismissed because she has been driving her children to school from her current residence in Campbelltown to their existing school at Concord.

[96] Ms Mamo has continued conducting a side business associated with the Body Shop since she was dismissed.

[97] Ms Mamo commenced performing casual work for Sydney Funerals in December 2023.

[98] I find Ms Mamo's family commitments have made it difficult for her to find other employment and she has continued conducting a pre-existing side business. Ms Mamo has also found casual work with Sydney Funerals.

[99] I do not consider any deduction should be made for failure to mitigate loss.

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

[100] Ms Mamo provided bank statements which show she has earned the following remuneration between her dismissal and 25 February 2024:

From Body Shop

- \$240.00
- \$477.00
- \$1,885.36
- \$147.60
- \$118.00
- \$82.61
- \$2,683.72
- \$34.38
- \$8.60
- \$115.95
- \$133.00

From Sydney Funerals

- \$750.00
- \$180.00
- \$300.00
- \$540.00
- \$360.00
- \$930.00

[101] Ms Mamo has earned \$5,926.22 from the Body Shop and \$3,060.00 from Sydney Funerals from her dismissal on 2 September 2023 to 25 February 2024. That is total remuneration of \$8,986.22. Given the order will be made on 27 March 2024, I will estimate that Ms Mamo has earned a further \$1,200 from 25 February 2024 to 27 March 2024. That increases the total remuneration to \$10,186.22.

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

[102] I intend to order that the compensation payable to Ms Mamo is to be paid within 14 days. I estimate that Ms Mamo will earn around \$600 during this period.

Other relevant matters

[103] Neither party submitted that there were any other relevant matters.

Compensation – how is the amount to be calculated?

[104] As noted by the Full Bench, “[t]he well-established approach to the assessment of compensation under s.392 of the FW Act... is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket (Sprigg)*.³² This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.³³”³⁴

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

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

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

Step 3: Discount the remaining amount for contingencies.

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

Step 1

[106] I have estimated that Ms Mamo would have remained employed by Life Streaming until 2 October 2023. This is the “anticipated period of employment”.³⁵

[107] The remuneration Ms Mamo would have received, or would have been likely to have received, from her dismissal on 2 September 2023 until 2 October 2023 is \$4,400 plus superannuation.

Step 2

[108] Only monies earned since termination for the anticipated period of employment are to be deducted.³⁶

[109] Ms Mamo earned \$240 between 2 September 2023 to 2 October 2023.

[110] For the reasons outlined above, I have not applied a deduction for failure to mitigate loss because Ms Mamo has taken steps to mitigate her loss.

[111] A figure of \$4,160 plus superannuation is left after the deduction for remuneration earned.

Step 3

[112] I now need to consider the impact of contingencies on the amounts likely to be earned by Ms Mamo for the remainder of the anticipated period of employment.³⁷

[113] I know Ms Mamo's earnings during the anticipated period of employment. I therefore do not need to make a deduction for contingencies.

Step 4

[114] I have considered the impact of taxation but have elected to settle a gross amount of \$4,160 plus superannuation and leave taxation for determination.

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

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

[116] It is arguable a deduction should be made in relation to Ms Mamo's conduct in changing the password for Life Streaming's email account on 17 August 2023. However, I decline to do so in all the circumstances, particularly having regard to the link between the conduct and the breakdown of the personal relationship.

Compensation – how does the compensation cap apply?

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

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

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

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

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

[119] Given Ms Mamo's gross weekly wage rate of \$1,100, a compensation cap of \$28,600 plus superannuation applies in accordance with s.392(6) of the FW Act.

Is the level of compensation appropriate?

[120] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that “the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case.”³⁸

[121] The application of the *Sprigg* formula has resulted in an outcome where Ms Mamo would be awarded compensation of \$4,160 plus superannuation.

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

Compensation order

[123] Given my findings above, I will make an order that Life Streaming must pay Ms Mamo \$4,160 less taxation as required by law, plus superannuation of \$457.60 to be paid into Ms Mamo’s nominated fund, with both payments to be made within 14 days of the date of this decision.



COMMISSIONER

Appearances:

Ms Mamo representing herself.

Mr Niven from *Taylor Rose Lawyers* on behalf of *Life Streaming*.

Determinative conference details:

2024.

Via video.

28 February.

14 March.

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<PR772765>

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- ¹ There is no dispute Life Streaming is a small business and that Ms Mamo and Mr MacDonald were the only employees at the time of dismissal.
- ² Attachment AM5 to Exhibit R1.
- ³ Exhibit A4.
- ⁴ Attachment AM 2 to Exhibit R1.
- ⁵ Exhibit A11.
- ⁶ *Pinawin v Domingo* (2012) 219 IR 128, [30].
- ⁷ *Sayer v Melsteel Pty Ltd* [\[2011\] FWAFB 7498](#), [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].
- ⁸ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- ⁹ *Ibid.*
- ¹⁰ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ¹¹ *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- ¹² *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- ¹³ *Newton v Toll Transport Pty Ltd* [\[2021\] FWCFB 3457](#), [75].
- ¹⁴ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].
- ¹⁵ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- ¹⁶ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- ¹⁷ *Ibid.*
- ¹⁸ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFB 762](#), [46]-[49].
- ¹⁹ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- ²⁰ *RMIT v Asher* (2010) 194 IR 1, 14-15.
- ²¹ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- ²² *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFB 762](#), [46]-[49].
- ²³ *Federation Training v Sheehan* [\[2018\] FWCFB 1679](#), [53].
- ²⁴ *Wadey v YMCA Canberra* [1996] IRCA 568.
- ²⁵ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].
- ²⁶ *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#), [9].
- ²⁷ *Vennix v Mayfield Childcare Ltd* [\[2020\] FWCFB 550](#), [20]; *Jeffrey v IBM Australia Ltd* [\[2015\] FWCFB 4171](#), [5]-[7].
- ²⁸ Exhibit R3.
- ²⁹ *He v Lewin* [2004] FCAFC 161, [58].
- ³⁰ *Biviano v Suji Kim Collection* [PR915963](#) (AIRC FB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* [PR908053](#) (AIRC FB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].
- ³¹ *Biviano v Suji Kim Collection* [PR915963](#) (AIRC FB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.
- ³² (1998) 88 IR 21.
- ³³ [\[2013\] FWCFB 431](#).
- ³⁴ *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWCFB 7206](#), [16].

³⁵ *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

³⁶ *Ibid.*

³⁷ *Enhance Systems Pty Ltd v Cox* [PR910779](#) (AIRCFCB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

³⁸ *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWCFB 7206](#), [17].