



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Tamara Depp**

v

**Oz Seaside Hair And Beauty Pty Ltd**

(U2025/10618)

DEPUTY PRESIDENT LAKE

BRISBANE, 29 JANUARY 2026

*Application for an unfair dismissal remedy – jurisdictional objection – small business – minimum employment period – purchase of business – jurisdictional objection dismissed – small business fair dismissal code – alleged misconduct – small business fair dismissal code not complied with – dismissal unfair – compensation ordered*

[1] Ms Tamara Depp (the **Applicant**) made an application to the Fair Work Commission (the **Commission**) seeking a remedy pursuant to s.394 of the *Fair Work Act 2009* (the **Act**) stating that she was unfairly dismissed from her employment with Oz Seaside Hair And Beauty Pty Ltd (the **Respondent**).

[2] Section 396 of the Act requires satisfaction of four matters before considering the merits. The Respondent raised a jurisdictional objection that the Respondent is a small business and the Applicant was not a person protected from unfair dismissal as she did not meet the minimum employment period of twelve months under s.382 and s.383 of the Act.

[3] The matter was listed for a hearing on 7 October 2025. Both parties appeared self-represented.

## Background

[4] The Applicant began working for the business under a previous owner on 16 January 2024.<sup>1</sup>

[5] On 2 December 2024, the Respondent company purchased the business. I have been provided with a redacted copy of the business sale contract. The contract lists five employees of the business. The contract includes a special condition that the Seller will adjust in favour of the Buyer for an amount of 72.5% of the aggregate value of the Transferring Employees' entitlements to annual leave and long service leave. "Transferring Employee" is defined to mean an employee who accepts an offer of employment from the Buyer prior to completion of the contract.

[6] The Contract includes a special condition stating:

## 7. NO STAFF RETENTION WARRANTY

7.1 The Buyer acknowledges and agrees that the Seller has no authority or control over whether or not employees may chose to continue working or to resign their position.

7.2 The Seller provides no warranty or representation that the current employees will remain working in the business.

[7] The contract also includes a term that the previous owner of the business would “become an employee of the Buyer” and enter into an employment agreement for six months.

[8] The Applicant provided evidence that the Respondent processed payslips from the date of the completion of the business sale contract.<sup>2</sup> The Applicant provided timesheet records showing her days worked following the sale of the business.

[9] On 27 March 2025, Ms Sherry Dai, director of the Respondent, offered the Applicant additional duties, including managerial responsibilities in exchange for a pay increase and allowance.

[10] On 23 May 2025, Ms Dai issued the Applicant with a written casual employment contract, stating:

Hi Tamara,

I hope you're well!

As you know, you've been an important part of the Toogoom Hair Studio team, and I really appreciate everything you bring to the salon. To ensure everything is clear and consistent for all team members, I've been in the process of issuing formal casual employment contracts — and I'd like to offer you one as well.

The contract outlines the terms we've already been working with, including your agreed casual rate. It's the same format as the one recently provided to other stylists, just to ensure fairness and transparency across the board.

I know you currently work at other salons as well, and I want to reassure you that I fully support you continuing that. While the contract includes a standard restraint clause (Clause 21), this does not apply to your existing salon work or your ability to work elsewhere alongside Toogoom Hair Studio. I'm more than happy for you to maintain your other roles — this is simply a formality for consistency with all staff contracts.

Please find your casual contract attached. Let me know if you have any questions, and feel free to return a signed copy at your earliest convenience.

Thanks again for being a valued part of the team — I really appreciate all your hard work and dedication.

[11] There were two incidents relating to the Applicant's dismissal. The first was on Saturday, 7 June 2025, when the Applicant and the salon manager, Ms Nikki Reid, had an argument regarding rebooking the Applicant's client. The argument arose because one of the Applicant's clients had been rebooked with another stylist. According to Ms Reid, the Applicant was angry and confronted her in front of a client. The Applicant allegedly told Ms Reid that she

had no right to do that. Ms Reid suggested that they speak outside, which they did. The Applicant is then alleged to have told Ms Reid that she is a terrible manager. The Applicant said that she spoke with Ms Dai and Ms Reid, the Applicant apologised and agreed that she would not question Ms Reid in front of a client again. The Applicant argued that she believed she had been given a verbal warning. The Applicant's employment was then terminated via email on 9 June 2025:

Hi Tamara,

I hope you're well. I wanted to reach out personally regarding your position at the salon.

You've been with the business for quite some time, and we genuinely appreciate the service and contribution you've made during that period. However, recent events have made it very difficult to continue working together in a professional and productive environment.

In particular, the confrontation that occurred with the salon manager last Saturday — in front of clients and during active service — was deeply concerning. This kind of behaviour is not acceptable in a professional setting, especially in front of clients, and unfortunately, it has placed the salon's reputation at risk.

Additionally, I sent through an official employment contract on 23rd May, which you have not acknowledged or responded to. While I respect your decision not to sign, it has left us without any clear agreement or structure moving forward.

Although you have been working in a casual capacity, and no formal agreement has been signed, I would still like to offer you two weeks' notice as a gesture of goodwill.

If you would prefer to end your employment immediately, please let me know and we can finalise everything accordingly.

I truly wish things had worked out differently, but I believe this is the best decision for the business moving forward. I wish you all the best with your future work.

**[12]** The Applicant agreed to work through the two-week notice period.

**[13]** On 11 June 2025, during the Applicant's first shift of her notice period, the Applicant and Ms Reid had another argument. The Respondent alleges that the Applicant used the following words in front of clients: "Don't worry about contacting my clients, I have already contacted them and I'm taking them all with me. I hope karma gets you like the cunt you are." The Applicant admits to swearing but states that she said: "this is bullshit". The Applicant denies swearing in front of a client.

**[14]** Following the incident on 11 June 2025, the Applicant was asked to leave the salon. Ms Dai then sent a further email to the Applicant effectively revoking the notice period:

Following our previous correspondence, I had hoped that the two-week notice period would allow for a smooth and respectful transition. Unfortunately, your behaviour this

morning — including two further incidents involving the salon manager in front of clients — has made it clear that this is no longer a workable arrangement.

Your continued unprofessional conduct, particularly in front of clients, is unacceptable and directly impacts the reputation and daily operations of the salon. As a result, I have made the decision to terminate your employment effective immediately.

### **Consideration**

[15] I note that both parties' submissions leave much to be desired. That is understandable though, given the transfer of business provisions in the Act are complex and both parties are unrepresented.

[16] Under s.382 of the Act, the Applicant is only a person protected from unfair dismissal if:

#### **“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.

[17] There is no dispute that the Applicant's earnings are less than the high income threshold.

[18] The minimum employment period is defined in s.383 of the Act. The minimum employment period is 12 months for a small business or 6 months if the employer is not a small business. In this case, there does not appear to be a dispute that the Respondent is a small business. Having seen the Respondent's payroll records, I am satisfied that the Respondent is a small business employer. The Applicant has provided no evidence to suggest that there are any employing associated entities whose employees should be counted.

[19] Section 384 of the Act provides:

#### **“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 as a regular casual employee; 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.”

**[20]** Commissioner Saunders (as he then was) helpfully summarised the relevant legislation relating to period of employment in *Harris v Laing O'Rourke Australia Construction Pty Ltd* [\[2017\] FWC 1204](#):

**[8]** The relevant statutory regime may be summarised in the following way:

- (a) An employee must have completed at least the minimum employment period to be eligible to bring an unfair dismissal claim against their employer (ss.382, 390 & 396 of the Act);
- (b) For a person employed by a non-small business employer, the minimum employment period is six months (s.383 of the Act);
- (c) An employee's period of employment with an employer is the period of continuous service the employee has completed with their employer (s.384(1) of the Act);
- (d) A period of “service” by an employee with their employer is a period during which the employee is employed by the employer, but does not include certain “excluded periods” (ss.12 & 22 of the Act);
- (e) The expression “continuous service” is not defined in the Act. The ordinary meaning of “continuous service” is the period of unbroken service by an employee with an employer. However, the ordinary meaning of “continuous service” is affected by s.22 (s.12 of the Act);
- (f) An “excluded period” does not break an employee's “continuous service” with their employer, but does not count towards the length of the employee's “continuous service” (s.22(3) of the Act). “Excluded periods” include a period of unauthorised absence and a period of unpaid leave or unpaid authorised absence, subject to certain exceptions (s.22(2) of the Act);

- (g) Subsections 22(5) and (7) of the Act alter the ordinary meaning of “continuous service”. In effect, they deem service by an employee with one employer to be service with another employer if there is a transfer of employment within the meaning of s.22(7) of the Act. In addition, those provisions stipulate that, in the event of such a transfer of employment, the period between the termination of employment with the first employer and the commencement of employment with the second employer does not break the employee’s “continuous service” with the second employer, but the “gap” does not count towards the length of the employee’s “continuous service” with the second employer (s.22(5)(b) of the Act); and
- (h) In order for an employee’s service with a previous employer to be deemed to be part of their “continuous service” with a subsequent employer as a result of a “transfer of employment”, one of the following sets of conditions must be satisfied (s.22(7) of the Act):
- First, the first and second employers must be “associated entities” and the “gap” in employment must not be more than three months; or
  - Secondly, the first and second employers are not “associated entities” and the employee is a “transferring employee” in relation to a “transfer of business” within the meaning of s.311 of the Act.

[21] This matter raises issues in relation to the minimum employment period. Firstly, it must be considered whether the Applicant is a “transferring employee” in relation to a “transfer of business” and whether her service prior to the business sale counts. Secondly, it must be considered whether the Applicant, during her period of service, had a reasonable expectation of continuing employment by the Respondent on a regular and systematic basis. If the Applicant’s service prior to the business sale does not count, the application fails. Additionally, if the prior service does count, but the Applicant’s employment was not regular and systematic such that it counts towards the period of employment, the application fails.

[22] Section 311 of the Act defines “transferring employee” and “transfer of business”:

**“311 When does a transfer of business occur**

Meanings of transfer of business, old employer, new employer and transferring work

- (1) There is a transfer of business from an employer (the old employer) to another employer (the new employer) if the following requirements are satisfied:
- (a) the employment of an employee of the old employer has terminated;
  - (b) within 3 months after the termination, the employee becomes employed by the new employer;
  - (c) the work (the transferring work ) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
  - (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

Meaning of transferring employee

(2) An employee in relation to whom the requirements in paragraphs (1)(a), (b) and (c) are satisfied is a transferring employee in relation to the transfer of business.

Transfer of assets from old employer to new employer

(3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:

- (a) the old employer or an associated entity of the old employer; and
- (b) the new employer or an associated entity of the new employer;

the new employer, or the associated entity of the new employer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible):

- (c) that the old employer, or the associated entity of the old employer, owned or had the beneficial use of; and
- (d) that relate to, or are used in connection with, the transferring work.

Old employer outsources work to new employer

(4) There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer.

New employer ceases to outsource work to old employer

(5) There is a connection between the old employer and the new employer if:

- (a) the transferring work had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced the transferring work to the old employer or an associated entity of the old employer; and
- (b) the transferring work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource the work to the old employer or the associated entity of the old employer.

New employer is associated entity of old employer

(6) There is a connection between the old employer and the new employer if the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.”

**[23]** The Respondent appears to believe that it is impossible for the Applicant’s prior service to be counted. The Respondent submitted:

The Business Sale Contract between myself and the previous owner explicitly states that no guarantee of employment would continue with the new owner. I have already submitted this document as evidence, which also confirms that no employment was transferred to me except for that of the previous owner herself.

At no stage did I agree to recognise the applicant's previous service, and there was no transfer-of-employment arrangement between the two entities.

Under section 384(2)(b) of the Fair Work Act 2009 (Cth), service with a previous employer can only count toward the minimum employment period if the new employer is an associated entity or has agreed to recognise that prior service. Neither of these conditions apply in this case.

[24] It seems that the Respondent may have gotten incorrect legal advice at the time of the business purchase to the effect that no prior service will count unless the Respondent explicitly agrees to recognise prior service. That is not the effect of s.22 or s.384 of the Act. Section 384(2)(b) outlines when a period of prior service *does not count*, it does not define when a period of prior service *does count*.

[25] Under section 22 of the Act, the prior service counts when there is a transfer of employment under s.22(7) of the Act. The Act distinguishes between situations where the old and new employer are associated entities, and where they are not associated entities. The old employer is a natural person. I have not seen any evidence that the Respondent and the old employer are associated entities within the meaning of s.50AAA of the *Corporations Act 2001* (Cth).

[26] As the old and new employer are not associated entities, there can only be a transfer of employment if the Applicant is a "transferring employee" and there was a "transfer of business".

#### **Is the Applicant a transferring employee?**

[27] The Applicant is a transferring employee under s.311(2) of the Act if:

1. The employment by the old employer was terminated;
2. Within three months after the termination, the Applicant became employed by the Respondent; and
3. The work performed by the Applicant with the new employer is the same, or substantially the same.

[28] The first question to ask is whether the Applicant's employment was terminated as a result of the sale of the business. Under the standard terms of the business sale contract, if the Buyer does not wish to hire the employees of the business, the Seller is required to notify those employees and formally terminate their contracts. It seems that did not happen. As the former owner of the business did not give evidence, it is difficult to understand why this did not occur without speculating. From the Applicant's perspective, she gave evidence to the effect that work continued seamlessly. In my view, it seems more likely than not that "the employment of an employee of the old employer has terminated" on 5 December 2024. The old employer stayed on in the business, but only as an employee for six months. She did not act as the Applicant's employer following the sale of the business and the Applicant received pay from the new employing entity. There is no question that the old employer has ceased to be the Applicant's employer.

[29] The next question to ask is whether the Applicant became employed by the Respondent within three months of the sale of the business. The Respondent submitted that there was no “formal” contract entered into after the sale of the business. I put to the Respondent in the hearing it is possible to have a purely verbal employment contract. Ms Dai accepted that proposition but reiterated that the Applicant was “only ever working on a casual basis”. I take this to mean that the Respondent believed that was no continuing obligation to offer work. In my view, on balance, the Applicant was re-employed within three months following the sale of the business. I was provided with evidence of timesheets showing the Applicant worked 19 shifts in the three months following the business purchase.<sup>3</sup> Further, the Applicant was added to the Respondent’s payroll and was paid by the Respondent for that work.

[30] I note the Respondent argues that the Applicant’s roles before and after the business purchase may have been different, stating:

- The roles listed by the previous employer are described as “Tamara senior casual M–F” and “Tamara senior casual SAT,” while my company’s payslips specify distinct positions of “Senior Stylist Standard” and “Stylist Weekend.”
- These inconsistencies suggest that the prior role may not have been the same or clearly defined as a stylist position within the business, further supporting that the two employments were not continuous.<sup>4</sup>

[31] The differences described by the Respondent cannot, in my view, amount to a “substantial” difference. I have been provided with no evidence to substantiate an argument that the Applicant’s work was not substantially the same following the business purchase.

[32] I am satisfied that the Applicant is a transferring employee.

### **Was there a transfer of business?**

[33] There is no evidence that the circumstances in ss.311(4) – 311(6) apply. Under s.311(3) there is a transfer of business if there is a transfer of assets meeting the requirements of that subsection.

[34] Deputy President Clancy considered a number of relevant authorities relating to s.311(3) in *Crossin v Tazzy Tyres Accessories Pty Ltd T/A Tazzy Tyres* [\[2016\] FWC 6525](#):

[27] As outlined above, s.311(3) of the Act provides that there will be “a connection” between JB Enterprises and Tazzy Tyres if, in accordance with an “arrangement” between them, Tazzy Tyres “owns or has the beneficial use of some or all of the assets (whether tangible or intangible)” that JB Enterprises “owned or had the beneficial use of” and “that relate to or are used in connection with the transferring work”.

[28] The words “in accordance with an arrangement” were considered by the Full Bench of the Commission in *John Lucas Hotel Management Services (t/as World Square Pub) v Hillie* (Hillie) as follows:

“[19] We agree with Commissioner Bissett in *Zabrdac* that guidance as to the use and meaning of the word “arrangement” can be found in a previous judgements concerning trade practices and taxation matters. ....

[20] In accordance with the Explanatory Memorandum the word “arrangement” should be interpreted broadly. It certainly need not imply a formal let alone legally enforceable agreement between the two parties. However the expression must still be given some content. From the authorities it can be concluded that for an “arrangement” to exist one party must have assumed at least a moral obligation, or given an “assurance” or “undertaking” that it will act in a certain way.”

[29] In *Hillie*, the Full Bench was satisfied that there was no evidence to support the first instance finding that there was an arrangement between the applicant’s previous employer and the respondent involving a transfer of assets as contemplated by s.311(3) of the Act. It described the evidence concerning the new employer having the beneficial use of some assets of which the old employer previously had the beneficial use as “fairly sketchy” and found that whatever arrangement existed for the new employer to take over the operation of the hotel in question was between the owner of the hotel and the new employer.

[30] In the *Zabrdac* decision referred to by the Full Bench in *Hillie* at paragraph [19], Commissioner Bissett found there was no connection between the old employer and new employer as required by s.311(1)(d) of the Act because there was no arrangement between them with respect to the beneficial use of some or all assets of the old employer.

[31] In the case of Mr Crossin’s application, the evidence does not persuade me there is a connection between JB Enterprises and Tazzy Tyres pursuant to s.311(3) of the Act. For such a connection to exist, Tazzy Tyres would need to own or have the beneficial use of some or all of the assets that relate to or are used in connection to the transferring work that JB Enterprises owned or had the beneficial use of, “in accordance with an arrangement” between JB Enterprises and Tazzy Tyres. I am not satisfied there was an “arrangement” between JB Enterprises and Tazzy Tyres whereby Tazzy Tyres owns or has the beneficial use of some or all of the assets that JB Enterprises owned or had the beneficial use of that relate to or are used in connection to the transferring work. I base this on the following findings:

- a) Mr Barnes had decided to shut down his business of his own volition. Mr Vasicek did not purchase it or make payment for goodwill or the like.
- b) Mr Vasicek did not purchase or use any of Mr Barnes’ equipment or other assets, instead bringing in an entirely new set of tools and his own equipment.
- c) The trading name, Tazzy Tyres, was not something Mr Vasicek obtained from JB Enterprises - he already owned it.
- d) Mr Vasicek did not assume responsibility for the lease Mr Barnes had held over the premises but rather, negotiated a new lease, on new terms directly with Ms Ma, the property owner.
- e) Mr Vasicek did not purchase the four-post hoist Mr Barnes left behind. While he made three or four payments of \$900 to Mr Cox, this was pursuant to a hand shake agreement made directly with Mr Cox. In any event, the four-point hoist

did not work and was never used in connection to the transferring work prior to its removal from the premises

[35] In this matter, I find that there was an “arrangement” in relation to the transfer of assets. The business contract, which is standard Real Estate Institute of Queensland Business Sale Contract, includes a list of plant and equipment which are included in the business sale. Those are assets which the Respondent owns pursuant to that sale. That includes equipment used to operate the hair salon, such as basins and layback chairs, a computer and money drawer and other hair styling tools such as combs, hairdryers, and brushes. According to the ABN records, the business name is still registered to the previous owner despite it appearing to be included in the sale under the contract. In any event, according to the Applicant’s evidence, the Respondent trades using the same business name as before the sale and therefore has beneficial use of that asset. As these matters are encapsulated in a contract representing the understanding of the seller and buyer, I am satisfied that there was an arrangement for the transfer of assets which constitutes a transfer of business.

### **Whether the period of service as a casual counts toward period of employment**

[36] As the Applicant is a transferring employee and there was a transfer of business, the Applicant’s service with the previous employer forms part of her continuous period of service. It is also necessary, in light of the Respondent’s arguments regarding the Applicant being a casual employee, to consider whether the Applicant’s period of service as a casual employee counts towards her period of employment under s.384 of the Act.

[37] I have been provided with the Applicant’s timesheets and payslips over the period of her employment. I understand that the Applicant worked at a different salon while employed by the Respondent, as is common in the hairdressing industry. The Applicant’s timesheets demonstrate a consistent pattern of work. The Applicant worked on Wednesdays and every second Saturday, with occasional shifts on Thursdays or Fridays. The evidence demonstrates that the Applicant worked over 50 shifts in the six months following the Respondent’s business purchase. I am satisfied that the Applicant was a regular casual employee and has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

[38] I find that the Applicant is a person protected from unfair dismissal. Her service with the former owner of the business counts, meaning her period of service is greater than twelve months, and the Applicant’s period of service as a casual employee counts towards the minimum employment period.

[39] It is therefore necessary to consider the Respondent’s objection that the dismissal was consistent with the Small Business Fair Dismissal Code.

[40] The Small Business Fair Dismissal Code states the following:

### **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.

[41] The Full Bench decision in *Pinawin v Domingo* [\[2012\] FWAFB 1359](#) (*Pinawin*) summarises the following principles.

*This test brings the position for small businesses into line with the test for unfairness applied by tribunals in the UK in misconduct cases. In the leading case of British Home Stores Ltd v Burchell, the Employment Appeal Tribunal held that:*

*“What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.”*

[42] Deputy President Bartel in *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* [2010] FWA 7891 said at 60:

“At the outset it is appropriate to note that unlike a consideration of the dismissal of an employee of a business that is not a small business employer, the function of FWA is not to determine on the evidence whether there was a valid reason for dismissal. That is, the exercise in the present matter does not involve a finding on the evidence as to whether the applicant did or did not steal the money. The application of the Small Business Fair Dismissal Code involves a determination as to whether there were reasonable grounds on which the respondent reached the view that the applicant’s conduct was serious enough to justify immediate dismissal. As such, the determination is to be based on the knowledge available to the employer at the time of the dismissal, and necessarily involves an assessment of the reasonableness of the steps taken by the employer to gather relevant information on which the decision to dismiss was based.”

[28] Senior Deputy President O’Callaghan in *Harley v Rosecrest Asset Pty Ltd T/A Can Do International* [2011] FWA 3922 at [8] said:

“For an employer to believe on reasonable grounds that the employee’s conduct is sufficiently serious to justify immediate dismissal, it is firstly necessary for the employer to establish that the employer did in fact hold the belief that as a matter of fact that (i) the conduct was by the employee; (ii) the conduct was serious; and (iii) that the conduct justified immediate dismissal. This is to be contrasted to the provisions of s.387(a) where FWA, in determining whether there was a valid reason for the dismissal, must find whether the conduct in fact occurred.

Secondly, it is necessary for the employer to establish that there are reasonable grounds for the employer holding the belief. It is thus necessary for the employer to establish a basis for the belief held which is reasonable. In this regard it would usually be necessary for the employer to establish what inquiries or investigations were made to support a basis for holding the belief. It would also ordinarily be expected that the belief held be put to the employee, even though the grounds for holding it may not be. Failure to make sufficient inquiries or to put the accusation to the employee in many circumstances might lead to a view that there were no reasonable grounds for the belief to be held.”

[43] I note that the Applicant was first dismissed with two weeks’ notice on 9 June 2025. The Applicant agreed to work out the two weeks’ notice. The notice of dismissal was then retracted on 11 June 2025. Effectively, the Applicant’s dismissal with notice was later changed to a summary dismissal.

[44] I understand that the Respondent relies on serious misconduct justifying immediate dismissal. It is necessary to first consider whether the Respondent held a belief that the Applicant had engaged in misconduct. I consider that this leg of *Pinawin* is satisfied. Ms Dai stated in her termination email to the Applicant on 11 June 2025 that she believed the Applicant had engaged in unacceptable and unprofessional behaviour which impacted on the salon’s operation. The Respondent argued that the Applicant’s conduct, in swearing at Ms Reid in front of customers, caused reputational and financial harm to the business, as the salon was required to close early.

[45] It is necessary to examine whether the Respondent had a reasonable basis for believing that the Applicant had engaged in serious misconduct. Ordinarily, the employer would be expected to conduct an investigation prior to terminating the Applicant's employment. In this case, it appears there was no investigation. Ms Dai had a conversation with the Applicant and Ms Reid on 7 June 2025 in which the Applicant claims she promised she would not engage in the alleged behaviour again. However, for the incident on 11 June 2025, it appears Ms Dai simply required the Applicant to leave and then revoked the notice period. As Ms Dai was not actually present for the incident on 11 June 2025, it was not, in my view, reasonable for her to simply rely on Ms Reid's account given to her over the phone. In the cases of workplace arguments, at the very least, the employer should attempt to hear both sides, even through an informal discussion, before making a decision on termination. The Respondent did not have reasonable grounds to believe that the Applicant had engaged in serious misconduct.

[46] I am not satisfied that the Respondent had a reasonable basis for the belief that the Applicant had committed serious misconduct. Accordingly, the dismissal was not in accordance with the Small Business Fair Dismissal Code. I will now consider whether the dismissal was harsh, unjust or unreasonable.

#### **Was the dismissal harsh, unjust or unreasonable?**

[47] Section 387 of the Act provides the criteria and considerations the Commission must take into account when deciding if the dismissal was harsh, unjust or unreasonable. As required by the Act, I consider the following:

***(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);***

[48] A valid reason for dismissal should be "sound, defensible or well founded" and should not be "capricious, fanciful, spiteful or prejudiced."<sup>5</sup> As summarised by Deputy President Asbury in *Smith v Bank of Queensland Ltd* a "dismissal must be a justifiable response to the relevant conduct or issue of capacity".<sup>6</sup> The Commission must consider the entire factual matrix in determining whether an employee's termination was for a valid reason.<sup>7</sup>

[49] The reasons provided for the dismissal, based on the emails of 9 June 2025 and 11 June 2025, include:

- Swearing at the salon manager in front of clients
- Engaging in unprofessional behaviour
- Not signing an employment contract which had been sent to the Applicant two weeks earlier

[50] I will deal with the last reason first. The Respondent argued that not signing an employment contract "left us without any clear agreement or structure moving forward." The Applicant stated that the reason she had not signed at the time of her dismissal was because the contract had a restraint of trade clause which she wanted changed. The Applicant states that she mentioned this during the telephone conversation with Ms Dai on 7 June 2025 and Ms Dai asked for the Applicant to send through the amendments. This reason does not amount to a valid

reason for dismissal. The parties had been working together without a written contract for six months. Further, the Applicant was entitled to properly review the contract before signing.

[51] Not all swearing will amount to a valid reason for dismissal. The behaviour must be considered in context. I do not agree with the Respondent's characterisation that the Applicant's behaviour was serious misconduct justifying summary dismissal. I note the Respondent argues that the words "I hope karma gets you like the cunt you are" were "profane and threatening". I agree that the statement is profane but do not agree that it is threatening. It is an appeal to karmic intervention rather than a threat of anything the Applicant intends to do.

[52] In any case, the Respondent's evidence of what exactly was said on 11 June 2025 is imprecise and seems to be reliant entirely on Ms Reid's evidence. Ms Reid's witness statement is vague and simply refers to the Applicant "bad mouthing" her. I found the Applicant to be a reliable witness. I prefer her evidence that she used words to the effect of "this is bullshit". The Applicant also denies swearing in front of a client. This appears to be consistent with Ms Reid's written statement in which she said that she waited until *after* the client left to tell the Applicant her behaviour was unprofessional. The substantive argument ensued after that.

[53] The Applicant's behaviour of swearing and arguing with Ms Reid was unprofessional. It is not the appropriate way of managing a workplace grievance. However, the Applicant's conduct does not amount to a valid reason for dismissal. The Applicant is only alleged to have engaged in inappropriate behaviour on two shifts. There is no evidence that the Applicant threatened anyone, as opposed to expressing frustration. The appropriate response from the employer would have been a written warning.

[54] I note it was alleged that the Applicant had engaged in solicitation of clients. On the evidence before me, it seems that this relates to the Applicant's comments on 11 June 2025. The Applicant reportedly told a client that she would be working at another salon and the client could rebook with her there. The Respondent alleged that this was unprofessional behaviour. I agree that the Applicant could have behaved more professionally but I also note that this occurred *after* the Applicant had been given her notice of termination. The Applicant could, in my view, tell clients, with whom she has a professional relationship, about where she would be working, especially if the client initiated the conversation.

[55] I find there was no valid reason for dismissal. This weighs in favour of a finding that the dismissal was harsh, unjust or unreasonable.

***(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***

[56] Though there was a telephone conversation on 7 June 2025 about how the Applicant and Ms Reid would work together going forward, this conversation, in my view, did not provide the Applicant with an opportunity to respond to the reasons for dismissal. Particularly considering the Applicant was later summarily dismissed for behaviour which occurred after that conversation took place.

[57] The Applicant was not given an opportunity to respond to the reasons for dismissal. This weighs in favour of finding that the dismissal was harsh, unjust or unreasonable.

*(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and*

[58] There is no evidence that the Applicant requested a support person during the telephone discussion on 7 June 2025. There was no discussion relating to the dismissal after that.

[59] This factor is a neutral consideration.

*(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*

[60] As the Applicant was terminated for misconduct this factor is not relevant.

[61] This factor weighs neutrally.

*(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*

[62] The Respondent is a small business. I find it likely that the size of the business impacted the procedures followed. The Respondent did not follow a standard process in effecting the dismissal. This factor weighs against a finding of unfairness.

*(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*

[63] The Respondent did not have a human resources manager. The lack of expertise in the enterprise did affect the procedures followed. This factor weighs against a finding of unfairness.

*(h) any other matters that the FWC considers relevant.*

[64] A relevant factor I consider is determining whether summary dismissal was a proportionate response to the Applicant’s conduct.<sup>8</sup> The Applicant engaged in inappropriate behaviour. However, the Respondent’s characterisation of the behaviour as “threatening” and serious misconduct is disproportionate. The Applicant had an argument with Ms Reid on two occasions and swore, using the words “this is bullshit”. This is not sufficient to meet the threshold of serious misconduct. I find that the Respondent’s characterisation of the Applicant’s behaviour as serious misconduct was harsh. This weighs in favour of finding that the dismissal was harsh, unjust or unreasonable

## Conclusion

[65] Considering all the factors above, there was no valid reason for dismissal and the dismissal was harsh. Therefore, the Applicant is entitled to an unfair dismissal remedy. I now consider remedy.

## Remedy

[66] Given that I have found that the Applicant's dismissal was unfair, it is necessary to consider the question of remedy. The Applicant has made an application under s. 394 of the Act seeking remedy for unfair dismissal.

[67] Pursuant to section 390 of the Act, this Commission may order:

### **“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.”

[68] The Applicant does not seek reinstatement. Reinstatement would, in my view, be inappropriate given the animosity between the Applicant and Respondent. I note the Applicant's mother's employment with the Respondent ended at the same time as the Applicant's. This also affects the trust and confidence between the parties.

[69] Section 392 sets out the considerations for awarding 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.”

[70] The established approach to assessing compensation in unfair dismissal cases was set out in *Sprigg v Paul Licensed Festival Supermarket*,<sup>9</sup> and has been applied and developed by Full Benches of the Commission.<sup>10</sup>

[71] The assessment of compensation involves a four-step process. however, this is not a substitute for the words in the Act:

“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). I am also required to consider the length of service with the employer<sup>11</sup> and the ability to find a new role as a relevant factor in calculating compensation per s392(2).

Step 2: Deduct monies earned since termination.<sup>12</sup>

Step 3: Discount the remaining amount for contingencies.<sup>13</sup>

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

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).

[72] The Applicant worked with the Respondent (and the previous owner) for approximately eighteen months. Considering the fractious relationship between the Applicant and Ms Reid, I consider it unlikely the Applicant would have remained employed for more than another month had the Applicant not been terminated.

[73] The Applicant averaged a shift of 8 hours each Wednesday and 6 hours every second Saturday. The Applicant’s payslips from prior to the dismissal indicate her base ordinary hourly pay rate was \$38.00 per hour. The hourly pay rate for Saturdays was \$43.00 per hour. Using the Applicant’s payslips, based on this average shift pattern, I calculate that the Applicant would have earned \$1,732.00 gross had she not been terminated.

Step 2: Deduct monies earned since termination.

[74] I make no deductions for failure to mitigate losses in the period of 4 weeks following the dismissal.

Step 3: Discount the remaining amount for contingencies.

[75] I have made no deductions 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.”

[76] In *Bowden v Ottrey Homes Cobram and District Retirement Villages*,<sup>14</sup> the Full Bench noted that in relation to the fourth step, the usual practice is to settle a gross amount and leave taxation for determination. I will leave the issue of taxation for determination by the Respondent.

Viability

[77] No issues of viability were raised by the Respondent.

**Order**

[78] The Respondent is ordered to pay the sum of \$1,732.00 gross plus superannuation within 21 days upon issuing this Order to the Applicant's nominated bank account that was on payroll.



DEPUTY PRESIDENT

*Appearances:*

T Depp for the Applicant

S Dai for the Respondent

*Hearing details:*

7 October

2025

Hearing Via Microsoft Teams

*Final written submissions:*

10 October 2025

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<sup>1</sup> Business Sale Contract, page 7

<sup>2</sup> Digital Hearing Book page 24

<sup>3</sup> Digital Hearing Book at 59

<sup>4</sup> Respondent email to Chambers dated

<sup>5</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>6</sup> [\[2021\] FWC 4](#) at 118.

<sup>7</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWC FB 4185](#), [46], citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, 413.

<sup>8</sup> *Sydney Trains v Hilder* [\[2020\] FWC FB 1373](#) at [32].

<sup>9</sup> (1998) 88 IR 21.

<sup>10</sup> *Bank of Sydney Ltd T/A Bank of Sydney v Repici* [\[2015\] FWC FB 7939](#).

<sup>11</sup> *Fair Work Act 2009* (Cth) s392(2)(b) -(c) and s392(2)(g).

<sup>12</sup> *Ibid* s392(2)(e).

<sup>13</sup> *Ibid* s392(2)(a), (d) and (f).

<sup>14</sup> [\[2013\] FWC FB 431](#)