DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Lester Box
v
Sirrom Co. Pty Limited
(U2025/18868)

COMMISSIONER MATHESON SYDNEY, 22 APRIL 2026

Application for an unfair dismissal remedy – insufficient evidence for finding valid reason – no valid reason for dismissal – applicant unfairly dismissed – no mitigation efforts – compensation ordered

[1] Mr Lester Box (**Applicant**) has made an application to the Fair Work Commission (**Commission**) for an unfair dismissal remedy. The Applicant's former employer and respondent to the application is Sirrom Co. Pty Limited (**Respondent**). The Applicant is seeking financial compensation.[1]

[2] The Applicant commenced employment with the Respondent on 25 September 2024[2] and was dismissed on 26 November 2025.[3] The Applicant made his application on 29 November 2025, within 21 days after the dismissal took effect (ss. 394(2)(a) and 394(2)(a) of the *Fair Work Act 2009* (Cth) (**Act**)). It is not in contest and I find that:

- the Applicant had, at the relevant time, competed a period of employment with the Respondent of at least the minimum employment period (s.382(a));
- a modern award covered the Applicant (s.382(b)(ii)), being the *Cleaning Services Award 2020*;[4]
- immediately prior to the Applicant's dismissal he was earning $3,181 per fortnight;[5]
- the Applicant was a person protected from unfair dismissal (ss.382 and 396(b));
- at the time of the Applicant's dismissal the Respondent was not a small business employer, having employed 262 employees at the relevant time,[6] and the Small Business Fair Dismissal Code is therefore not a relevant consideration in this mater (s.396(c));
- the dismissal was not a case of genuine redundancy (s.396(d)).

[3] A determinative conference was held to deal with the matter on 2 April 2026, and both parties were self-represented. The Applicant filed a witness statement of Stacey Mills, a former employee of the Respondent, however during the determinative conference the Applicant

indicated Ms Mills would not be available to attend the determinative conference to give sworn evidence. The Applicant gave evidence on his own behalf during the determinative conference. The Respondent filed an affidavit of Joni Quintal, another employee of the Respondent. However, during the determinative conference, the Respondent indicated Ms Quintal would not be available to attend the determinative conference to give sworn evidence. The Respondent did not bring any other witnesses in support of its case.

Context

[4] The Applicant was employed as a cleaner on a mining site and commenced his employment with the Respondent on 26 November 2024. Employees of the Respondent, including the Applicant, stayed in employer provided accommodation at the site. Other workers from the mine shared that accommodation.

The gathering on 15 November 2025

[5] On 15 November 2025 a group of employees engaged in a social gathering at the deck, barbeque and pool facilities at the site of the accommodation. The gathering was organised by the Applicant's supervisor, Elizabeth, and was attended by five employees of the Respondent who played music and engaged in drinking.

[6] The gathering started in the barbeque area at around 6.30pm or 7:00pm. The Applicant said the group moved to the pool area at around 8:00pm. During the determinative conference the Applicant said he had between five and six drinks earlier in the night and had another drink or two toward the end of the night. The Respondent indicated that when it had spoken to the Applicant to obtain his account of events, he indicated that he had consumed eight or nine drinks. I do not consider the difference to be material as on either account the Applicant has not denied he was drinking alcohol and acknowledged he consumed multiple drinks in the range of six to nine drinks.

[7] At some stage during the evening, mining workers, who were not employed by the Respondent but also resided in the accommodation, congregated near the gathering after they had returned from the gym.

[8] Toward the end of the evening the Applicant entered the swimming pool with one of the mining workers. The Applicant confirmed during the determinative conference that he was the only employee of the Respondent who did so.

[9] There are site rules in place regarding the accommodation facilities and during the determinative conference the Applicant conceded he was aware of these site rules. There was no rule against drinking outside work hours at the facilities or swimming in the pool however there *is* a site rule that says employees are not allowed to swim naked. The Respondent alleges that the Applicant was naked when he entered the pool and this is in contest.

[10] It was not in contest that employees present, including but not limited to the Applicant remained in the pool area past 10:00pm.

Stand down

[11] On 18 November 2025 the Respondent provided the Applicant with a letter with the subject 'Temporary Notice to Stand Down Pending Workplace Investigation' (**Stand Down Letter**). In that Stand Down Letter it was alleged that on 15 November 2025:

- the Applicant and a male guest jumped into the site pool whilst naked in front of guests and employees;
- the Applicant consumed alcohol after the Respondent's 10:00pm curfew at a bar or deck in the pool area.

[12] The Stand Down Letter indicated that if the allegations were substantiated the conduct would amount to a serious breach of the Respondent's Code of Conduct, Workplace Behaviour Policy and Site Rules. The Applicant was stood down pending an investigation.

Show cause meeting

[13] On 21 November 2025 the Applicant was invited to attend a show cause meeting (**Show Cause Meeting**) to provide his response to the allegations and show cause as to why disciplinary action, up to and including termination of employment, should not be taken.

[14] The Show Cause Meeting took place on 24 November 2025.

Dismissal

[15] On 26 November 2025 the Respondent provided the Applicant with a letter (**Termination Letter**) indicating that during the Show Cause Meeting the Applicant acknowledged that:

- he consumed approximately 8-9 drinks while on site;
- he remained in the deck/pool area after 10:00pm;
- he could not recall if he entered the pool unclothed but was informed the following day that he had done so;
- his judgement was impaired due to alcohol consumption;
- he was aware of the expectations of the Site Village Rules, Code of Conduct and Workplace Behaviour Policy and agreed his behaviour did not meet these standards.

[16] The Termination Letter indicated that:

- the allegations had been substantiated;
- the Applicant's conduct constituted a serious breach of the Code of Conduct, Site Village Rules and Workplace Behaviour Policy;
- entering the pool while intoxicated and naked, in view of guests and employees, posed a significant safety, behavioural, and reputational risk to the Respondent and was considered serious misconduct;
- the Respondent had decided to terminate the Applicant's employment effective immediately.

[17] The Termination Letter indicates that the Respondent considered this to constitute a serious breach of its Code of Conduct, Site Village Rules and Workplace Behaviour Policies.

[18] The dismissal took immediate effect on 26 November 2025.

Site Rules

[19] The Respondent provided a copy of a document entitled 'Centurion Village Rules' (**Site Rules**). The Site Rules state that they were for the "comfort and convenience of all persons using the village", that they "apply to all residents, employees, and unauthorised visitors to the village" and that:

- "Should any resident act in a manner which interferes with the privacy or use or enjoyment of facilities by other residents … management will take disciplinary action that may include termination of employment…"
- "Excessive noise: (after 10pm and before 4:30am) to the point of disturbance to other personnel should be curtailed when requested". Should a resident not comply with the above, further action will be taken which may lead to the withdrawal of accommodation for a period decided by management."
- "Pool / BBQ and deck areas adhere to the same rules as the no excessive noise (10pm -4.30am) hours. Within the pool fenced area the following are prohibited:

    - Alcohol
    - Food
    - Smoking
    - Running and jumping
    - Naked Swimming
    - Glass
    - Food or drink containers".

The Code of Conduct Policy

[20] The Respondent provided a copy of its Code of Conduct Policy that applied at the time of the alleged conduct. While it is unclear what specific aspects of the Code of Conduct Policy the Respondent alleges have been breached the Code of Conduct Policy does state, among other things, that employees have "an obligation and duty of care to:

- behaving (sic) ethically and properly when dealing with all clients and their employees, workplace participants, and members of the public with respect and professionalism
- maintaining and using company and client property with due care and skill maintaining a safe and healthy work environment
- ensuring that all work practices are conducted in a responsible and professional manner, lawfully and with strict observance to the highest standard of propriety, and in accordance with Federal and/or State legislation
- comply with company policies and procedures, and clients' village rules
  …

- behaving and conducting themselves in a manner that does not bring Sirrom into disrepute ".

The Workplace Behaviour Policy

[21] The Respondent provided a copy of its Workplace Behaviour Policy that applied at the time of the alleged conduct. While it is unclear what specific aspects of the Workplace Behaviour Policy the Respondent alleges have been breached the Workplace Behaviour Policy does state, among other things, that:

- it's purpose is to "detail the standards, values and expectations for appropriate behaviour in the workplace, and in particular an employees' obligation to contribute to a safe and pleasant work environment that is free from discrimination, bullying and harassment";
- "All employees and workplace participants are required to demonstrate courtesy, respect and professionalism and abstain from any behaviour, conduct, omission, or act which, in the reasonable opinion of [the Respondent], should not occur in the workplace or in any circumstance connected to their work, including but not limited to:
    - bullying;
    - harassment (in any form);
    - unlawful discrimination (in any form);
    - vilification;
    - occupational violence;
    - victimisation; and/or
    - any other unlawful behaviour.";
- "All employees and workplace participants are expected to:
    - be aware of the impact that their behaviours may have on others
    - treat others with courtesy, respect, and tolerance at all times
    - conduct themselves in an appropriate and professional manner and where possible manage and/or influence the behaviours of others to be of the same standard
    - familiarise themselves with and comply with [the Respondent's] policies, procedures and associated documentation relating to unacceptable workplace behaviours
    - report incidents of inappropriate workplace behaviour and feel safe doing so
    - be familiar with the various forums in which a report can be made
    - not accept offensive, inappropriate, or discriminatory behaviour and take steps to help or provide support
    - comply with reasonable and lawful management direction and/or processes."
- addressing incidents of unacceptable workplace behaviours may include "taking disciplinary action (including counselling) up to and including termination of employment".

[22] While the policy is nonprescriptive, it requires compliance with the Respondent's policies. I also accept that the act of taking clothes off and becoming naked in front of

colleagues and other workers in an employer provided facility would reasonably be considered inappropriate and may result in discomfort for persons observing such conduct. If such conduct has occurred it would, in my view, be in breach of the Workplace Behaviour Policy.

Pre-start meeting on 24 August 2025

[23] A pre-start meeting was held on 24 August 2025. The Respondent filed a copy of a meeting record which indicates the Applicant was in attendance and makes reference to the 'Code of Conduct', 'Workplace Behaviour Policies' and 'Pool access & correct behaviour'. It does not indicate what was said about these topics and this is a matter in contest. It is uncertain as to whether there was any specific discussion about curfew rules and getting in the pool naked given the high-level reference to the documents however in any case, during the determinative conference the Applicant acknowledged that he was aware of the relevant polices and site rules.

Consideration

Section 387(a) - Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[24] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[7] "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."[8]

[25] The Applicant contends his dismissal was unfair because:

- four other employees were drinking past the 10:00pm curfew and he was the only one reprimanded;
- he was not shown evidence of being naked in the swimming pool, he had requested video footage but was told by Human Resources that it was only available through the Respondent's client, and the Respondent relied on hearsay;
- he wasn't the only one in the pool;
- he had been told by a work colleague that he was in the pool for a few minutes but was wearing underwear; and
- he was targeted due to his sexual orientation.[9]

[26] The Respondent submitted that there was a valid reason for dismissal relating to the Applicant's conduct[10]. The Respondent provided a copy of an email sent by the client to the Respondent dated 7 November 2025 in which the client states that it is "formally escalating a serious concern regarding the repeated and unacceptable smoking breaks" being taking by the Applicant and another employee. The Respondent sent a letter to its client dated 10 November 2025 in which it indicates that the Applicant and another employee had acted "in direct violation of both site expectations and [the Respondent's] contractual obligations" and that it would be taking corrective actions including issuing the Applicant with a "first and final warning" and counselling him on the seriousness of the conduct. However, the Respondent did not appear to rely on prior conduct as a basis for the Applicant's dismissal and any concerns regarding

smoking breaks are unrelated to the alleged conduct that ultimately led to the Applicant's dismissal. Rather, the Termination Letter indicates that the Applicant was dismissed because he:

- entered into the site pool naked in the presence of employees; and
- consumed alcohol and remained in the deck/pool area after the approved 10.00pm curfew.

[27] I find that the above reasons were the reasons relied on by the Respondent in dismissing the Applicant and the evidence before the Commission does not establish that the Applicant was targeted due to sexual orientation.

[28] The Respondent submitted that the alleged conduct was inappropriate, unsafe and inconsistent with expected standards in a shared accommodation environment and that the seriousness of the conduct was compounded by:

- the presence of other employees and residents;
- the nature of the behaviour being public nudity; and
- the Applicant's intoxication.[11]

[29] The Respondent submitted that the Applicant was aware of the relevant policies and expectations and on 24 August 2025 attended a pre-start toolbox talk covering the Respondent's Code of Conduct, workplace behaviour expectations, use of shared accommodation facilities and curfew requirements.[12] The Respondent submitted the conduct constituted serious misconduct and provided a sound, defensible and well-founded reason for dismissal.[13]

[30] The materials filed by the Respondent include a document entitled 'HR Incident Report – Pool Area Misconduct' (**Incident Report**) which appears to have been prepared on 17 November 2025 and indicates that the 'Reporting Officer' was the Catering Operations Manager, Terrence.

[31] The Incident Report indicates that on 16 November 2025 a report was received from a representative of the client "regarding an incident that took place the previous evening involving alleged public nudity, excessive intoxication and disorderly behaviour within the accommodation village and pool area". The Incident Report goes on to state that multiple witness interviews were conducted on 16 November 2025 and "several individuals independently identified [the Applicant] as the person who entered the pool without clothing". The Incident Report identifies that the following persons were present:

- Elizabeth, who was the Applicant's supervisor.
- Ms Quintal.
- Ms Miller.
- Janelle.
- The Applicant.
- A guest.
- Additional several other unidentified personnel from Peabody.

[32] Under the heading 'Witness Interviews Fact Finding' the Incident Report indicates that there was an interview with Elizabeth at 6:45pm on 16 November 2025 in which she confirmed that the Applicant had entered the pool naked, but that Elizabeth had declined to provide a written statement because she felt blame for the incident due to her role in organising the party. Elizabeth did not provide direct evidence to the Commission.

[33] The Incident Report indicates that an interview was held with Ms Quintal on 16 November 2025 in which Ms Quintal confirmed that the applicant and a mine worker that was not employed by the Respondent both stripped naked and jumped in the pool. The Respondent also provided a copy of an email dated 22 November 2025 from Ms Quintal which states that the Applicant "stripped off naked and jumped in the pool", that another mining worker "stripped off and jumped in the pool" and that she left not long after as she was "tired and needed sleep". While Ms Quintal did not attend the determinative conference, the Respondent provided a copy of an "Affidavit" from Ms Quintal dated 10 March 2026 and which appears to have been signed in the presence of a Justice of the Peace, and which sets out an account of events consistent with this.

[34] The Incident Report indicates that an interview was held with Ms Miller on 16 November 2025, and she stated that she could not recall whether anyone entered the pool naked. While the Applicant filed a witness statement in respect of Ms Miller, she did not attend the determinative conference. Ms Miller's witness statement indicates:

- four of the Respondent's employees commenced their work Christmas Celebrations at around 7:00pm and this involved enjoying "nibbles and a couple of alcoholic beverages and music" and exchanging gifts;
- in the time she was there she did not witness anyone naked or displaying behaviour that was misconduct;
- on or about her next swing, she saw Ms Quintal receive a letter from Janelle;
- Ms Quintal opened the letter, and it included a handwritten note with words to the effect of "call Terry" with Terry's phone number written on it;
- the next day Ms Quintal contacted Terry via phone in her presence and Terry said words to the effect of "I want you to write a statement saying you were not at the Christmas party and did not witness anything so you will not lose your job. This is to be kept between us."

[35] It seems likely that the reference to "Terry" is a reference to the Catering Operations Manager, Terrence who is identified as the Reporting Officer in the Incident Report.

[36] The Incident Report indicates that an interview was held with Janelle on 16 November 2025 and in that interview, she indicated:

- Music was played until approximately 10:00pm and after the music stopped the Applicant entered the pool.
- The Applicant appeared intoxicated.
- Several men verbally encouraged the Applicant to remove his clothing.
- She did not visually confirm the nudity but indicated that multiple individuals at the table stated the Applicant was naked as they cheered him on.

- The Applicant remained in the pool for an extended period, including time spent on an inflatable air mattress.
- Additional individuals briefly entered the pool.

[37] An email dated 16 November 2025 from Janelle was also provided in which she provided her account of events. In that email the employee indicated:

- she finished work at 9:00pm and walked out to the deck area to have a social drink;
- the Applicant was very ”chirpy” by this time and everyone was chatting and enjoying the music until it stopped at approximately 10:00pm;
- at this stage the Applicant decided to go for a swim and was encouraged by the other men to “strip off” but she “did not look to see if he had” and “according to everyone at the table he was naked”:
- “One of the other boys jumped in for a bit and then 3 boys from the gym came out for a quick swim after their workout as well”
- at this stage she walked home to get another drink and when she came back “both boys” were still there dressed as far as she could tell and everyone slowly started to head off;
- she “understood the issue with the nakedness” and “personally did not wish to see that – but other than that everyone was pretty well behaved.”

[38] While ‘Meeting Notes’ filed by the Respondent record the Show Cause Meeting as occurring on 24 November 2026, this clearly cannot have been the case, and it occurred on 24 November 2025. The Meeting Notes indicate that the Applicant was asked and provided responses to the following questions:

Question:	“It has been reported that you and a guest entered the site pool naked. Did you enter the Pool?”
Response:	“I can’t say, I got told that I did, I remember people coming out of the gym, Janelle brought out pool noodles and the boys started egging us and each other on.”
Question:	“Were you waring clothing or underwear?”
Response:	“Unsure, when I woke up in the morning, I had by (sic) bordies (sic) on my quick dries. I was too drunk to remember.”
Question:	“Were you aware that swimming naked on site is prohibited?”
Response:	“Not sure, but I am now.”
Question:	“What was your decision-making process at that time?”
Response:	“Impaired due to alcohol and being egged on”.
Question:	“How long were you in the pool?”

Response: "I honestly don't know. Females, had their backs to us, Stacey, said know (sic) one seen nothing, you did not do anything silly."

Question: "You stated you were too intoxicated to remember jumping in the pool and naked, but you remember [mining worker] was the guest that jumped in the pool?"

Response: "Um, … yes I think so"

Question: "You stated you were impaired due to alcohol and being egged on, again you stated you were too drunk to remember, but who was egging you on?"

Response: "The miners"

Question: "It has been reported that you were in the deck/pool area after 10pm, which is outside authorised service/amenity hours. Can you confirm what time you were in the pool?"

Response: "After 10 – left around 11pm, I think I can't really remember, yeh I think 11pm".

Question: "Are you aware of the site's curfew rules?"

Response: "Not actual curfew rules, bar shuts at 8.30pm, I didn't know what time the area shuts, miners say 10pm we must be out of that area".

Question: "Have you read the village rules?"

Response: "I'm not sure, yes I think so".

Question: "Are you aware of the safety and behavioural expectations under the Site Access Rules / Code of Conduct / Workplace Behaviour Policy / Camp Rules?"

Response: "Yes"

Question: "Do you believe your behaviour that night was consistent with those expectations?"

Response: "No, I am truly sorry and if anything, I did I apologize".

Question: "Do you acknowledge the potential reputational or safety risk posed by entering a pool while heavily intoxicated or unclothed?"

Response: "Yes"

Question: "Is there anything you would like to add or clarify about the events that occurred that night?"

Response: "No, I believe we have it all, I wish I could remember."

[39] There were four other employees present and it appears the Respondent has interviewed them but there no minutes of those interviews have been provided. I accept they appear to have

been summarised in the Incident Report but the person who prepared the report did not appear as a witness in these proceedings. I observe that it is incorrectly dated November "2026" instead of "2025".

[40] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[14] "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."[15] In *Briginshaw v Briginshaw*[16] the High Court said the "seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences." While this principle does not raise the standard of proof beyond the balance of probabilities, the strength of the evidence needed to establish a fact on the balance of probabilities may vary according to the nature of the conduct alleged. The Respondent alleges that the Applicant engaged in serious wrongdoing and the onus in this case rests on the Respondent to prove, to the Commission's satisfaction, that the misconduct had, in fact, occurred.

[41] As reflected in the Termination Letter, the Respondent alleges that the Applicant "consumed alcohol after the Respondent's 10pm curfew a bar or deck in the pool area". During the determinative conference contends that the Applicant remained in the barbeque or pool areas until approximately 11:00pm[17] which is consistent with what the Respondent has recorded in the Meeting Notes. I do not consider this difference between the parties to be material. Both parties appeared to be under the impression there was a 10:00pm curfew however it is not clear from the evidence that there actually was a curfew that prevented drinking past 10:00pm. Rather the Site Rules deal with 'excessive noise' past 10:00pm, stating:

- "Excessive noise: (after 10pm and before 4:30am) to the point of disturbance to other personnel should be curtailed when requested". Should a resident not comply with the above, further action will be taken which may lead to the withdrawal of accommodation for a period decided by management."
- "Pool / BBQ and deck areas adhere to the same rules as the no excessive noise (10pm -4.30am) hours."

[42] In those circumstances I am not satisfied that drinking past 10:00pm at the facilities amounted to wrongdoing. Further, it is not in contest that other employees were with the Applicant who remained in these areas past 10:00pm and were drinking and these employees were not dismissed. The alleged conduct that distinguishes the Applicant's conduct from that of the other employees present during the gathering on 15 November 2025 is the allegation he got in the pool naked.

[43] If the Applicant engaged in naked swimming, it would be in breach of the Site Rules which clearly prohibit this. As the employees resided at Respondent provided accommodation and used facilities in connection with the accommodation provided by the Respondent, I consider such a requirement to be reasonable and lawful as there is a relevant connection to the

employment relationship. If naked swimming has occurred it would also, in my view, be in breach of the Code of Conduct Policy which requires compliance with "company policies and procedures, and clients' village rules" and the Workplace Behaviour Policy which required compliance with reasonable and lawful management direction and/or processes. The Code of Conduct Policy states that failure to comply with it may lead to disciplinary action including termination of employment. While there was contention about whether these requirements were discussed at the pre-start meeting on 24 August 2025, during the determinative conference the Applicant conceded that he was aware of these Site Rules and relevant policies.

[44] During the proceedings the Applicant asserted he was wearing underwear when he was in the pool. However, during the determinative conference the Applicant did not contest the record of his responses set out in the Respondent's Meeting Notes of the Show Cause Meeting on 24 November 2025 which indicate the Applicant said he did not recall whether he was naked in the pool due to purported intoxication. In his application the Applicant also said his work colleague had told him the next day that he had been in the pool for a few minutes but had his underwear on.[18] During the determinative conference the Applicant said he recalled waking up in his quick dry boardshorts and when he did, they were still wet. The Applicant said he still had his underwear on when he woke, and his board shorts must have been wet because his underpants underneath had been wet.

[45] I consider it unlikely that the Applicant's colleague told him he had his underwear on when he was in the pool, otherwise he would have volunteered this important information during the Show Cause Meeting on 24 November 2025. I did not find the Applicant to be a particularly credible witness in circumstances where he did not recall key information when he participated in the Show Cause Meeting but purported to remember things during his unfair dismissal proceedings.

[46] Despite my reservations around the Applicant's credibility, I consider the evidentiary case of the Respondent to be poor. The person who is said in the Incident Report to have raised the concerns about the Applicant's conduct did not provide any direct evidence to the Commission and it is unclear from the material before the Commission as to how that person or persons raising the concern became aware of the alleged conduct. Despite this, it was not in contest five of the Respondent's employees were present during the events of 15 November 2025. One of those was the Applicant's supervisor, Elizabeth. While the Incident Report recorded that Elizabeth had confirmed the Applicant entered the pool naked, Elizabeth declined to put this in writing and did not give direct evidence during the proceedings. The Catering Operations Manager, who is named as the Reporting Officer in the Incident Report recording Elizabeth's account did not give evidence either. In these circumstances I am unable to attach any significant weight to the statement in the Incident Report, recording Elizabeth's confirmation that the Applicant entered the pool naked.

[47] The Respondent provided an email from Janelle indicating she did not see the Applicant naked in the pool. Peculiarly, it appeared that Janelle told the person who prepared the Incident Report, as recorded in the Incident Report, that the Applicant "remained in the pool for an extended period, including time spent on an inflatable air mattress". It is difficult to understand how Janelle could have observed the Applicant remaining in the pool for an extended period on an inflatable mattress but did not see whether he was naked or not. Janelle was not called as a witness, and her written unsworn accounts are of little assistance.

[48] While the Applicant sought to rely on the evidence of Ms Miller and filed a witness statement setting out her evidence, Ms Miller did not attend the determinative conference to enable her evidence to be tested and while the statement indicates she did not see the Applicant naked in the pool, the statement is of little assistance in identifying whether or not he was naked.

[49] Ms Quintal appears to have at least gone to the trouble of preparing a statement and having that statement attested before a Justice of the Peace in which she indicated that the Applicant was naked in the pool. Ms Quintal was the only actual witness the Respondent sought to rely on, but Ms Quintal did not attend the determinative conference to enable her evidence to be tested under oath or affirmation. This is problematic in circumstances where there is a direct conflict between the Applicant and Ms Quintal about whether the Applicant engaged in the conduct alleged.

[50] There is a deficit of direct evidence from three of the four other employees alleged to have been witnesses to the events of 15 November 2025. It is recorded in an Incident Report prepared by a Catering Operations Manager that Elizabeth confirmed the Applicant was naked in the pool but there is no direct account from Elizabeth in the form of a statement of otherwise. The Respondent's sole witness did not appear in the proceedings to enable their evidence to be tested in relation to a material contested fact. The only person who appeared in the proceedings to give direct evidence and enable his evidence to be tested was the Applicant. The Applicant maintained he was wearing underwear, his explanation being that he woke up in wet boardshorts. While he may have recalled this after he provided his account of events to the Respondent, I attach more weight to his sworn evidence than that of the purported accounts of the people who did not appear at the determinative conference and whose evidence was unable to be tested in circumstances where there was a contest about a material fact. The Respondent's poor evidentiary case does not support a finding that he was naked in the pool. In these circumstances, I am unable to reach a firm conclusion, on the balance of probabilities that the alleged conduct occurred. On this basis I am unable to conclude that there was a valid reason for the dismissal.

Section 387(b) - Was the Applicant notified of 'that reason'?

[51] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[19]

[52] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[20]

Section 387(c) – Was the Applicant given an opportunity to respond to any reason related to his capacity or conduct?

[53] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[21]

Section 387(d) – Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at any discussions relating to the dismissal?

[54] The Respondent went through a show cause process and invited the Applicant to have a support person of his choice present at the Show Cause Meeting. The Applicant took up that invitation. In the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Section 387(e) – If the dismissal related to unsatisfactory performance by the applicant, had the Applicant been warned about that unsatisfactory performance before the dismissal?

[55] The dismissal did not relate to unsatisfactory performance. Section 387(e) of the Act is not a relevant consideration in the context of the dismissal.

Section 387(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

[56] The Respondent's response to the application indicates the Respondent employed 262 employees at the relevant time. Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

Section 387(g) – The degree to which the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[57] The documents filed with the Commission suggest representatives from the Respondent's human resources team were involved in the disciplinary process I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise.

Section 387(h) – What other matters are relevant?

[58] The Respondent submitted that the Applicant's conduct in a shared accommodation environment, where maintaining appropriate standards or behaviour is critical to safety, employee impact and wellbeing and workplace standards. It submitted that the Applicant's alleged inability to recall events due to intoxication does not mitigate the seriousness of the conduct. However, in circumstances where the alleged conduct has not been made out, I do not consider these matters to be relevant.

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

[59] I have made findings in relation to each matter specified in section 387 as relevant.

[60] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[22]

[61] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was unjust and unreasonable because the conduct

alleged has not been proven on the balance of probabilities and this is a matter that carries significant weight.

Remedy

[62] Being satisfied that the Applicant:

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

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

[63] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[64] The Applicant did not seek reinstatement and confirmed during the determinative conference that did not want to return to the Respondent's employment. In such circumstances, "the Applicant's disposition is a sure guide to the Commission as to whether or not it would be appropriate to reinstate or re-employ the Applicant. To act contrary to the Applicant's desired position in this respect would be to give effect to an order that may not yield a productive or cooperative workplace."[23] I am satisfied that reinstatement of the Applicant is inappropriate.

Compensation as a potential remedy

[65] In circumstances where reinstatement is inappropriate the only available remedy is compensation. 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 an application in lieu of reinstatement including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant 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 the Applicant 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.

Viability (s.392(2)(a))

[66] There is no evidence to establish that an order for compensation would not have an effect on the viability of the employer's enterprise, and I find it would have no such effect.

Length of service (s.392(2)(b))

[67] The Applicant had been employed by the Respondent for a year and two months when he was dismissed. This is not a lengthy period, and I consider it does not support reducing or increasing the amount of compensation ordered.

Remuneration received, or likely to be received (s.392(2)(c))

[68] The evidence in this regard is limited however and does not in my view support a finding that the Applicant's employment would have ended in the near future but for the dismissal. I consider that it is likely that the Applicant's employment would have continued for a period of six months.

Mitigation efforts (s.392(2)(d))

[69] The Applicant was dismissed in November 2025 and during the determinative conference in April 2026 the Applicant indicated that he had not tried to look for work because he thought he would wait and see what happened with his application and that he remained unemployed.

[70] In these circumstances I find the Applicant has not taken reasonable steps to minimise the impact of the dismissal for since his dismissal on 26 November 2025 and nor is he likely to while the decision remains pending. I consider that this warrants a substantial reduction in the compensation that might otherwise be ordered.

Remuneration earned and income likely to be earned (s.392(2)(e) and (f))

[71] As noted above, the Applicant said he had not looked for or secured alternative work as he thought he would wait and see what happened with his unfair dismissal application. I am satisfied the Applicant has not earned any remuneration since his dismissal and on account of such inactivity find that it is unlikely he will earn any income during the period between the making of the order for compensation and the actual compensation.

Other relevant matters (s.392(2)(g))

[72] I do not consider that there are any other matters relevant and do not consider it necessary to adjust the amount of compensation for 'contingencies', or factors that that might otherwise have affected the Applicant's earning capacity.

Misconduct (s.392(3))

[73] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by section 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct. I was unable to find that the Applicant engaged in misconduct that contributed to the Respondent's decision to dismiss him.

Conclusion regarding remedy

[74] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be $41,353 on the basis of my finding that the Applicant would likely have remained in employment for a further period of six months. I have found that the Applicant did not earn any remuneration since his dismissal and nor was he reasonably likely to earn any between the making of the order for compensation and the payment of compensation, particularly as he had not been looking for another job. I do not consider it necessary to adjust the amount of compensation for 'contingencies' or factors that that might otherwise have affected the Applicant's earning capacity.

[75] However, the Applicant has not, since his dismissal, taken any steps to mitigate his loss, and I consider that he was unlikely to do so up until the date of this decision given his admission that he wanted to wait and see what happened with his application. I have considered whether it is appropriate in the circumstances for any compensation to be ordered. 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.[24] However the Applicant's explanation for not looking for a job is not a reasonable one, particularly in circumstances where he did not wish to return to the employment of the Respondent and was instead seeking compensation. While the Applicant was unlikely to have secured new employment immediately, had he made reasonable efforts to look for another job, he would have likely found one in the cleaning industry where jobs are routinely advertised. I estimate this would have occurred within six weeks of his employment ending. In those circumstances, I consider it appropriate to limit the amount of compensation to the six-week period of unemployment where the Applicant's loss is attributable to the dismissal rather than his failure to take any steps to mitigate his loss, including by failing to search for alternative employment. During the six-week period immediately following his dismissal the Applicant would have earned $9,543 (based on $3,181 per fortnight). In all the circumstances, I consider that an order for payment of $9,543 in compensation is appropriate and I do not consider it would be appropriate to award more. The amount of compensation does not include a component for shock, distress or humiliation, or other analogous hurt (s.392(4)).

[76] I will order payment of this amount to the Applicant within 28 days of the decision and issue that order separately.

COMMISSIONER

Appearances:

L Box, the Applicant.
T Hill, for the Respondent.

Hearing details:

2026.
By video using Microsoft Teams.
2 April.

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[1] Applicant's Unfair Dismissal Application Form F2, response to q. 3.1.

[2] Applicant's Unfair Dismissal Application Form F2, response to q. 1.1.

[3] Applicant's Unfair Dismissal Application Form F2, response to q. 1.3; Respondent's Form F3 – Employer response to unfair dismissal application, response to q. 1.4.

[4] Respondent's Form F3 – Employer response to unfair dismissal application, response to q. 1.1.

[5] Respondent's Form F3 – Employer response to unfair dismissal application, response to q. 1.5.

[6] Respondent's Form F3 – Employer response to unfair dismissal application, response to q. 1.7.

[7] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[8] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[9] Applicant's Unfair Dismissal Application Form F2, response to q. 2.1.

[10] Respondent's Submissions, 3.1.

[11] Respondent's Submissions, 3.3 – 3.4.

[12] Respondent's Submissions, 4.1 – 4.2.

[13] Respondent's Submissions, 7.1.

[14] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[15] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[16] [1938] HCA 34.

[17] Form F3 – Employer response to unfair dismissal application, response to q. 3.1.

[18] Unfair dismissal application Form F2, response to q. 2.1.

[19] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[20] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[21] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[22] *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 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

[23] *Taylor v C-Tech Laser Pty Ltd* [2013] FWC 8732, [58].

[24] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].