



# DECISION

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

**Serena Donato & Emma Donato**

v

**Queensland Venue Co Pty Ltd**  
(U2025/12023 & U2025/11925)

COMMISSIONER SIMPSON

BRISBANE, 5 FEBRUARY 2026

*Applications for unfair dismissal remedies – summary dismissal – Applicant dismissed for placing objects in the workplace – Applicants dismissed for alleged bullying behaviour – dismissal harsh, unjust and unreasonable – no valid reason – no bullying conduct – compensation ordered.*

[1] On 21 and 22 July 2025, Mrs Serena Donato (**S Donato**) and Mrs Emma Donato (**E Donato**) (together **the Applicants**) applied to the Fair Work Commission (**the Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**the Act**) for an unfair dismissal remedy, alleging they were both unfairly dismissed from their employment with Queensland Venue Co Pty Ltd (**the Respondent**). The matter was listed for hearing on 26 November 2025. Directions were issued for the filing of submissions and parties filed further material.

[2] Ms Melissa Butters from the Queensland Hotels Association appeared on behalf of the Respondent, and the Applicants appeared on their own behalf.

[3] Both the statement of E Donato<sup>1</sup> and the statement of S Donato<sup>2</sup> dated 3 November 2025 were admitted into evidence. In addition, a witness statement from Mr Brady Sionetali dated 3 November 2025 was admitted into evidence.<sup>3</sup> Mr Sionetali was not required for cross examination.

[4] The statements of Mr Damien Tyler, Head Chef;<sup>4</sup> Ms Claire Maskill, Venue Manager;<sup>5</sup> Mr Scott Vickers, Regional Manager<sup>6</sup> were admitted into evidence and those witnesses were not required for cross examination.

[5] Ms Jacqueline Griffin, National People and Culture Manager provided a witness of 17 November 2025<sup>7</sup> for the Respondent.

## **Background and Evidence**

[6] On or around 20 November 2023, E Donato commenced her employment as a Duty Manager. In June 2025, she transferred to Cleveland Sands Hotel.

[7] On or around 27 November 2023, S Donato commenced her employment, and at the relevant time was a Food and Beverage Supervisor at Mansfield Tavern Hotel.

[8] Around February 2025, S Donato was invited to an Instagram group chat comprising of current and former Cleveland Sands Hotel employees.

[9] The subject of the Incident was a Manager at Cleveland Sands (**the Complainant**).

[10] The Respondent asserted that E Donato's relationship with the Complainant was purely professional. The Respondent asserted that S Donato's relationship with the Complainant was strained.

[11] The Respondent contended S Donato previously worked within the relevant venue, where there had been a recent workplace conflict that arose between her and the Complainant which required management intervention.

[12] The Respondent said shortly before the incident, the Complainant approached the Regional Manager, Mr Scott Vickers and reported difficulties with staff at the venue. The Respondent submitted the Complainant described staff being dismissive of her reasonable management instructions, being openly insubordinate (including eye-rolling, mocking and snickering at her) and resistant to lawful and reasonable directions inherent to her role as Manager. Mr Vickers provided advice on addressing this behaviour.

### ***The incident***

[13] For approximately one to two weeks prior to the incident, E Donato said that, as a light-hearted gesture, she placed small rubber ducks around the venue in staff areas. Another involved employee submitted the purpose was for the Complainant to come across or otherwise search for these rubber ducks. He said this continued as a running joke between E Donato and the Complainant over the course of several weeks.

[14] On the evening of 3 July 2025, E Donato arranged a small display involving rubber ducks and a hand-drawn pentagram on the Complainant's desk (**the Incident**). Amongst the various descriptions of this, it was referred to it as "ducks engaged in a summoning ritual to summon more ducks" and E Donato said she intended to bring in a larger duck the following day as the 'product' of the spell.

[15] At 11.36am on 4 July 2025, the Complainant submitted a formal complaint to her Venue Managers Mr Procopis and Ms Zoe Sepesiova and to Mr Vickers. Attached to her complaint was a photograph of a pentagram surrounded by plastic ducks and paper candles placed on her desk. The Complainant wrote:

"I have just arrived to work to find the attached picture on my desk.

No matter if it seems funny with the duckies, it is a symbol evoking the devil. I have past experiences that terrify me of these ritualistic actions, but I'm sure it would upset anyone".

[16] The Respondent submitted the Complainant was highly distressed by the discovery, raising immediate concerns regarding her mental state and the impact on her health and safety. At that time, the Complainant was not aware of who was responsible for the pentagram and associated items on her desk.

[17] Mr Procopis immediately commenced an investigation into the complaint. During the investigation the Complainant stated, “I did not know what I was going to see the next day, was it going to be a rubber duck hanging on a noose?”.

[18] Mr Procopis reviewed the roster for the preceding shift and reviewed the CCTV. The investigation identified E Donato and another employee as responsible for staging the scene, which had been done during paid work time.

### *Relationships between parties*

[19] Mr Procopis informed Ms Griffin that, while he was unaware of any conflict between E Donato and the Complainant, he was aware S Donato had allegedly previously experienced several interpersonal conflicts with the Complainant which required him to act as a mediator from time to time. Mr Procopis, Ms Griffin and Ms Sepesiova, another Venue Manager, discussed whether this background may have informed the motivation for the incident, noting E Donato had only been employed for two weeks and they believed had no positive friendship or meaningful relationship with the Complainant.

[20] E Donato said her relationship with the Complainant was cordial and friendly and extended to a level of personal familiarity beyond casual acquaintance. E Donato was asked about her comment in attachment G to her statement and the reference to “difficult dynamics”. E Donato said this was in reference to difficulty the Complainant had had with others. E Donato was referred to the evidence of Mr Vickers where he said that the Complainant had expressed to him concerns about her treatment by staff.

[21] E Donato refuted that the placing of the ducks around the workplace was specifically directed at the Complainant and there were ducks in every area of the venue. It was only on the night of July that it was directed at the Complainant. E Donato said she did not recall any staff mocking the Complainant. E Donato said the only staff aware of the placing of the ducks around the venue were staff who asked her directly about it.

[22] S Donato said her working relationship with the Complainant was quite strong and she enjoyed working with her. S Donato said she had worked with the Complainant for 6 months, their shifts crossed over almost always, and they often worked together closely. Her evidence was they had spoken numerous times about ‘occult’ or new-age topics, such as astrology, tarot and the paranormal. S Donato rejected there was conflict between herself and the Complainant.

[23] During cross examination of Ms Griffin, S Donato asked on what basis or evidence did the Respondent reach the conclusion that S Donato had been in conflict with the Complainant, as she said she had never been asked about the alleged conflicts or been subject to meetings or warnings regarding the alleged conflict.

[24] Ms Griffin maintained that she was made aware of the conflict as she is with any small conflict within the venues, and it was usual for them to be managed informally. Ms Griffin could not point to any further specific information as to the alleged conflict or how the theory that E Donato must have been acting against the Complainant due to the conflict between them. Ms Griffin accepted she did not have evidence of it.

***Post incident***

[25] E Donato said she was led to believe the Complainant stated she felt targeted and threatened. E Donato said on 4 July 2025, the Complainant and her worked a shift together without issue. Although rumours about the ducks had circulated, E Donato said she was never approached by management or HR. E Donato asked Ms Griffin why, if it was believed the Complainants safety was at risk, she was allowed to work the following day and not suspended. Ms Griffin it was not her decision however she believed it was because there was no cross over between E Donato and the Complainant that day.

[26] On 6 July 2025, E Donato said a coworker sent her a message telling her that he was required to attend a meeting with HR regarding the incident. E Donato said she texted her Venue Manager asking if she needed to contact HR as well. The Venue Manager responded that E Donato did not need to make contact and HR would email her to arrange a chat. E Donato attended work on that day with no issues. E Donato observed that the Complainant displayed no signs of discomfort or hostility toward her. Based on workplace rumours that the Complainant had spoken to HR, E Donato said she avoided discussing the matter with her directly without a witness present.

[27] On 6 July 2025, S Donato had heard that the incident had “gone to HR”, however did not know or understand the scope and did not realise that someone had felt targeted and had become distressed. S Donato said she believed that a Regional Manager or other person had seen the Incident, which may have prompted an investigation.

[28] On 6 July 2025, S Donato sent a message in the Instagram group chat asking for clarification about the incident. E Donato is not a part of this group. When the conversation became no longer respectful, S Donato said she attempted to stop the conversation in a manner which would draw attention from the person affected and place the attention on to her wife. S Donato said the Respondent deemed her messages were sent in an attempt to mock, ridicule and further embarrass the Complainant, as well as concealing the involvement/identity of her wife in the incident.

[29] On 7 July 2025, the Complainant informed Ms Griffin a subordinate employee had shared with her that there existed a group chat among current and former employees and that they were mocking the Complainant about the pentagram incident in it.

[30] The messages sent by S Donato in the course of this group chat read as follows:

- “Alright I have to ask: who knows what about the aftermath of the ducks LMFAAAOOOO”
- “surely not omg”
- “chat is this real life”
- “holy moly \*deletes self\*”

- “WELP”
- “How do you guys even find this shit out haha”
- “Maybe needless to say, Emma’s spooked and it’d be real cool if it didn’t get gossiped about at worrrkkk I beg I beg”
- “Phew okay, also like respect for the other person. I shouldn’t have asked but wanted to know what you guys know bc im scared [left finger emoji, right finger emoji]”
- “Sands really seems like the kiss of death for people huh [laughing crying emoji]”
- “You could write the avc gossip column I stg you know everything”

[31] Screenshots provided by the employee showed what the Respondent deemed ‘an inappropriate conversation’ occurring on 6 July 2025 about the Complainant’s distress in response to the incident. The Respondent said a user that was reasonably suspected to be S Donato initiated and actively participated in the mockery.

[32] On 7 July 2025, E Donato received a Letter of Allegation from the Venue Manager by email for a meeting on 9 July 2025.

[33] On 8 July 2025, E Donato had not been told to stand down and was still expected to work her shift, however, took mental health leave as she said she was experiencing extreme anxiety.

[34] On 8 July 2025, S Donato received a phone call from Ms Griffin to inform her that the company had become aware of the messages in the Instagram chat and that she would be receiving a Letter of Allegation and was told not to attend her rostered shift that day.

[35] On 8 July 2025, S Donato was issued a letter by email titled “Notice of Allegations and Request to Attend Meeting” and a meeting scheduled for 9 July 2025.

[36] At S Donato’s meeting at 11:00am on 9 July 2025, she read out a pre-written statement, before answering a series of questions. She said the transcript shows a number of inappropriate comments made to her, about her and to prejudice her. S Donato said she was not asked any questions about her relationship with the Complainant or the relationships between herself and any of her coworkers. She said there was no attempt to establish if there was a pattern of behaviour.

[37] Ms S Donato asked Ms Griffin during cross examination why she was asked no questions about her relationship with the Complainant in this meeting (in the context of it being an alleged motive to bully). Ms Griffin said from her perspective S Donato’s relationship with the Complainant would not be given the weight it was with E Donato. Ms Griffin accepted it was relevant in S Donato’s case but not to the same degree as E Donato’s case.

[38] Ms Griffin was referred to her evidence where she said the Complainant had called her and wanted to be involved in the disciplinary discussions with whoever was allegedly responsible so she could speak to them directly about the impact on her. Ms Griffin said she declined this as she did not believe it would be appropriate. Ms Griffin said the victim should be kept separately so the investigation is impartial.

[39] It was put to Ms Griffin that this could have provided an opportunity for conciliation. Ms Griffin said the conduct was too severe to engage in mediation or conciliation and it had to be addressed as misconduct.

[40] It was put to Ms Griffin that if it was inappropriate for the Complainant to have communication with E Donato or S Donato why would it not have been inappropriate for S Donato to approach the Complainant. Ms Griffin said she did not direct the Complainant to not contact either of them, and E Donato had the opportunity to speak to the Complainant the day before.

[41] Ms Griffin said if the parties had independently resolved the matter it may have influenced the decision, however there were no movements there. It seemed from Ms Griffin's evidence that it was possible S Donato would not have been dismissed had she apologised to the Complainant on the day immediately following the chat occurring on the Sunday.

[42] S Donato asked Ms Griffin how it could be interpreted that she was mocking the Complainant (by raising the incident in the group chat). Ms Griffin said it is reflective of the entire conversation. Ms Griffin was asking whether she accepted S Donato did not know about the Complainant's reaction at the time she made the initial comment in the group chat. Ms Griffin said she thought it was unlikely.

[43] S Donato said the Respondent made a number of inappropriate comments and displayed a number of inappropriate behaviours during the disciplinary meeting, evidenced in the transcript of the meeting, such as:

- Asking her multiple questions in succession without giving her a chance to respond;
- Cutting her off whilst she was speaking during the meeting;
- Asking if she had apologised to the Complainant or reached out to her, without considering whether this was appropriate, considering whether she knew if the Complainant had seen the messages or not, or considering the lapse of time between events;
- Making false statements to make the situation appear worse, for example when discussing how serious this matter was, stating as a fact "so you've known for a number of days now", and disregarding her correction of "it hasn't been a number of days, it's been one day";
- Stating that half the people in the group chat had been terminated for misconduct – as if she should have known that, when there was no way for her to have known;
- Stating in a prosecutorial manner that this was "an extremely toxic group chat. And that's what it is, it's toxic. The entire chat is toxic. And it's bullying", without giving her a chance to respond further; eg. Stating "what I want to understand now is substantiate what the intentions were, because that's a really key part of this" – suggesting that Ms Griffin's interpretation of what S Donato's intentions were is what would determine the outcome – which is completely unjust;
- Ignoring her response of "My intentions genuinely, I mean I've told you...I don't know how much more I can stress that I genuinely did not understand...the context around it" without any acknowledgement, but instead, immediately moving on to further questioning;

- Making the meeting so uncomfortable that at one point, she stopped talking as she felt as though she was not being listened to;
- Stating that her intentions were very clearly malicious – without any proof of such or even reasonable grounds to suggest that, simply stating in support “it’s all right here in front of me” and ignoring her response that there was no malicious intent;
- Making inappropriate comments such as “You’re a ‘92 baby...You’re too old to be, you know, in these group chats”. S Donato was unclear why her age was relevant to the allegations.
- Dismissing her concerns that “[Cleveland] Sands is an extremely isolating place and very hard to work at”, and stating, “I can see why it’s hard if this is the type of culture in the workplace”, then in response to comment that this isn’t the culture, stating “well, obviously it is”.

[44] The meeting broke for 15 minutes for deliberation, before reconvening for Ms Griffin to deliver an outcome of dismissal.

[45] Later, on 9 July 2025, S Donato was issued with a termination letter effective immediately. The reason given in the letter was:

“We refer to our recent meeting in relation to substantiated allegations against you regarding your conduct. Specifically engaging in a significant act of misconduct. To your own admission, you participated in a group chat which consisted of approximately 30 former and current employees. In this chat you initiated discussion regarding acts of bullying conducted by your partner Emma Donato, laughed in response to the victim’s negative reaction to the act and encouraged members of the chat not to discuss the matter in the workplace with the intention of preventing Emma’s misconduct from being identified.

In consideration of your position as a supervisor, your actions have the potential to cause significant psychological harm and is not aligned with your obligation to contribute to a respectful workplace free from bullying, harassment and unreasonable behaviour.”

[46] At 1:42pm on 9 July 2025, E Donato sent the Complainant a text message apology.

[47] E Donato agreed that during her disciplinary meeting she accepted she became aware on the Sunday that the Complainant had not reacted well. It was put to E Donato that she did not apologise at that time. E Donato said that she did not feel it was appropriate to approach the Complainant when it was rumours at the time and she had not received any contact from HR representatives, or a credible source. E Donato was pressed on why did not contact the Complainant and explain it was just a joke. E Donato responded that the Complainants attitude on the day they did work together displayed no signs of distress whatsoever and she continued conversations as normal.

[48] At E Donato’s meeting at 2:00pm on 9 July 2025, it was noted that she had sent the Complainant a brief text apology prior to the meeting, expressing regret if the incident had caused the Complainant psychological harm. E Donato said Ms Griffin commented that she had not reviewed the matter since receiving the initial report on 4 July 2025 and asserted (without asking E Donato) that E Donato only sent the apology after knowing her wife was terminated.

E Donato said the Respondent accused her of breaching confidentiality and asserted again that they know the intent behind her actions – without asking her or giving her a chance to respond.

[49] E Donato put to Ms Griffin that she was asked in her termination meeting why she did not reach out to the Complainant earlier to apologise, and also referred Ms Griffin to her written statement at paragraph 8.67 where it is said the Respondent took into account not making any attempt to identify themselves or explain their actions prior to the Company’s intervention in an attempt to protect E Donato from being identified. E Donato asked how the Respondent arrived at that judgement. Ms Griffin said she was satisfied E Donato had the opportunity on the Sunday after the incident to approach the Complainant which she didn’t take.

[50] E Donato asked Ms Griffin how she concluded E Donato’s apology was not made in good faith. Ms Griffin said it was the timing, and the wording of the apology. Ms Griffin read the email apology during her evidence which was as follows:

“Hey sorry this hasn’t come sooner; I have been unsure whether it was appropriate to chat until this had all been concluded. If I brought you genuine distress or hurt, I truly apologise. This was meant to be a joke; a slightly bigger duck would appear the shift I was on I would be leaving the tiny ducks around the venue for the past week assuming you noticed them. Again, I am sorry for rattling you.”

[51] Ms Griffin referred to the wording “If I brought you genuine distress...” in the apology and said by that time E Donato was confident the Complainant had suffered distress and this led to her cynicism about the apology.

[52] E Donato asked Ms Griffin if she believed it would have been appropriate for her to reach out to the Complainant without Ms Griffin or HR’s knowledge and Ms Griffin responded yes. It was put to Ms Griffin that could have aggravated the situation. Ms Griffin did not initially accept that. Ms Griffin said that would be an assumption on her part.

[53] E Donato referred Ms Griffin to her statement at paragraph 8.68 and the conclusion that E Donato had engaged in repeated unreasonable behaviour toward the Complainant, firstly by leaving the ducks only in the Complainant’s work area without telling the Complainant. Ms Griffin was asked if she searched all the other workspaces in the venue. Ms Griffin said she searched the upstairs office with another employee, and the other employee also said she had not seen any other ducks.

[54] It was put to Ms Griffin that ducks were placed in other areas, and she said Mr Tyler found one in his in tray on his desk.

[55] During E Donato’s disciplinary meeting, she read out a prepared written response to the allegations. She said she clearly explained that her intentions were not malicious, that she did not expect to cause harm to her coworker, and profusely apologised for causing harm. E Donato said she requested to mediate with her coworker and formally apologise. However, the request was denied. E Donato said she suggested a venue transfer, however that was also denied.

[56] E Donato’s statement included the following:

- “I want to state clearly that I did not intend to offend, threaten, or cause any harm to [the Complainant] or anyone else with the rubber duck display. It was meant as a harmless prank — a light-hearted, silly gesture inspired by plastic ducks I found in a discount store. These ducks were placed around the venue over the course of a week, in various locations, as a playful attempt to lift morale during a period that has felt increasingly stressful and isolating. This was meant to be a practical joke for the whole team.”
- “I regret that it has been misinterpreted in such a serious way, and regret not thinking more critically about how this might be received.”
- “To be clear, I have never had a malicious or hostile relationship with [the Complainant].”
- “At no point was anything meant to reference offensive symbolism.”
- “I understand that perception matters and that workplace culture should always feel safe and inclusive. I take full responsibility for the fact that this action has not been received in the way I intended. That said, I respectfully ask that you also consider my previously clean record, my commitment to building strong working relationships, and the emotional toll this workplace takes on staff, including myself.”

[57] Following a short break in the meeting, E Donato was informed that leaving ducks around the venue had allegedly made the Complainant the “butt of a joke,” and that her apology was viewed as insincere due to her wife’s concurrent dismissal and they did not find the message genuine. E Donato said her wife’s unrelated case was referenced multiple times during the meeting. Additionally, E Donato said Ms Griffin again brought up the group chat as a reason to terminate her employment – despite her not even being in it. Ms Griffin also mentioned that the Complainant has “a history of mental health” and cut E Donato off when she was replying to let Ms Griffin know that she wasn’t ever privy to that.

[58] Later, on 9 July 2025, E Donato was issued with a termination letter effective immediately. The reason given in the letter was:

“We refer to our recent meeting in relation to substantiated allegations against you regarding your conduct. Specifically engaging in a significant act of misconduct and bullying. To your own admission, you proceeded to place small ducks in and around the workstation of a fellow manager. Unbeknownst to this manager you promoted this prank amongst multiple subordinate employees before escalating the prank to the point of placing a grossly offensive symbol on the desk of this colleague. This matter continued to escalate amongst subordinate employees with no genuine effort observed by you to rectify or remedy the situation.

In consideration of your position as an experienced manager, your actions have the potential to cause significant psychological harm and is not aligned with your obligation to contribute to a respectful workplace free from bullying, harassment and unreasonable behaviour.”

### ***Complainant actions since Applicant dismissed***

[59] On 11 August 2025, the Applicants noted that the Complainant publicly posted that she obtained a new tattoo of the very pentagram shape that she and the Respondent claim to have caused her distress.

[60] The Applicants submitted it could be suggested that by the Respondent's reasoning that the Complainant now displaying such a 'dangerous' occultist symbol itself would constitute a severe threat to workplace health and safety.

[61] Further, the Applicants noted that the Complainant worked at an event on 23 August 2025 titled "Necrosonic" at a sister venue, Mansfield Tavern. This event heavily featured a pentagram in its marketing. They said this called into question the offense claimed to have been taken over the incident.

### **Relevant legislation**

[62] Section 387 of the Act sets out the considerations when considering if a dismissal was harsh, unjust or unreasonable:

#### **"387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

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

## Submissions

### *Workplace bullying*

[63] The Respondent asserted that there was a valid reason for the Applicants' dismissal relating to the Applicants' capacity or conduct (including its effect on the safety and welfare of other employees). It submitted the standard of evidence is met in the circumstances of CCTV evidence, screenshots of messages and the Applicants' own admissions.

[64] The Respondent said the Applicants were both terminated for serious misconduct as defined in the Fair Work Regulations.

[65] It said the Full Bench has clarified that 'the criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s. 387(a) (although a finding that misconduct of the type described might well ground a conclusion that there is a valid reason for dismissal based on the employee's conduct).'<sup>8</sup>

[66] The Respondent noted workplace bullying presents a clear health and safety risk because it can cause psychological and physical harm, irrespective of intent.<sup>9</sup> The Respondent said it has a statutory and common law obligation to ensure a safe system of work for its employees. It cannot reasonably be expected to retain the Applicants' employment in circumstances where they'd already received payment for bullying another worker on paid work time, where their conduct posed a serious risk to the Complainant's wellbeing.

[67] Prima facie, it was of the view the conduct in question was serious and provided a lawful basis for summary dismissal. In such circumstances, continued employment during a notice period would have been unreasonable.

[68] The Respondent continued, saying the Applicants' conduct contravened its Equal Opportunity, Diversity & Inclusion Policy, which provides for the following examples of workplace bullying in cl. 3.4(e):

- Gossiping and sharing private and/or negative information/misinformation about employees to others.
- Posting photos or making comments on social media about another employee.
- Excluding or isolating employees.
- Teasing, practical jokes or initiation ceremonies.

[69] The Respondent said it is not unusual in workplace bullying matters for the target initially to attempt to ignore the behaviour. The Complainant discovered small plastic ducks in her work area, was puzzled and continued working. Unknown to her, staff were laughing at her behind her back. Bullying conduct often escalates and creates a hostile working environment and poor working relationships, which the Complainant reported to her Regional Manager before the pentagram incident.

[70] The Respondent submitted the evidence and the Applicants' own admissions confirm that a running joke existed among staff – excluding the Complainant and allegedly directed at

her – involving the placement of the ducks for her to find and staff, including E Donato found this amusing. The conduct then escalated to the serious pentagram incident.

[71] The Respondent contended that when the Complainant finally exhibited distress, the participants mocked her in both the group chat and in discussions outside of it.

[72] The Respondent was of the view that at that point, any of the participants could have contacted the Complainant, explained what had happened, what their intentions were and to apologise profusely. They did not do so. Instead, they continued to mock her behind her back. It said, E Donato's eventual apology occurred only after she received her letter of allegation and learned of the others' dismissals. The Respondent submitted it should be forgiven for forming the view that the apology was less than genuine by that time.

[73] The Respondent continued, noting intent is not determinative. Even absent an intention to cause harm (which it does not concede in these matters), conduct may still constitute bullying if a reasonable person would anticipate that it could cause offence, humiliation or intimidation. The Respondent said it was entirely foreseeable that a pattern of conduct encouraging staff to laugh at the Complainant behind her back could humiliate her. It is the impact on the victim's health and safety – not the perpetrator's claimed motive – that is the critical consideration.<sup>10</sup>

[74] The Respondent said the conduct engaged in by E Donato occurred on paid work time. The effect of such is that the Respondent was effectively paying its employees to engage in repeated unreasonable conduct towards a colleague, to the detriment of that colleague's health and safety. It said her misuse of paid work time, paired with deriving a financial benefit while causing a serious risk to the Complainant's health and wellbeing, significantly compounds the seriousness of the misconduct.

[75] Had the Complainant made an application for compensation under the *Workers' Compensation and Rehabilitation Act 2003*, the Respondent would have had no reasonable defence. Such a claim would have exposed the Respondent to liability in an open-ended compensation jurisdiction solely because of the Applicants' conduct. This risk is inherently unacceptable and further reinforces the characterisation of their behaviour as serious misconduct.

[76] The Respondent contended that regrettably, the Applicants now appear to have abandoned whatever insight or remorse they previously expressed. Their submissions reveal no acknowledgement of the seriousness of their actions, nor any genuine commitment to behavioural change. It said this ongoing lack of accountability and contrition strongly supports the Respondent's decision to terminate their employment and weighs against any finding that the dismissals were unfair.

[77] The Respondent said it did not consider that there existed any personal friendship between E Donato and the Complainant. The Complainant's evidence was that they had worked together for just two weeks and did not share any personal friendship. E Donato held a different view. The Respondent preferred the Complainant's evidence.

[78] The Respondent submitted that had E Donato genuinely regarded the Complainant as a friend, and considered her conduct merely a "joke", the Respondent considered it likely she

would have apologised much earlier – particularly given her awareness of the Complainant’s distress for at least five days.

**[79]** The Respondent contended that it found E Donato had engaged in repeated unreasonable behaviour towards the Complainant when she:

- Left plastic ducks around only the Complainant’s work area, without informing the Complainant.
- Involving other employees in this activity and laughing about the Complainant’s discovery and reaction, behind the Complainant’s back.
- Placing a pentagram and associated items on the Complainant’s desk, intending that the Complainant would discover them.
- Failing to disclose her involvement when she became aware of the Complainant’s distress, despite knowing the Complainant did not know who was responsible.
- Talking about the Complainant and her response to the pentagram incident to subordinate employees during her shift after the incident.

**[80]** The Respondent contended all of the above-mentioned behaviour occurred on paid work time, meaning E Donato derived a financial benefit while engaging in conduct that amounted to bullying another employee. The Respondent said it determined that this repeated and unreasonable behaviour caused serious and imminent risk to the Complainant’s health and safety.

**[81]** E Donato contended that what occurred is that she put ducks on a colleague’s desk, without any malicious intent. Although a practical joke of this nature may be viewed as immature, she said it should not be punishable by termination. In her submission, this could not possibly be perceived as bullying by the Respondent as the very definition of bullying is repeated behaviour.

**[82]** E Donato submitted that the termination of her employment was unreasonable and disproportionate disciplinary action taken against her for the actual conduct. In her view, the punishment far outweighed the alleged misconduct.

**[83]** The Respondent submitted that although the group chat was not an employer-sanctioned platform, it was brought to the Complainant’s attention while at work and discussed work-related matters – including the pentagram incident and her reaction to such. The Respondent submitted S Donato’s conduct therefore had a sufficient connection to employment to be considered an employment-related matter and to justify disciplinary action.

**[84]** The Respondent submitted S Donato initiated the relevant conversation in the group chat by messaging a group of 30+ former and current employees about the incident. The Respondent submitted this was inappropriate and encouraged a discussion showing no regard for the Complainant’s wellbeing. The Respondent submitted even when her distress became known, S Donato posted “ha-ha” in response to others’ comments.

**[85]** During cross examination, S Donato was asked about the messages in the Instagram Chat that lead to her dismissal. The chat included the following comments by S Donato:

- “Alright I have to ask: who knows what about the aftermath of the ducks LMFAAAOOOO”
- “surely not omg”
- “chat is this real life”
- “holy moly \*deletes self\*”
- “WELP”
- “How do you guys even find this shit out haha”
- “Maybe needless to say, Emma’s spooked and it’d be real cool if it didn’t get gossiped about at worrrkkk I beg I beg”
- “Phew okay, also like respect for the other person. I shouldn’t have asked but wanted to know what you guys know bc im scared [left finger emoji, right finger emoji]”
- “Sands really seems like the kiss of death for people huh [laughing crying emoji]”
- “You could write the avc gossip column I stg you know everything”

**[86]** S Donato accepted she raised the duck incident in the chat. S Donato said she was confused and had noticed that E Donato was becoming stressed and she was worried. S Donato said all she had heard in the aftermath of the incident was that it could have gone to HR from E Donato. S Donato said she did not realise that anyone had been upset by the incident, and she had a different understanding of what had happened to lead to HR, and it was because it had been seen by other managers.

**[87]** S Donato agreed she found the ducks being left around the venue amusing. S Donato was referred to a comment in the chat “Deborah was not a happy camper” and her response “Chat is this real life”. S Donato was then referred to the response “I’m afraid so...” and her response to that comment “Holy moly deletes self”. S Donato explained her comment “WELP” was a misspelling of “WELL”. S Donato was referred to other comments made by participants and her comment “How do you guys even find this shit out haha”.

**[88]** S Donato was asked how the comment including “,..haha” deescalated the mocking tone directed at the Complainant. S Donato said it was a change of subject. S Donato said the comment was not in reference to the Complainant and it was a general observation about how people find out about these types of things. S Donato denied she found the Complainant’s reaction funny but maintained the “haha” was not about the Complainant.

**[89]** S Donato was referred to her next comment “Maybe needless to say, Emma’s spooked and it’d be real cool if it didn’t get gossiped about at worrrkkk I beg I beg”. S Donato said E Donato had been anxious about this incident potentially going to HR.

**[90]** S Donato was asked about her following comment: “Phew okay, also like respect for the other person. I shouldn’t have asked but wanted to know what you guys know bc im scared [left finger emoji, right finger emoji]”.

**[91]** S Donato was asked what she was scared about and she responded her wife’s anxiety. S Donato also said having just learned that the Complainant was upset, it would be inappropriate to talk about it at work.

**[92]** S Donato emphasised she did not know at the time she engaged in the chat group that the Complainant had been upset and only became aware of this during the chat.

[93] Ms Griffin was asked what acts she alleged were bullying by S Donato. She pointed to each of the messages S Donato sent in the group chat.

[94] Ms Griffin said each message was unreasonable behaviour and taken together were considered repeated and therefore met the test for bullying and constituted serious misconduct.

[95] S Donato submitted that she asked a question in a group chat and this could not possibly be perceived as bullying by the Respondent. She said the very definition of bullying is repeated behaviour, while this was one isolated incident of her asking a question in a group chat on Instagram, made up of a number of people, some of whom worked for the Company and some of whom did not.

[96] The Respondent said it considered that S Donato failed to appreciate her responsibilities as a supervisor and senior team member. Under the Respondent's Code of Conduct, managers and supervisors are expected to model appropriate behaviour and are held to a higher standard. The Respondent said it does not tolerate supervisors instigating or encouraging poor conduct in the workplace or in communications that have a sufficient nexus to work.

[97] The Respondent submitted E Donato asserted that she intended to "bring joy to the group of people", but this justification was inappropriate. The Respondent said any "joy" was at the expense of a colleague who was excluded from the conversation and unaware of the supposed "joke". The Respondent formed the view the group was clearly laughing at the Complainant, not with her.

[98] Having regard to the definition of workplace bullying, Ms Griffin said she determined that the group chat messages constituted further repeated unreasonable behaviour directed at the Complainant which, once disclosed to her, created a risk to her health and safety.

### *Process*

[99] The Respondent submitted it complied with its established procedures by providing the Applicants with a letter detailing the allegations and a notice of a disciplinary meeting, allowing ample time for them to arrange a support person, if they wished. Both Applicants had the fulsome opportunity to respond to the concerns, both in writing and orally, as both took up. Then, consistent, the Respondent's representatives adjourned the disciplinary meetings to consider all available evidence, including the Applicants' responses.

[100] The Respondent said only after the employees had been given the opportunity to respond, and that response had been properly considered, were findings made. The Respondent then reconvened the meetings and informed the Applicants of the decision to terminate their employment and the reasons. This process represents, in effect, a textbook application of procedural fairness and was overseen by the Respondent's National People and Culture Manager who is a specialist in her field.

[101] E Donato agreed she was given two days' notice of the issues to be discussed at the disciplinary meeting. S Donato also accepted she was given notice of the issues to be discussed

at the meeting. Both Applicant's submitted that the Respondent did not conduct a procedurally fair process, despite trying to argue that it did so.

[102] E Donato said she did not have the ability to give her version of events or to properly respond to any proposal to terminate her employment in a legitimate disciplinary meeting for the Respondent to seek to understand what had occurred. Rather, she said she was invited to a meeting and presented with a prosecutorial stance on the matter. The Respondent also substantiated the allegation and dismissed the Applicant's within minutes of their responses. They submitted this indicated that there was a pre-determined outcome.

[103] S Donato contended the Respondent has not shown any investigative process, nor is she convinced that any was undertaken. She submitted the outcome is harsh as the Respondent has failed to consider mitigating circumstances such as her clean personnel record and a satisfactory work performance history. S Donato said she maintained the decision was predetermined and there was nothing she could have said to change the decision.

[104] S Donato said even though the Respondent claims alleged misconduct occurred, although there is no misconduct she is aware of, the decision would be considered harsh as the outcome was disproportionate to the gravity of the misconduct noting all she did was send a message in a non-work related group chat. She said the punishment does not fit the crime.

[105] E Donato said the Respondent, and specifically Ms Griffin, who was conducting the meeting, made a number of inappropriate comments and displayed a number of inappropriate behaviours towards her. She said the very transcript of the meeting shows an inappropriate method of conducting a disciplinary meeting and suggests a skewed perspective by the investigator.

[106] Both E Donato and S Donato accepted they was given the opportunity to have a support person, and accepted there was a break between their meetings and the advice of the decision to dismiss.

[107] The Respondent submitted it is a well-resourced enterprise with dedicated human resource management specialists who oversaw the procedural fairness of each of these matters. It said while S Donato states that there is "no excuse" for the Respondent not following fair procedural steps, this claim is not developed in any meaningful way and is unsupported by evidence.

## **Consideration**

### ***Valid reason***

[108] The Respondent's theory of the case was that as S Donato had been having problems with the Complainant at work, and her partner E Donato had recently moved to the same workplace, E Donato decided to bully the Complainant by placing ducks around the workplace and placing an inverted pentagram and ducks on her desk.

[109] The basis for which the Respondent held the view that there were issues between S Donato and the Complainant is based on vague assertions of one of the managers and hearsay evidence that there were tensions between the two which were being resolved locally.

[110] I have afforded Mr Tyler's evidence little weight as he could not give any direct evidence about any alleged issue in the relationship between S Donato and the Complainant. Ms Maskill's evidence is also of limited assistance as its relevance is limited to a general observation about her own working relationship with the Complainant and that she received a phone call from the Complainant on 4 July advising that she was upset in relation to finding the pentagram on her desk.

[111] Mr Vicker's gave evidence that he did not recall ever having worked alongside either S Donato or E Donato. His evidence in relation to his discussion with the Complainant prior to the incident of 3 July about the Complainant feeling undermined and not taken seriously by staff generally is of limited assistance in relation to the specific allegations concerning the two Applicants.

[112] Ms Griffin's evidence was that she was aware of these issues (concerning S Donato and the Complainant) as they had been brought to her informally. S Donato asked how and whether these alleged issues had been confirmed, as she had never been asked about it prior to this hearing, Ms Griffin was only able to provide vague answers again. S Donato was consistent in her evidence that their relationship with the Complainant was not as it was being characterised by Respondent.

[113] It was my impression that both E Donato and S Donato were witnesses of credit. They both responded to questions during cross examination directly and their oral evidence remained consistent with the earlier written evidence. They both made appropriate concessions during cross examination about their own conduct but did not waiver on the key issues.

[114] The Respondent has submitted the Applicants' conduct was in breach of its *Equal Opportunity, Diversity & Inclusion Policy*.

[115] Where there is a conflict between the Respondent's conclusions in relation to the motivations or intentions of E Donato in relation to why she placed the ducks in the workplace and placed the pentagram on the Complainant's desk, and in relation to S Donato's comments in the group chat, I am inclined to prefer the evidence of E Donato and S Donato in their respective cases.

[116] E Donato consistently stated that the reason she had been placing ducks around the workplace was to boost morale of the team as a whole, and when asked she would tell people what she was doing. Her evidence was that it was not intended to be targeted specifically at the Complainant, and after leaving the inverted pentagram on the Complainant's desk, the final stage of the prank was to bring in a giant duck. I accept her submission that while her prank may have been unwise it was not intended to be malicious.

[117] I have concluded that contrary to the Respondent's determination, the evidence does not establish that she engaged in behaviour that would constitute bullying under the *Fair Work Act 2009*. Ms Griffin herself gave evidence one of the ducks was found in the in tray of another

employee. I accept the Respondent's submission that intent is not determinative, however I have concluded the evidence does not establish that a reasonable person would have anticipated the Complainant's apparent reaction to the incident.

[118] In S Donato's case I accept her evidence that she was unaware that the Complainant was distressed by the incident at the time she joined the group chat. I also do not consider any of these messages that S Donato contributed to the Chat Group amounted to bullying or mockery of the Complainant as the Respondent maintained.

[119] I have concluded that even if it could be established that the conduct of the two Applicants was in breach of its *Equal Opportunity, Diversity & Inclusion Policy*, the conduct in the context of all the facts the breach would not be in the nature of a breach of the policy that would provide a valid reason for dismissal.

[120] I am also of the view that the Respondent afforded too much weight to the failure of the Applicants to offer an apology, (or in E Donato's case apologise more promptly) in the small window of time between the incident itself and the disciplinary processes that led to the termination of their employment.

[121] Having weighed all the evidence I am not satisfied that there was a valid reason to dismiss either of the Applicants. I have concluded the decision to move to dismissal in both cases was disproportionate to the gravity of their conduct.

[122] The Complainant did not give evidence in these proceedings. I note that the Applicants have raised that the Complainant has since their dismissals obtained a tattoo of a pentagram. I simply make the observation that this seems somewhat incongruent with the level of impact the Complainant appears to have communicated to the Respondent, that the incident had on her.

#### ***Notification of reason***

[123] The Applicants were notified of the reasons for dismissal.

#### ***Opportunity to respond***

[124] The Applicants were given an opportunity to respond to the reasons for dismissal both in writing and at the final disciplinary meetings, however it would seem from the evidence that the one disciplinary meeting in each instance was somewhat perfunctory, and did not examine in an appropriate level of detail the relationship between the Complainant and the two Applicants, or the alleged motivation for the conduct which the Respondent had concluded existed, and that I have concluded has not been established by the evidence.

#### ***Refusal of a support person***

[125] Both Applicants accepted they were provided an opportunity to have a support person present at the disciplinary meeting.

#### ***Size of enterprise and availability of human resource specialists***

[126] The Respondent is not a small business and has internal human resource specialists. These are neutral considerations.

*Other considerations*

[127] Both E Donato and S Donato had no previous warnings and had otherwise unblemished employment records. The outcome was harsh in that the dismissals were summary. S Donato made submissions about the stress that she has suffered because of the summary termination.

**Remedy**

[128] The Applicants have not sought orders for reinstatement, nor would it be practical or appropriate for such orders to be made in all of the circumstances, and on that basis I do not intend to make such orders. The alternative remedy is an order for the payment of compensation.

[129] Section 392 of the Act provides:

**“392 Remedy—compensation**

*Compensation*

- (1) An order for the payment of compensation to a person must be an order that the person’s employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

*Criteria for deciding amounts*

- (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
  - (a) the effect of the order on the viability of the employer’s enterprise; and
  - (b) the length of the person’s service with the employer; and
  - (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
  - (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
  - (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
  - (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

- (g) any other matter that the FWC considers relevant.

*Misconduct reduces amount*

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

*Shock, distress etc. disregarded*

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

*Compensation cap*

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

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

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

- (a) the total amount of remuneration:
  - (i) received by the person; or
  - (ii) (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.”

**[130]** It is said by E Donato that she sought six weeks compensation. It was confirmed by the Respondent and accepted by E Donato that she earned \$1,400.96 per week averaged over the preceding 26 weeks and this was a salary.

[131] The evidence of the Applicants was that but for the dismissal they saw no reason why they would not have continued in employment with the Respondent for an extended period.

[132] Applying the formula in *Sprigg v Paul's Licensed Festival Supermarket*,<sup>11</sup> I have estimated that the remuneration that the Applicants would have received had they not been dismissed, would have been at least a further 6 weeks, which is the length of time they are both seeking compensation.

[133] In the case of E Donato, the agreed weekly rate of \$1,400.96 multiplied by six equates to \$8,405.76.

[134] S Donato was engaged as a permanent part time employee with a guaranteed minimum of 25 hours per week. S Donato said over the four weeks prior to her termination she earned an average of \$1,175.00 per week gross. I am satisfied it is appropriate to use this weekly average over the preceding four weeks as a benchmark for assessing compensation for S Donato. S Donato said she was seeking reimbursement for the six-week period from 17 July 2025 to 28 August 2025 when she obtained other employment.

[135] In the case of S Donato \$1,175.00 multiplied by six equates to \$7,050.00

[136] I make no further deductions on account of income earned since termination as it was earned outside the period for which I have determined to award compensation for lost earnings.

[137] I also make no further deductions on account of contingencies as the period for which I intend to award compensation is past.

[138] The amounts I intend to order in both cases does not exceed the legislative cap.

[139] The Respondent did not bring any evidence concerning the effect of an order for compensation on the viability of the business. I make no deduction on that account.

[140] The Applicants gave evidence that they had been seeking other employment. I am satisfied the Applicants have been seeking to mitigate their loss and I make no further deduction on that account.

[141] I do not intend to reduce the amounts compensation for either Applicant on account of s.392(3) as I am not satisfied the respective conduct of the either Applicant warrants such a deduction.

## **Conclusion**

[142] I have determined to issue an order that the Respondent pay to E Donato \$8,405.76 gross taxed according to law and 12% superannuation contributions on that amount into the Applicant's nominated superannuation fund, within 14 days of the date of this decision.

[143] I have determined to issue an order that the Respondent pay to S Donato \$7,050.00 gross taxed according to law and 12% superannuation contributions on that amount into the Applicant's nominated superannuation fund, within 14 days of the date of this decision.

[144] Orders to this effect will be issued separately and concurrently with this decision.



COMMISSIONER

*Appearances:*

*S Donato*, Applicant

*E Donato*, Applicant

*M Butters*, for the Respondent

*Hearing details:*

2025

Brisbane (Video using Microsoft Teams)

26 November

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<sup>1</sup> Exhibit 2

<sup>2</sup> Exhibit 3

<sup>3</sup> Exhibit 1

<sup>4</sup> Exhibit 4

<sup>5</sup> Exhibit 5

<sup>6</sup> Exhibit 6

<sup>7</sup> Exhibit 7

<sup>8</sup> *Titan Plant Hire Pty Ltd v Malsen* [2016] FWCFB 5520, [28].

<sup>9</sup> *Carroll v Karingal Inc* [2016] FWC 3709, [62].

<sup>10</sup> *Fair Work Act 2009* (Cth) s.789FD.

<sup>11</sup> (1998) 88 IR 21.