DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kathryn Keane
v
The Trustee for Roscon Property Services Trust
(U2025/9325)

COMMISSIONER YILMAZ MELBOURNE, 9 JANUARY 2026

Application for relief from unfair dismissal – whether dismissal was harsh, unjust or unreasonable

[1] On 3 June 2025, Ms Kathryn Keane made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (Act) for a remedy alleging she had been unfairly dismissed from her employment with The Trustee for Roscon Property Services Trust (Roscon or Respondent).

Background

[2] Ms Keane was employed as Operations Manager commencing in March 2022 and was dismissed on 19 May 2025. She submits that there was no valid reason for the dismissal and that the process was unfair as she was dismissed while on sick leave. The Respondent submits that it is a small business and that the dismissal was consistent with the Small Business Fair Dismissal Code. In any event, it submits that there was a valid reason for the dismissal and that the Applicant received warnings prior to her dismissal. The Applicant does not dispute that the business was a small business, having employed less than 15 people at the time of her dismissal.

[3] A Hearing to determine the matter was held via Microsoft Teams on 30 September 2025. Ms Keane represented herself at the Hearing and Mr Cummaudo, Director for Roscon, was the representative of the Respondent. The witness evidence of both were considered.

Submissions and evidence of the Applicant

[4] Ms Keane submits that the Respondent sent a letter of termination on 16 May 2025, but she did not see the email until 19 May 2025 upon returning to work after a period of absence on personal leave. The dismissal was effective immediately with payment in lieu of notice, and outstanding wages and accrued annual leave paid.[1]

[1] Payslips, Digital Hearing Book (‘*DHB*’) pp 267 and 269.

[5] Ms Keane disputes the submissions of the Respondent concerning alleged warnings and the submissions concerning the events leading to the dismissal. She submits that the Respondent cannot demonstrate to the Commission a valid reason for the dismissal.

[6] The letter of termination dated 16 May 2025[2] confirms summary dismissal (without notice) effective immediately and provides the following reason for the dismissal:

> "I refer to previous correspondence, phone discussions, and/or meetings regarding your capacity to perform the inherent requirements of your position as Operations Manager, recently you have demonstrated a lack of interest in the workplace and failed to follow instructions promptly an example is the email I sent you yesterday (attached) at 2:50 PM and 4:50 PM I reminded you to complete the task and you said you would attend to it first thing in this morning, on my return to the office 3;30 PM today Joy Hirst advised me that you had gone home due to feeling unwell, I attended the matter personally which took only 10 minutes to complete. I have provided 3 previous warnings (see APPENDIX 1), taken from your employment file and cannot tolerate any more.
>
> After carefully considering all matters, including your failure to carry out ongoing responsibilities, I regret to inform you that your employment with Roscon Property Services is terminated, effective immediately, as of 16 May 2025.
>
> The reasons for this decision are as follows:
>
> - Your role as Operations Manager requires physical attendance at our premises to supervise reception and office operations, which are core and essential duties. You recently worked from home without obtaining my approval, and on past occasions when I was on leave, in both instances."

[7] Ms Keane submits that the warnings dating back to 2022 were dealt with and as far as she understood they were no longer relevant. She submits that one of the criticisms related to project management which she was unfamiliar with, but this was subsequently rectified with training.[3] She further submits that she had replied to each of the alleged "warnings" and that the Respondent had offered to sit with her to look over the workload, but this did not occur.[4]

[8] Ms Keane submits that the alleged "time critical" task for which she was dismissed was to correct an error made by the Director in a quote that he had prepared. She submits that on 16 May 2025 she was taking directions from Joy Hirst (the Director's partner) on other urgent issues which took priority over the alleged "time critical" task. Ms Keane submits that after lunch she proceeded to complete the "time critical" task but she took ill with a migraine. With Ms Hirst's permission she left the workplace after being ill in the bathroom but not having completed the task.

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[2] Letter of Termination, Attachment C to the Applicant's outline of submissions, *DHB* p 29. Employer's Response, attachment A and appendix 1, *DHB* pp 42-43. However, the payslip of 19 May 2025 shows notice paid in lieu, *DHB* p 269.

[3] Exhibit A1, Witness statement of Kathryn Keane at [5]-[6], *DHB* pp 17-18.

[4] Ibid at [14]-[17], *DHB* p 19.

[9] Ms Keane submits that she was clearly instructed not to work from home, therefore on leaving the workplace on 16 May 2025, she did not complete any work tasks from home. Ms Keane became aware of her dismissal when she attended work on Monday 19 May 2025, when Joy advised her to check her emails. It was then that she saw the letter of termination sent by the Director on Friday 16 May 2025. Ms Keane then went to say goodbye to the staff and left the workplace.

[10] For the period of 3 months preceding the dismissal Ms Keane submits that she experienced stress migraines and hostility from the Director, his partner Joy, and his daughter Carla. Further, she submits that since December 2024 the Respondent reported on its inability to pay wages and this placed pressure on her to bring money into the business and perform duties as instructed by Joy that were prioritised over other duties.[5] Ms Keane describes that the difficult work environment coupled with threats from the Director that her work hours would be reduced added to her stress.[6]

[11] During the two-week period of the Director's leave of absence between Easter and ANZAC Day in April 2025, Ms Keane made an arrangement with the work team to work from home consistent with her medical practitioner's advice.[7] However, she submits that she received an abusive phone call from Joy Hirst about working from home. Ms Keane then responded to this outburst with an email to Joy, copying in the Director and other staff, addressing the allegation that her medical condition is a "deception."

[12] The Applicant's email confirms advice from the medical practitioner to temporarily work from home for 3 weeks to aid recovery from a medical condition.[8] Mr Cummaudo, the Director responded to Ms Keane's email at 2.23pm, which in summary advised her that she had no right to work from home, that her position required attendance in the workplace and that given the assessment of a medical condition his view was that the Applicant was unable to perform the inherent requirements of the job and therefore she ought to be on a period of sick leave. The email further states that if the period of prolonged absence continues then they may consider making her position redundant.[9]

Submissions and evidence of the Respondent

[13] The Respondent relies on a letter with attachments dated 19 June 2025 sent to Mr Kozijevic of Unfair Dismissals Australia Pty Ltd (a paid agent) but also addressed to the Fair Work Commission as its submissions. In addition, an outline of submissions was submitted[10] where the reason for dismissal was noted as "failure to comply with lawful instructions, culminating in her failure to complete a time-critical expert witness quotation despite reminders on 15 May 2025, and her early departure on 16 May 2025 without completing the task."[11] The Respondent relies on clause 16.4(a) of Ms Keane's employment agreement which states that

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[5] Exhibit A1 at [44], *DHB* p 22.

[6] Ibid at [44]-[74], *DHB* pp 22-25.

[7] Medical certificate dated 24 April 2025, *DHB* p 146.

[8] Email from the Applicant to Joy Hirst on 28 April 2025 at 12.09am, *DHB* p 145.

[9] *DHB* p 152.

[10] *DHB* pp 161 – 174.

[11] *DHB* p 162.

"deliberate and wilful failure to follow any lawful instruction or direction constituted grounds for summary dismissal."[12]

[14] The Respondent submits that on 16 May 2025, Ms Keane was dismissed due to "ongoing failure to carry out the inherent requirements of her role as Operations Manager."[13] It submits that Ms Keane's dismissal met the criteria in s.387 of the Act as there was a valid reason and 3 prior warnings. In addition, the Respondent is critical of Ms Keane leaving the workplace on 16 May 2025 due to illness but failing to attend to her emails from home.[14] It submits that Ms Keane's contract of employment confirms her place of employment as the registered office but in the course of employment the place of employment may change. It confirms that she ought to follow lawful and proper directions and her employment may be summarily dismissed for serious and wilful misconduct which includes failure to follow any lawful instruction.

[15] The same letter refers to performance concerns subject to prior warnings and the incident of 16 May 2025 which led to the dismissal as "part of a broader pattern", namely a failure to perform a task for the Director.

[16] The Respondent does not deny that there was a lack of process to enable the Applicant to respond to the reason as the Respondent acted with "urgency and finality of the repeated conduct"[15] in dismissing Ms Keane. However, the Respondent submits that it complied with the Small Business Fair Dismissal Code. Appendix 1 to the letter of termination is a list of items of which three are highlighted. The 3 highlighted items are listed as follows:

> 2022-10-05 1st Warning To Kathryn
> 2022-11-09 2nd Warning – Various Matters
> 2024-07-15 1 Re_Various – 3rd Warning

[17] A full copy of the warning issued on 5 October 2022 relates to an email from the Director to the Applicant at 6.07pm raising a concern that an email received at 10.48am of the same day authorising a job had not been actioned as a work order.[16]

[18] A full copy of the warning issued on 9 November 2022 requests that the Applicant come to the Directors office to discuss three matters then proceeds to reference a statement found in all Roscon employment agreements describing the type of people the Respondent employs. The email makes no reference to a warning about the Applicant's performance or conduct; it does however refer to a newsletter that has not eventuated.

[19] The email of 15 July 2024 referenced as 3rd warning in the list above makes no reference to a warning in the email itself. The email contains instructions on a word document in a shared folder where portal requests are to be completed. The same email directs the Applicant to

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[12] Ibid.

[13] Letter of 19 June 2025 responding to the unfair dismissal application, *DHB* p 39.

[14] Ibid.

[15] *DHB* p 40.

[16] *DHB* p 109.

perform certain tasks and to copy in her Director in all correspondence otherwise he assumes she has no work to do.

[20] Included in the bundle of materials submitted by the Respondent are emails of 15 September 2022 where the Applicant was reminded of responsibilities, and made aware of an amendment to her list of responsibilities; and an email of 15 December 2022 critiquing the Applicant's decision to work from home.

[21] The Respondent completed the Small Business Fair Dismissal Code (the Code) checklist on 20 June 2025.[17] In answer to the question "Did you dismiss the employee for some other form of serious misconduct?" the Respondent ticked "no" and instead indicated in question 8 that the dismissal was due to the employee's unsatisfactory conduct, performance or capacity to do the job. However, question 9 indicates there was another reason for the dismissal. The Form F3 lists five reasons for the dismissal.[18]

Consideration - Was the dismissal harsh, unjust or unreasonable?

[22] It is not contested that the Respondent is a small business. The Respondent submitted a completed Small Business Fair Dismissal Code checklist. The Code is to be determined before consideration of the criteria of what makes a dismissal harsh, unjust or unreasonable under s.387 of the Act. The relevant legislation follows:

[23] Section 385 of the Act is expressed in the following terms:

> "**385 What is an unfair dismissal**
>
> A person has been ***unfairly dismissed*** if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
>
> (b) the dismissal was harsh, unjust or unreasonable; and
>
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
>
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388."

[24] Section 388 of the Act provides:

> **"388 The Small Business Fair Dismissal Code**

[17] Employer's Response, Attachment D, *DHB* pp 49 – 53.

[18] Employer's Response, Attachment E, *DHB* p 64.

(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.

(2) A person's dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal."

[25] The Code contains the following definition of Summary Dismissal:

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

[26] The provisions concerning dismissals other than summary dismissal require the employer to give the employee the reason why they are at risk of being dismissed and this reason must be valid based on the employee's capacity or conduct. The employee must either be verbally warned, or preferably, warned in writing that they risk being dismissed if there is no improvement. The employee must be given an opportunity to respond and a chance to rectify the problem.

[27] The Respondent in this matter did not summarily dismiss Ms Keane, despite the wording of the letter of termination. The evidence shows that the Applicant was dismissed for performance consistent with the concerns raised by the Respondent.[19] Further the Respondent paid the Applicant notice in lieu which is evidence that the dismissal was not summary termination and that the dismissal is not consistent with the definition of summary dismissal under the Code.

[28] Consequently, the Code requires dismissals other than summary dismissals to comply with the requirement that an employee is given the reason that their employment is at risk and the reason must be valid based on performance or conduct. The warning which provides the reason need not be formal, but the employee ought to know the nature of the concern about their conduct or performance in order to be able to respond and satisfy the requirement to respond to the concern. The Respondent summarises the five reasons for the dismissal in the Form F3, that being:

[19] Alleged warnings, references to patterns of performance in the Employer's Response, the completed Form F3 and Exhibit R1, Witness Statement of Paul Cummaudo.

1. Ongoing failure to carry out inherent requirements of her role as Operations Manager.
2. Demonstrated disengagement in the workplace.
3. Failure to follow direct and reasonable instructions promptly- breach of clear work instructions.
4. Absence from workplace without prior approval, despite onsite nature of her supervisory duties, leaving workplace closed. Disregard for supervisory duties.
5. Repeated underperformance.

[29] I observe that the above five reasons are not consistent with the reasons given in the letter of termination. In any event none of these reasons were given to the Applicant prior to her dismissal as reasons that her employment was at risk of dismissal. The Respondent relies on two warnings in 2022, the first[20] concerning the Applicant's failure to check her emails during the day states the communication is to be accepted as a warning that tasks and responsibilities are not being handled in a timely manner. There is no reference to risk of employment, and the email was given in October 2022 some two and a half years before the dismissal. The second "warning" also in 2022[21] does not even reference the word warning let alone spell out the performance or conduct giving rise to risk of employment. Equally, an alleged third "warning" makes no reference to a warning or risk to employment.[22]

[30] It is helpful to clarify what a warning is and is not. A mere exhortation for an employee to improve their performance would not be a sufficient warning. A warning must:

(a) identify the relevant aspect of the employee's performance which is of concern to the employer; and
(b) make it clear that the employee's employment is at risk unless the performance issue identified is addressed.[23]

[31] In addition, a warning is not indefinite. Even if the first warning was to be considered in the required form, it is aged and its relevance reasonably questionable in the present circumstances. Each of the reasons referred to above in the Form F3 are unclear and unsupported by evidence. Namely, failure to carry out "inherent requirements of the role", disengagement or failure to follow directions or underperformance are not precise in the form of conduct or performance to which the Applicant could reasonably respond. The Respondent's submissions that the Applicant failed to complete what was considered a time critical task on 16 May 2025 is an exception to this. Regarding reason four, the reason of absence from the workplace may relate to the absence after leaving the workplace on 16 May or the work from home arrangement in April 2025. Neither of these absences give rise to a valid reason for the dismissal as the Applicant was medically unwell to perform her job. Further the Respondent submits that the Applicant failed to complete the task or monitor her emails after leaving work on 16 May, which she had no obligation to do so as she went home unwell. Regardless, none of these reasons cited by the Respondent were provided to the Applicant in the form of a warning, which also meant she was not able to respond prior to her dismissal.

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[20] Dated 5 October 2022, *DHB* p 108.

[21] Dated 9 November 2022, *DHB* p 115.

[22] Dated 15 July 2024, *DHB* p 143.

[23] *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFB, Ross VP, Williams SDP, Blair C, 21 August 2000), [43]-[44].

[32] The Respondent failed to address any of the reasons with the Applicant prior to her dismissal, it did not inform her that her employment was at risk of dismissal for any of the reasons cited. For these reasons the Respondent has not complied with the Code and I now address the criteria of s.387 of the Act.

[33] Section 387 of the Act provides that, in considering whether I am satisfied that a dismissal was harsh, unjust or unreasonable, I 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."

[34] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[24]

Whether there was a valid reason

[35] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well-founded."[25] Further it is the role of the Commission to consider the employer's reasoning to determine whether that reasoning is valid.[26]

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[24] *Sayer v Melsteel Pty Ltd* (2011) FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [2002] AIRC 317, [69].

[25] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[26] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[36] The Respondent dismissed the Applicant without informing her of the reason for the dismissal. The alleged "warnings" fail to meet the test of a sound, defensible or well-founded reason and no reasoning was provided to demonstrate that there was a valid reason for the dismissal by email. The reasons for the dismissal as described in the Form F3 are not sufficiently supported with evidence so as to be considered valid reasons. The critical incident appears to be the failure of the Applicant to deal with the Respondent's described time critical task. While the Respondent may have had reason to be concerned, the failure to perform the task alone as the reason for dismissal is not proportionate.

[37] Critically, during the proceedings the Respondent confirmed that while as Director, the Applicant was obligated to follow his instructions, the Applicant was also required to follow the instructions of Joy Hirst (his partner) and his daughter Carla, particularly in his absence. On the day Ms Keane was sent a letter of termination she was taking instructions from Joy Hirst at the expense of completing the task for the Director. This created confusion as to how the Applicant ought to prioritise work when two other individuals were authorised to instruct the Applicant on work tasks.

[38] On the evidence before me I am not satisfied that there was a valid reason for the dismissal.

Whether the person was notified of that reason

[39] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[27] and in explicit[28] and plain and clear terms.[29]

[40] In all the circumstances I am not satisfied the Applicant was notified of the reason(s) in explicit, plain or clear terms that her employment was at risk. There was no meeting prior to the dismissal and the alleged warnings were aged and too vague to be described as a valid warning that her ongoing employment was at risk.

Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[41] At no point was the Applicant given an opportunity to respond to any reason relating to capacity or conduct before her dismissal.

[42] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.[30] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[31]

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

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

[29] Ibid.

[30] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[31] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[43] The Applicant was simply sent an email which was not known to her until she appeared at work on 19 May 2025. Even then, Ms Hirst advised her to check her emails, which informed the Applicant of her dismissal. The manner in which the dismissal was conducted in this regard was harsh and unfair.

> *Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal*

[44] While the Respondent did not refuse the Applicant to have a support person, in reality there was no opportunity for the Applicant to address the allegation against her and consider whether she might require a support person. Due to the failure to follow any reasonable process, this factor is a neutral consideration.

> *If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal*

[45] The Respondent submits that the dismissal was related to performance, but there was no reasonable warning that the performance would lead to dismissal. As already referenced, the alleged warnings were either aged or unreasonably insufficient to warn the Applicant of any risk to employment.

> *The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal*

[46] While the business is small, it does appear the Respondent is aware of a need to comply with at least the Code. Despite this, the Code was not met and no fair process adopted in relation to the dismissal. The Respondent made no submissions regarding size of enterprise and impact on dismissal. I do consider that the size of the enterprise is a neutral consideration.

> *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*

[47] Similar to the above this consideration is neutral on the basis that the Respondent made no submissions regarding the relevance of access to any human resources support.

> *Any other matters that the FWC considers relevant*

[48] The Applicant led witness evidence of stressors in the workplace which was not contested by the Respondent. I do accept the evidence and consider the internal challenges created a hostile work environment towards the Applicant from the family members. Such circumstances are not conducive to a working relationship capable of being restored.

Conclusion – whether harsh, unjust or unreasonable?

[49] Based on my reasons above, I do find that the Applicant's dismissal is harsh, unjust and unfair.

[50] I have considered each matter specified in section 387 and the evidence in relation to each matter. In reaching my determination I have considered whether the dismissal was harsh, unjust or unreasonable. I have weighed up all of the circumstances of the case and I am satisfied that all of the circumstances do weigh in favour of finding that the dismissal was harsh, unjust or unreasonable because of an absence of valid reason, failure to notify the Applicant of the reason, and lack of opportunity to respond before the dismissal.

Conclusion

[51] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act. 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 Act,

[52] I may, subject to the Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant. Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

- I am satisfied that reinstatement of the Applicant is inappropriate; and
- I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[53] The Applicant ought not be reinstated, and compensation is appropriate in this circumstance because reinstatement into a hostile work environment is unhelpful and impractical.

[54] Based on the evidence before me that led to the finding that the dismissal was unfair, an order for compensation is justified.

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

[55] Section 392(2) of the Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant 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.

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

Effect of the order on the viability of the Respondent's enterprise

[57] There is no direct evidence regarding the viability of the Respondent's small business, but the Applicant's evidence that the Employer was unable to pay wages, directed staff to take leave during the Christmas period and threatened to reduce the Applicant's hours of work are relevant considerations.

Length of the Applicant's service

[58] The Applicant's length of service was 3 years and 2 months. This is not a long period but also not an insignificant period. This factor is a relevant consideration.

[59] The maximum compensation under the Act is 26 weeks but given the length of employment and the working environment, particularly the working relationship between the Applicant and the family, I consider longer term employment unlikely but rather 8 weeks to be a reasonable period of compensation.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[60] As stated by a majority of the Full Court of the Federal Court,

> "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[32]

[61] Had the employment not been terminated the Applicant was likely to receive the 8 weeks of wages to represent ongoing employment. There was no direct evidence of other likely reason,

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[32] *He v Lewin* [2004] FCAFC 161, [58].

other than the Applicant's evidence of capacity to pay wages and threats to reduce her hours of work suggests had the business continued under the circumstances steps to reduce operating costs was likely. However, the decision to award 8 weeks is mindful of the circumstances of the business and no further adjustment is necessary. The Applicant was paid $1538.46 per week and 8 weeks value amounts to $12,307.68 gross.

Efforts of the Applicant to mitigate the loss suffered because of the dismissal and amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[62] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[33] What is reasonable depends on the circumstances of the case.[34]

[63] Ms Keane gave witness evidence of the medical condition she had suffered as a result of the working environment that has prevented her from finding alternative employment. A medical certificate and referral for specialist care indicates ongoing treatment. The Hearing took place three months after the dismissal, and I observe that insufficient evidence was tendered to explain why the medical condition rendered Ms Keane with no capacity to seek any employment. Ms Keane gave evidence that she had not found employment and relied on Centrelink support. Ms Keane did not provide evidence of other remuneration earned other than reliance on Centrelink payments. In the circumstances, the absence of evidence of efforts to seek employment and incapacity warrants a deduction of two weeks. This reduces the amount of compensation to $9,230.76 gross.

Amount of 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

[64] The Applicant provided no evidence of likely income from the date of the dismissal until the order for payment of compensation. Centrelink payment is not relevant therefore I treat this as a neutral consideration.[35]

Other relevant matters

[65] The evidence of Ms Keane demonstrates decisions that she made did not help her relationship with her employer and contributed to the work environment. On this basis, I do consider that Ms Keane was not entirely blameless. Despite this, the conclusion on valid reason and procedural fairness remains, but this consideration is another factor to justify the reduction of the compensation to total 6 weeks.

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[33] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] ('*Biviano*') citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[34] *Biviano*, [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[35] *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*) (1998) 88 IR 21.

The order of compensation

[66] An order of 6 weeks' pay is awarded and this figure is $9,230.76 gross to be taxed according to law. The Respondent is ordered to make the payment of compensation to the Applicant within 14 days of the order. The applicable tax is to be forwarded to the ATO.

[67] I am satisfied that the amount of compensation is appropriate to the circumstances of this case and the criteria for deciding compensation under s.392(2). Misconduct is irrelevant,[36] the figure does not include an amount for shock, distress etc,[37] and the compensation does not exceed the cap.[38]

[68] An order[39] will be issued for the payment of the net sum ($9,230.76 less tax) within 14 days of this decision into the Applicant's bank account. Superannuation on this compensation is also payable directly into the Applicant's nominated superannuation fund in accordance with the Superannuation Guarantee requirements.

COMMISSIONER

Appearances:

Ms K Keane, *appearing on her own behalf*
Mr P Cummaudo, *for the Respondent*

Hearing details:

2025.
Melbourne:
September 30.

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[36] *Fair Work Act 2009* s.392(3).

[37] *Fair Work Act 2009* s.392(4).

[38] *Fair Work Act 2009* s.392(5).

[39] PR795574.