DECISION

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

Ms Gail Mercer

v

Sharn Enterprise Pty Ltd ATF Kapoor Family Trust
(U2025/8953)

COMMISSIONER SPENCER BRISBANE, 20 MARCH 2026

Application for an unfair dismissal remedy – jurisdictional objections determined - Small Business Employer and employee met the minimum employment period – Small Business Fair Dismissal Code considered – Employer did not rely on the Code – s.387 considered – termination unfair – harsh, unjust, and unreasonable – maximum compensation ordered.

[1] This decision is related to the unfair dismissal application of Ms Gail Mercer (the Applicant). Ms Mercer made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for an Order granting an unfair dismissal remedy. Ms Mercer alleged that she had been unfairly dismissed from her employment as an Educator at Little Ted's Childcare Centre, Oxley. The Centre at the time of the events had recently been purchased by Sharn Enterprises Pty Ltd ATF Kapoor Family Trust (the Respondent/the Employer/Little Ted's). Mrs Reena Kapoor was a Director (together with her husband) of Sharn Entreprises that owned and operated as Little Ted's Childcare. She also held the legislative position of nominated supervisor in relation to the business. It is also relevant to note that Mrs Kapoor held the same legislative position in terms of Mine N Yours Childcare, Coopers Plains, which she owned and operated as a sole trader.

[2] A prior jurisdictional decision was released.[1] The jurisdictional decision also related to two other employees' unfair dismissal applications with the Respondent (Ms Hamel and Ms Bowyer). That decision determined whether the Respondent was a Small Business Employer and whether each of the Applicants separately had met the respective minimum employment period and was therefore permitted to pursue their unfair dismissal application.[2] A jurisdictional Hearing was held in relation to the three applications. The following determinations were made in relation to each of the applications in that jurisdictional decision:

> "[65] Based on the reasoning set out above, none of the applications are jurisdictionally barred; they have all met the requisite minimum employment period (for Ms Hamel this period is 6 months under s.383(a) of the Act). For Ms Hamel, the Respondent will not be treated to be as a 'small business employer', but for Ms Mercer and Ms Bowyer, the Respondent will be considered as a 'small business employer', subject to the Small Business Fair Dismissal Code.

> [66] Therefore, in relation to all 3 of these applications (Ms Hamel, Ms Mercer, and Ms Bowyer), none of the applications are jurisdictionally barred and all are able to proceed to arbitration."

[3] The Respondent raised that they were a Small Business Employer; and therefore it is considered whether the Applicant's dismissal was consistent with the Small Business Fair Dismissal Code (SBFDC) and consequently whether the dismissal could not be unfair under s.385(c) of the Act. This decision will determine this jurisdictional objection first. If the objection is upheld, the application is dismissed. In the event that the objection is dismissed, the merits of the application will be considered in relation to s.387 of the Act. The Applicant submitted that her dismissal was not consistent with the SBFDC and that additionally, her dismissal was harsh, unjust or unreasonable.

[4] All of the Applicants were represented by Mr David Tuxworth, who indicated he had previously operated as a paid agent but that he was not appearing in that capacity. He stated that he was legally qualified and that he was currently employed as an employee relations adviser at a mining company but was acting for the Applicants on a pro bono basis. Mr Tuxworth had been a parent of children attending the Centre that Mrs Kapoor had bought and operated. There was some animosity between the Respondent and the Applicants' representative as a result of some prior interactions between them. Whilst acknowledging the jurisdiction of matters to be dealt with in an unfair dismissal application, Mr Tuxworth stated at the time of the Hearing (weeks after the finalisation of their employment contracts), a range of the Applicants' employment entitlements remained outstanding.

[5] The Respondent business was represented by Mrs Reena Kapoor, an owner of Little Ted's Childcare and the Employer. In this matter it warrants noting that it was extremely difficult to obtain the relevant information from Mrs Kapoor for the consideration of the prior jurisdictional objection and in this substantial application. The Respondent, having had the experience of the jurisdictional Directions and the related Hearing, again failed to appropriately comply with the Directions of the Commission and failed to provide responsive material and a witness statement. This non-compliance occurred, despite being sent the template documents for a witness statement and an outline of submissions from the Commission website. It is also set out that Mrs Kapoor was afforded repeated opportunities to file the material and was granted extensions to file material addressing her case and to respond to the Applicant's case. Mrs Kapoor was redirected, (which included an email of 6 February 2026 sent from my Chambers to her) to endeavour to have her file necessary submissions and evidence in relation to her case. That final correspondence, provided to Mrs Kapoor, redirected her with an extension to provide a specific response in relation to the accrued sick leave of Ms Mercer and the refusal to pay her using this accrued leave for her absence whilst having cancer treatment.

[6] The Respondent did not respond. As such, the only material the Respondent filed to rely on in this matter was Mrs Kapoor's email dated 6 February 2026.

[7] Each of the three applications was heard separately. It was conceded that there was some overlap between the facts, circumstances, and material between the applications. Where this is taken into account, it is identified in the decision.

Relevant Legislation

[8] Ms Mercer filed her application pursuant to s.394 of the Act:

> (1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.
>
> Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.
>
> Note 2: For application fees, see section 395.
>
> Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.
>
> (2) The application must be made:
>
> (a) within 21 days after the dismissal took effect; or
>
> (b) within such further period as the FWC allows under subsection (3).
>
> (3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
>
> (a) the reason for the delay; and
>
> (b) whether the person first became aware of the dismissal after it had taken effect; and
>
> (c) any action taken by the person to dispute the dismissal; and
>
> (d) prejudice to the employer (including prejudice caused by the delay); and
>
> (e) the merits of the application; and
>
> (f) fairness as between the person and other persons in a similar position.

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

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

[10] Section 385 of the Act states '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.

[11] In accordance with s.396 of the Act, it must be determined before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);
(b) whether the person was protected from unfair dismissal;
(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and
(d) whether the dismissal was a case of genuine redundancy.

[12] It is an agreed fact that the Applicant was dismissed, that her application to the Commission was filed within the statutory time limit, and the matter was not a case of genuine redundancy.

[13] The application has been considered in line with the SBFDC as after the dismissal of Ms Hamel (a related employee dealt with in an earlier decision), the Respondent then had fewer than 15 employees. Mrs Kapoor in this case did not refer to the SBFDC or rely on the approach in that Code. The information provided cannot appropriately be considered in isolation under the SBFDC given the facts of the matter. The Employer as stated did not rely on the SBFDC and no information was introduced as to whether the Respondent, or on what grounds there could have been to reach a reasonable belief that termination of the Applicant's employment, was necessary. Accordingly, the matter was assessed against the unfair dismissal provisions of the Act. The matters were further considered pursuant to ss.387 and 392 given this.

[14] Section 388 relevantly provides:

(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.

[15] The Small Business Fair Dismissal Code sets out:

The Code

Summary Dismissal

It is fair for an Employer to dismiss an Employee without notice or warning when the

Employer believes on reasonable grounds that the Employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the Employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business Employer must give the Employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the Employee's conduct or capacity to do the job.

The Employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business Employer must provide the Employee with an opportunity to respond to the warning and give the Employee a reasonable chance to rectify the problem, having regard to the Employee's response. Rectifying the problem might involve the Employer providing additional training and ensuring the Employee knows the Employer's job expectations.

Procedural Matters

In discussions with an Employee in circumstances where dismissal is possible, the Employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business Employer will be required to provide evidence of compliance with the Code if the Employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

[16] The Explanatory Memorandum for the Small Business Fair Dismissal Code sets out the following regarding its implementation:

> *211. There will also be a Small Business Fair Dismissal Code (the Code) for businesses with fewer than 15 Employees (small business Employers). The Code will set out the steps a small business Employer needs to take in order for the dismissal to be fair. If an Employee of a small business Employer makes an unfair dismissal claim, FWA will first determine if the Employer has complied with the Code. If so the dismissal will be considered fair. If the Employer has not complied with the Code, the claim will treated in the same way as any other unfair dismissal claim, and FWA will go on to determine whether the dismissal was harsh, unjust or unreasonable.*
>
> …

1545. If a person's dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair and the other factors relating to unfair dismissal do not need to be considered. This arises because clause 396 provides that whether a dismissal is consistent with the Code is an initial matter that FWA must consider before considering the merits of the application. If the Employer has not complied with the Code, the claim will be treated the same way as any other unfair dismissal claim.

[17] The Employer had not relied on or applied the Small Business Fair Dismissal Code. Whilst the Code was considered, it was necessary to determine the criteria in s.387 relevant to the circumstances:

> 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.
>
> Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:
>
> (a) the person sexually harasses another person; and
>
> (b) the person does so in connection with the person's employment.

[18] Furthermore, s.392 of the Act was considered on the facts of the matter:

> *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.

Background

[19] Ms Mercer commenced as an Educator at Little Ted's on 8 August 2019. Ms Mercer provided evidence in her witness statement that during her employment, there were no concerns with her employment including with her conduct or performance. Ms Mellissa Bowyer at the time was the Centre Director (she had moved into this position shortly after Mrs Kapoor had taken over as the new Owner, statutory operator, and Employer at the Childcare Centre). Ms Bowyer had been employed alongside the Applicant since the Applicant started at Little Ted's in 2019. Both Ms Bowyer and the Applicant were mature women and had regard for each other's experience in working at the Childcare Centre. Ms Bowyer gave evidence stating that Ms Mercer was an "exemplary employee who was great at caring for, and educating, children." Ms Mercer worked an average of 22.5 hours per week (three shifts per week). Ms Bowyer had, shortly after Mrs Kapoor had purchased the Centre (with Mrs Kapoor's approval), necessarily moved into the new role of Centre Director. This had occurred as the person in that role had departed at short notice. As part of the purchase agreement of the Centre, this person (Sam) was to remain in that role while the new Employer became established with the Centre. However, events transpired that led to that person abruptly relinquishing that role. Ms Bowyer in the circumstances where this role was required to be filled, agreed to step into the role. However Ms Bowyer had made it clear that she did not have the experience in this role but would endeavour to undertake it to assist. In this new role, Ms Bowyer supervised the rosters and leave arrangements for employees. However Mrs Kapoor retained authority over the payroll system in terms of the payment authorisations for leave and the employment overall.

[20] Ms Mercer stated that in either late February 2025 or early March 2025, she informed the Centre Director, Ms Bowyer, that she had been diagnosed with cancer, and would require treatment for this. Ms Mercer stated that she was approved by Ms Bowyer to use her accrued leave entitlements in order to undertake her cancer treatment. Ms Mercer stated she gave Ms Bowyer the list of dates for a period of two months or more for her chemotherapy treatments. This schedule was annexed to Ms Mercer's witness statement, and it showed the days she was undertaking chemotherapy (or had pre-approved leave) and the days she would be working. Ms Mercer gave evidence that the treatment was organised for every second week. In line with this arrangement, Ms Mercer stated that she would take Monday and Wednesday off utilising her accrued sick leave to undergo the treatment, and then on the other week she would work her regular hours. Ms Mercer stated that around halfway through her treatment that the days of treatment changed so she would only take the Friday off every second week. Ms Bowyer gave

corroborating evidence that Ms Mercer would give advance notice of appointments in order that the rosters could be planned; accordingly, they organised which days she would be taking off every second week.

[21] Ms Mercer, with the previous owners, had pre-approved use of her annual leave from 20-26 February 2025 (for the Adelaide Fringe Festival) and for 14 to 25 April 2025 (for the National Folk Festival in Canberra). Ms Mercer stated that on 15 April, while using her annual leave, she was advised that it had been cancelled by Mrs Kapoor.

[22] Ms Mercer stated that she provided advance notice of her scheduled appointments in order to arrange coverage of the children to the required statutory ratio of staff. From 28 March 2025 she was undergoing chemotherapy and would provide Medical Certificates to Ms Bowyer to utilise her sick leave. Ms Bowyer gave evidence that she advised Mrs Kapoor's of Ms Mercer's required absences and referenced that she had Medical Certificates to support such.

[23] Ms Mercer stated that after the purchase of the Centre by Mrs Kapoor, that she began to experience issues with the approval of the use of her leave accruals, and that she was either not paid or incorrectly paid when utilising her leave entitlements.

[24] Ms Mercer stated that for the following dates, when she had used her sick leave, she was not paid for this leave:

With Medical Certificate provided:

- 3 March 2025
- 5 March 2025
- 4 April 2025
- 28 April 2025
- 30 April 2025
- 14 May 2025
- 16 May 2025

Without provision of a Medical Certificate, but for which Ms Mercer stated was a rostered workday and she was entitled to be paid for:

- 2 May 2025

[25] Ms Mercer also gave evidence that on 5 May 2025, which was a public holiday, that she would normally work and without explanation she was not paid for this day. Mrs Kapoor argued at the Hearing that Ms Bowyer in her new role managed the rosters and the associated timesheets but that Mrs Kapoor held the responsibility and authority over the payment of wages and the payroll system. Mrs Kapoor argued in general terms at the Hearing that the rosters and timesheets prepared by Ms Bowyer had not appropriately reflected Ms Mercer's associated sick leave on this day. Mrs Kapoor provided no evidence of these timesheets nor did Mrs Kapoor as the Employer undertake any inquiry with Ms Mercer in relation to her required sick leave or the period for such. No explanation was provided to Ms Mercer regarding the non-payment or that her accrued leave entitlements could not be used in this manner.

[26] On 12 May 2025, Ms Mercer emailed Mrs Kapoor in relation to the issues she was having with her pay. Later that day, Ms Mercer received the following letter of termination via email:

> "Dear Gail,
>
> **Notice of Termination of Employment**
>
> This letter is to formally notify you that your employment with Little Ted's Childcare Centre will end one week from today, on **19 May 2025**.
>
> After careful consideration, we have determined that we are unable to accommodate your current availability in line with the operational requirements of the service. Unfortunately, this means we are no longer able to offer you ongoing employment.
>
> Your final week of employment will be from **12 May to 19 May 2025**, during which time you will be paid in accordance with your contracted hours. You will also receive your final entitlements, including any outstanding wages and accrued leave, in your final payslip.
>
> We thank you for your contributions during your time at Little Ted's and wish you all the best in your future endeavours.
>
> Should you have any questions regarding this notice, please don't hesitate to get in touch.
>
> Kind regards,
> Mellissa Bowyer
> Director
> Little Ted's Childcare Centre" (emphasis added)

[27] Ms Mercer stated that before receiving this letter, no conversations had been undertaken with her by Ms Bowyer or Mrs Kapoor. Whilst the termination letter was purported to be implemented at the authority of Ms Bowyer, the related evidence of Ms Bowyer was that she had objected to the termination of Ms Mercer's employment, particularly at a time when she was undertaking cancer treatment, but she was directed by Mrs Kapoor to prepare the termination letter.

[28] Mrs Kapoor objected on the grounds that she considered it was Ms Bowyer who made the decision. Mrs Kapoor stated that the decision to terminate Ms Mercer originated from Ms Bowyer's actions, and not hers. She stated that she had not engaged with Ms Mercer in relation to her employment status after her diagnosis and roster requirements. Ms Bowyer gave evidence that around the end of March, she had communicated to Mrs Kapoor that Ms Mercer was requiring every second Monday and Wednesday because she was undergoing chemotherapy.

[29] Ms Bowyer gave evidence that Mrs Kapoor had expressed to her that she considered that Ms Mercer's absences were not working for the business; she stated this was raised by her over phone and in person throughout March, April, and May 2025. Ms Bowyer stated that while

they were discussing how they could support Ms Mercer, Mrs Kapoor would often state that Ms Mercer's employment needed to be terminated, but then stating to give it one more month.

[30] Ms Bowyer stated that up to March 2025 there was no issues covering Ms Mercer while she was on approved leave, however that during this month there were multiple resignations which caused difficulties with rostering. She stated that she spoke to Mrs Kapoor at the end of this month, about obtaining additional staff when rostering became difficult, and that she discussed with Mrs Kapoor, Ms Mercer's required treatment. She stated this is when Mrs Kapoor first started raising the possibility of termination. Ms Bowyer stated that Mrs Kapoor had also raised the possibility of changing Ms Mercer's employment status from permanent part-time to casual.

[31] Ms Bowyer stated that on 12 May 2025, Mrs Kapoor had found out that the annual leave taken by Ms Mercer in April was for her to go to Canberra; she expressed that Mrs Kapoor was agitated with this because she considered that Ms Mercer was away from the workplace for cancer treatment. Ms Mercer gave evidence that Mrs Kapoor then instructed her to draft a letter of termination giving one week of notice due to lack of availability for rostering; she stated that she indicated to Mrs Kapoor that Ms Mercer only had two more weeks of chemotherapy left and then she would be back at work working her normal hours, but that the response was that she should, with words to the effect of, 'write the letter and sent it to her'. Ms Bowyer said that she asked Mrs Kapoor what to include in this, and she recalls that Mrs Kapoor said to include that the business cannot accommodate Ms Mercer's roster availability and that she should not mention anything about Ms Mercer's health as, words to the effect, that 'you can't sack someone for that'. Ms Bowyer drafted the letter and sent it to Mrs Kapoor for review. Mrs Kapoor replied back with "Ok -thanks".

[32] Mrs Kapoor was cross-examined at the Hearing in relation to her being the approved provider and having seniority over Ms Bowyer at the time of Ms Mercer's dismissal. Mrs Kapoor acknowledged that as she is the business owner that she is able to overrule any decision at any time, but that Ms Mercer's termination was Ms Bowyer's decision. However she did acknowledge that she supported Ms Bowyer's decision as the Centre Director.

[33] Since her dismissal, Ms Mercer stated that she has endeavoured to contact Mrs Kapoor in relation to the payment issues (above) and also to ask her to provide information to support her application for Centrelink benefits. Ms Mercer said she never received a response. Ms Mercer filed a series of text message exchanges between her and Mrs Kapoor in relation to her pay.

[34] Ms Mercer stated that on 22 July 2025, 10 weeks after her dismissal, she received payment for four weeks of notice in lieu but this was only calculated on a reduced incorrect amount of 15 hours a week in addition to her annual leave entitlements. Ms Mercer stated that she was owed five weeks of notice and that her average hours were 22.5 hours per week. Ms Mercer is 65 years old. She stated that in terms of her continuing estimate of work with the Employer, she had intended to work at Little Ted's until her retirement.

Jurisdictional Objection – Small Business Fair Dismissal Code

Consideration

[35] The Small Business Fair Dismissal Code (SBFDC), reiterated for convenience, states the following:

> **"Summary Dismissal**
>
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
>
> **Other Dismissal**
>
> In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job. The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.
>
> **Procedural Matters**
>
> In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.
>
> A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."

[36] The Applicant submitted that the Respondent did not demonstrate that the Employer had met any of the procedural requirements in the Code. It was submitted by the Applicant's representative that the Applicant was only given one week of notice and that the reason was provided that this was due to her roster availability (a capacity reason). It was then argued that the Code requires that the Small Business Employer give a valid reason as to why the employment is at risk, where the employee is warned about the risk of termination if the conduct

or capacity does not improve where the employee has the opportunity to respond and rectify. Which did not occur in this matter.

[37] The Applicant was not summarily dismissed and as such, this was a matter of 'Other Dismissal' under the Code. Procedurally, as per the SBFDC, the Small Business Employer must provide evidence of compliance including of warnings given. The Respondent failed to provide any evidence of this. The evidence of Ms Mercer is that before the termination letter was sent to her, there were no indications given, let alone warnings provided, that she may be dismissed due to her capacity; she was given absolutely no opportunity to respond, and as further considered below, the Employer had no valid reason based on the Applicant's conduct or capacity to do the job.

[38] For the reasons outlined above, the Respondent did not comply with the SBFDC in this instance; the Respondent failed to provide any submissions or evidence of compliance with the Code. Consequently, this jurisdictional objection is dismissed.

Consideration of the Merits

[39] The Applicant submitted that there was no valid reason for the termination. The Applicant further submitted that she was not notified of any reason for dismissal, nor given an opportunity to respond. Finally, the Applicant's representative submitted that there was no opportunity for the Applicant to have a support person and that there were no prior warnings for any performance issues. The Respondent's submissions in relation to s.387 were limited and are set out below.

Section 387(a) – Valid reason for dismissal

[40] In assessing whether there was a valid reason for the Applicant's dismissal, the reason must be 'sound, defensible or well founded.'[3]A reason which is 'capricious, fanciful, spiteful or prejudiced' cannot be a valid reason.[4] The onus is on the Respondent, in the current matter, to discharge the conduct that there was a valid reason for dismissal, on the balance of probabilities, in accordance with the principle established in *Briginshaw v Briginshaw*[5]:

> "The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' …"

[41] The Applicant submitted that there was no valid reason for the dismissal as she had been absent from work using her accrued sick leave to undergo chemotherapy (and had raised concerns about incorrect payments regarding this). It was then submitted that she was dismissed for her 'lack of availability for rostering', which was not a valid reason in the circumstances.

[42] The reason provided in the termination letter, which was sent shortly after Ms Mercer had made a further enquiry in relation to the pay issues she was experiencing, was as follows: "After careful consideration, we have determined that we are unable to accommodate your current availability in line with the operational requirements of the service. Unfortunately, this means we are no longer able to offer you ongoing employment."

[43] The Respondent, in the very limited material provided, did not provide any material on the reason for the dismissal. Her material merely stated that it was Ms Bowyer that was making the decisions, and not her. Mrs Kapoor concluded that her actions were 'lawful and reasonable' and that the decisions regarding the Applicant's employment were made by Ms Bowyer. This argument, being the only one provided by the Employer, is inconsequential. In this matter it does not matter whether it was Mrs Kapoor or Ms Bowyer making the decisions; the decisions themselves reflect on the Employer. Mrs Kapoor, as the Director and Owner cannot merely pass the consequences of a termination decision onto a subordinate. Nevertheless, the evidence in this matter on the balance of probabilities, does not conclude that Ms Bowyer was the one that made the decision in any case. There is evidence that Ms Bowyer had drafted the termination letter, but I find that she was under the instruction of Mrs Kapoor to do so. The draft termination letter was sent to Mrs Kapoor and she approved it.

[44] Further, Mrs Kapoor raised that Ms Mercer would often show on the roster as a 'no-show' when she was attending treatment. However, she failed to provide any evidence of this, that is, she did not file any rosters or payroll evidence to demonstrate that this is what was occurring. Accordingly, no weight is attributed to this.

[45] The Applicant was undergoing chemotherapy, which was approved by the Employer. The Applicant had clearly informed the Employer of her cancer treatment schedule in advance in order that the roster could be adequately managed. The Applicant was working, on a fortnightly basis, four out of six shifts, which then changed to five out of six shifts near the date of her termination. The Applicant's payslip dated for the pay period 3 to 9 February 2025 details her annual leave at 84.8683 hours and her personal leave at 47.4141 hours. This is a total of 132.2824 hours. The Applicant's normal hours were 45 hours per fortnight; her initial chemotherapy schedule had her working 30 of those hours. In other words, the Applicant on the evidence clearly had more than enough accrued leave to cover the days where she could not work due to the chemotherapy treatment; and was providing the Medical Certificates to the Employer to support this. The Applicant was meeting her contractual obligations in circumstances where she knew that there had to be certainty for the Employer in terms of the rosters to ensure the adequate ratio of staff to children. There is no evidence that the Applicant did anything in error; she appropriately informed the Employer of the necessity for her to undergo cancer treatment and provided a schedule in advance, with Medical Certificates being produced.

[46] Further, there was no evidence that the Applicant had any performance issues whatsoever. Ms Bowyer, who had worked with Ms Mercer since 2019 when Ms Mercer commenced at Little Ted's, recounted in her evidence that Ms Mercer was "an exemplary employee who was great at caring for, and educating, children. There was never any concern regarding her performance or conduct." Ms Bowyer had worked with Ms Mercer, both in Ms Bowyer's role as Lead Educator and in her new role as Centre Director.

[47] It was recognised that the Respondent was self-represented. However, as referred to, she had previously been subject to Directions for the provision of material and had participated in the jurisdictional Hearing before the Commission and therefore had some familiarity as to responding to Directions and participating in the Hearing. Previous to this, she had been in receipt of the Directions, and the Applicant's responses, therefore, she had an understanding of

how these proceedings would be discharged. Some latitude was provided to her at the Hearing. The Respondent however had been on notice that she could not present her case in terms of new evidence at the Hearing. The Respondent put no material before the Commission supporting that there was a valid reason for the dismissal; the only argument made by Mrs Kapoor was that it was someone else (Ms Bowyer) and not her making the termination decision.

[48] This baseless termination of employment was in circumstances where the Employer moved the responsibility for the ultimate decision of dismissal to the newly appointed Centre Director (Ms Bowyer) who had been a close working colleague of the Applicant over her years of employment. The Employer's direction for Ms Bowyer to impose the dismissal and for her having to be involved in this termination action, clearly caused her significant anguish as she was aware of the circumstances of the Applicant. The deliberate action by the Employer in endeavouring to shift responsibility for the dismissal decision to Ms Bowyer (where she objected to preparing and presenting the termination letter) exacerbated the circumstances of the dismissal for the Applicant.

[49] Accordingly, there was no valid reason for the dismissal, based on the evidence and submissions before the Commission. The finding on this criteria is in favour of the Applicant.

Section 387(b) – Whether the Applicant was notified of that reason

[50] A proper consideration of s.387(b) requires a finding to be made as to whether the Applicant 'was notified of that reason'. Contextually, the reference to 'that reason' is to the alleged valid reason if found to exist under s.387(a).[6]

[51] As set out above, the Respondent did not have a valid reason to terminate the Applicant's employment. Section 387(b) contemplates an Applicant being notified of a valid reason. Accordingly, if there is no valid reason, it logically follows that s.387(b) has no application because there cannot be a notification of a valid reason if the reason for termination is not valid.[7] Further, Ms Mercer's evidence established that even if there was a valid reason, that at no time before her receipt of the termination letter was she given notice that her employment may be in jeopardy due to her availability. This further lack of procedural fairness is considered a factor that weighs in favour of the Applicant.

Section 387(c) – Whether the person was given an opportunity to respond to any reason for dismissal

[52] In *Newton v Toll Transport Pty Ltd*,[8] the Full Bench stated:

> "[188] Section 387(c) focuses on provision of an opportunity to respond to a reason for dismissal prior to the dismissal. The valid reason for dismissal upheld by the Deputy President was not notified to Mr Newton before dismissal and he was not afforded an opportunity to respond to the assertion that he had been dishonest, misleading and had engaged in sinister conduct.
>
> [189] The Deputy President took into account an irrelevant consideration in concluding that any unfairness was ameliorated in the Commission proceedings. Any opportunity to respond to a reason for dismissal must be afforded prior to the dismissal occurring. It

> was not reasonably open to the Deputy President to conclude that the failure to provide Mr Newton an opportunity to respond to the valid reason as found by the Commission was a neutral consideration. Plainly it was a matter which sounded in favour of a finding that the dismissal was harsh, unjust or unreasonable. The weight accorded to a failure to comply with s 387(c) may hinge on whether an employee was deprived of the possibility of a different outcome." (emphasis added)

[53] In line with this case law, as above, Ms Mercer's evidence established that at no time before her receipt of the termination letter was she given notice that her employment may be in jeopardy due to her absence on genuine approved sick leave. Consequently there was no ability for her to respond as no reason was notified to her. This is similarly considered as a factor that weighs in support of the Applicant.

Section 387(d) – Unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[54] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account any unreasonable refusal by the Employer to allow the person to have a support person present to assist at any discussions relating to the dismissal.[9]

[55] There was no evidence before the Commission regarding this factor. The Employer did not undertake any discussion regarding the reason for termination and inherent to that, the Respondent therefore did not allow Ms Mercer to have a support person present at any discussion as no notification of the reason for termination or a discussion in that regard occurred. This is considered as a factor that is in favour of the Applicant given the lack of a procedure in relation to the termination of employment.

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

[56] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, if the dismissal related to unsatisfactory performance by the person, the Commission must take into account whether the person had been warned about that unsatisfactory performance before the dismissal.[10] Unsatisfactory performance is more likely to relate to the employee's capacity to do the job, than their conduct.[11]

[57] The Respondent characterised the reason for dismissal in the termination letter as related to Ms Mercer's 'current availability'. There was no evidence that the Respondent had raised any issues with the Applicant in any manner, whether formal or not before her dismissal. Further, in relation to the Applicant's conduct on the job, the evidence demonstrated that she was an "exemplary" worker (Ms Bowyer's evidence). The Employer, Mrs Kapoor, did not contest this. This factor weighs in favour of the Applicant.

Sections 387(f) and (g) – 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 the absence of dedicated human resource management specialists or expertise in the enterprise

[58] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account the degree to which the size of the Employer's enterprise would have impacted the procedures followed in effecting the dismissal.[12] Further, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account 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.[13]

[59] As set out above, the Respondent, was a Small Business Employer and therefore not a significantly sized Employer. There was no evidence that the Employer had access to human resources or industrial relations advice or had sought such expertise to assist with the process. It is also recognised that the Respondent, as the Director of the company, had a large range of duties and responsibilities in running the business and holding the statutory role for the responsibility in conducting the Childcare Centre. However, the factors in ss.387(f)-(g) of the Act cannot be used as a way to shield a business from reasonable scrutiny in relation to using a procedurally fair process.[14] In addition, the Employer cannot abdicate this responsibility. Similarly, the size of an Employer's business cannot be a significant mitigating consideration when dismissing an employee in a process that is "devoid of any fairness."[15] Given the Respondent's complete lack of process to dismiss the Applicant as detailed above (apart from merely sending the termination letter); the Respondent cannot claim the size of the business and absence of human resource specialists as a mitigating factor in not following a fair process. For this reason, these factors weigh in favour of the Applicant.

Section 387(f) – other relevant matters

[60] Mr Tuxworth submitted on behalf of the Applicant, that the Commission should also take into account that the Applicant had over five years of unblemished service at Little Ted's. The Applicant also submitted that she was 65 years old and she intended to work at the Centre until her retirement; consequently, it was submitted that as a result of the dismissal she is also unlikely to ever qualify for long service leave given the Applicant's age. It was submitted that endeavours have been made by the Applicant to obtain further employment but that to date this has been unsuccessful.

[61] Further, the Applicant's representative submitted that the Commission should take into account the fact that the Applicant was terminated by the Employer when it was well known by all that Ms Mercer was undergoing cancer treatment. Ms Bowyer knew about the Applicant's cancer treatment and gave evidence that this was spoken about with Mrs Kapoor. Further, there was evidence filed with the Commission that Ms Mercer had directly messaged Mrs Kapoor that she was undergoing cancer treatment. Mrs Kapoor cannot deny that she was aware of the health circumstances of the Applicant. To this point, Mr Tuxworth submitted that the Commission's decision in *Chanintorn v Urban Orchard Food Pty Ltd* should be taken into account as to the harshness of the Employer's termination:[16]

> "[68] Further, the absence of management specialists or other expertise, and the informality that would understandably exist in a small business, could not provide justification for the unnecessarily undignified implementation of a dismissal by way of a telephone call. This unnecessarily harsh approach was compounded by the extraordinarily heartless disregard for the personal circumstances of another human being who was suffering from pancreatic cancer"

[62] Mr Tuxworth also submitted that the Applicant was dismissed by email, which should be taken into account as to the harshness of the dismissal given prior decisions of the Commission have found that terminations should be conveyed personally.[17]

[63] The Applicant further only received one week of notice, when due to her length of service and her age, the minimum she should have received is five weeks. The Applicant submitted that 10 weeks after her dismissal, and after lodging this application, she was paid four weeks of notice. However, it was submitted that there were errors with this as she was owed five weeks, and she worked 22.5 hours per week, rather than 15 hours which is the amount that was used in error for the calculations of the notice period. While applications pertaining to the payment of unpaid entitlements are considered under a separate jurisdiction, this has been taken into account as a relevant matter as to the harshness of the termination of employment as a result of the Employer's failure to pay these obligations for a significant period of time.

Finding

[64] As set out above, the Respondent did not have a valid reason for dismissing the Applicant. In addition, based on the reasons set out above, there is an unfairness in the Applicant's dismissal based on the fact that no proper process was followed in relation to the dismissal. The dismissal of Ms Mercer was egregious and there is nothing to redeem the Employer in the circumstances of her dismissal. The Applicant's dismissal was harsh given her personal health circumstances which had been disclosed to the Respondent (a plan had been organised with the Employer for this purpose, and the Applicant had more than enough leave to cover for such). In addition, the dismissal was harsh in circumstances where payment of the Applicant's entitlements was significantly delayed. Further, the dismissal was unjust given that she was dismissed via email without any prior indication that this was being considered and when she had raised payment issues earlier that day (after multiple times previously indicating such). It was unreasonable also, as no proper process was followed by the Respondent in relation to the dismissal. The Applicant's dismissal, for all of the above reasons, was harsh, unjust, and unreasonable, and the Applicant is entitled to an unfair dismissal remedy.

Remedy

[65] Having found that the Applicant was protected from unfair dismissal, and that her dismissal was not for a valid reason and was harsh, unjust and unreasonable it is necessary to consider the appropriate remedy that should be granted to her.

[66] Section 390(3) of the Act provides that the Commission must not order the payment of compensation unless it is satisfied both that reinstatement of the person is not appropriate, and that it considers an order for the payment of compensation to be appropriate in all the circumstances of the case.

[67] The Full Bench Decision of *Nguyen* established that reinstatement might be inappropriate in a whole range of circumstances,[18] including where there has been a loss of trust and confidence in the employment relationship.[19]

[68] Given the parties' material, it is clear that the relationship between the parties is incapable of maintaining a productive working relationship. The Applicant did not seek reinstatement in her submissions stating a loss of trust and confidence in the Respondent. The Respondent made no submissions in relation to remedy. Reinstatement in this matter is not an appropriate remedy.

Compensation

[69] Given that reinstatement is not appropriate in the circumstances, it is necessary to assess whether an amount of compensation should be awarded. In relation to awarding compensation, the various considerations under s.392(2) must be taken into account. The *Sprigg*[20] formula provides the authoritative method of assessing compensation to be awarded. The *Sprigg* formula has been affirmed by several Full Bench decisions of the Commission, and these have been taken into account in addressing the following criteria.[21]

Section 392(2)(a) – the effect of the order on the viability of the employer's enterprise

[70] The originally set Directions sought submissions from the parties that included an extract of s.392 of the Act. The parties provided no submissions with respect to this consideration.

[71] It is noted, that in addition to this Centre, Mrs Kapoor operates another Childcare Centre and no information was provided that the order would effect the viability. Further to this, the Applicant worked part-time and received a moderate hourly wage. This is a neutral consideration in the circumstances.

Section 392(2)(b) – the length of the person's service with the employer

[72] The Applicant had been employed by the Respondent for over five years. This is a relatively significant period of employment. The Applicant submitted that she had an unblemished record at Little Ted's and there was no evidence to the contrary. Therefore, this is considered to be a factor weighing in favour of a higher consideration of compensation.

s.392(2)(c) – the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed

[73] The Applicant submitted that she intended to continue working at Little Ted's until her retirement (which she stated was not for at least another two years); therefore on the evidence, at the time of termination, it is considered likely she would have continued to work the next 26 weeks after her dismissal, which is the applicable maximum cap of compensation in this matter. The Applicant submitted that she was regularly rostered to work 22.5 hours per week (this is also the conclusion reached on the evidence in this matter), and she worked at a rate of $29.27

per hour. The Applicant's wage over a 26 week period would have been $17,122.95. This is a case where the award of the maximum compensation is appropriate.[22]

Section 392(2)(d) – the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; s.392(2)(e) the amount of any renumeration earned by the person from employment of other work during the period between the dismissal and the making of the order for compensation; and s.392(2)(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

[74] The Applicant's evidence was that she had been endeavouring to find other employment, after the callous dismissal, however she stated that given her age and the fact that she was undergoing cancer treatment. This understandably, as would have been known to the Employer, made that task difficult. She stated she had been applying for jobs in the months of May, June, July, August, and October 2025 and January 2026. However, she had not been successful in obtaining any of these positions; consequently the only income received was from Centrelink payments. I find that the Applicant had made efforts to mitigate the loss suffered, and due to no fault of her own, she was unable to secure other employment.

Section 392(2)(g) – any other matter that the FWC considers relevant

[75] In terms of further harshness, the Applicant at the time of her dismissal was not paid the correct amounts for sick leave taken and the notice period (in accordance with s.117 of the Act). The Applicant submitted that, many weeks after the dismissal, she was only paid four weeks wages in lieu notice at a rate of 15 hours per week. She stated she was owed a minimum of five weeks (due to her length of service and age) at a rate of 22.5 hours per week as this was her regular hours. The Respondent did not dispute in these proceedings that the Applicant's regular working hours were 22.5 per week. The Applicant therefore submitted that it should be taken into account by the Commission that her wages in lieu of notice was paid the significant period of 10 weeks after the dismissal, was miscalculated, and that this had still not been corrected as at the date of the Hearing. To this point, Mr Tuxworth, relied on the reasoning in the case of *Burke v Suncorp Group Pty Ltd*[23], stating that this decision considered that deductions do not have to be made if the Applicant has not received payment in lieu of notice for a significant period of time, as what occurred with Ms Mercer:

> "[150] At the point he was dismissed, Mr Burke head been employed for a total period of almost seven years, although there had been a break in service. His most recent period of service was approximately three years and four months. Mr Burke was told that he would be paid two weeks wages in lieu of notice on termination of his employment in August 2014. That amount was not paid until November 2014. At that time, Mr Burke was paid the two weeks in lieu of notice set out in his termination letter and a further amount of one week and two days wages when Ms Rowan realised that not only had Mr Burke not been paid notice at the time of his dismissal, but the period had also been miscalculated.
>
> [151] While I accept that this oversight was not intentional I do not doubt that it would have caused Mr Burke significant difficulty given that he was unemployed even at the point this application was heard. Dismissed employees should not have to wait for

> considerable periods to receive their minimum statutory entitlement to payment in lieu of notice and the impact of the failure of Suncorp to pay this amount in a timely fashion is a matter that I have taken into account in calculating compensation. This is particularly so given that the notice payment was not made until the period over which I have assessed compensation had elapsed.
>
> [152] Had Mr Burke remained in employment for the 8 week period he would have earned the gross amount of $8,400. Given my findings about the failure of Suncorp to properly consider whether health issues had impacted on Mr Burke's conduct and work performance, and that Mr Burke was dismissed for poor work performance rather than misconduct, I do not consider it appropriate to make a deduction in this regard. Given the late payment of Mr Burke's statutory entitlement to payment in lieu of notice and that the payment was made outside the time period for which I have determined that Mr Burke would likely have remained in employment, I make no deduction for the period of notice. In my view, the requirement to take such amounts into account does not necessitate that they are deducted from an award of compensation" (emphasis added)

[76] On the materials before the Commission, the unpaid wages for sick leave and public holiday prior to termination have also not been addressed, as previously set out in decision. Accordingly, the absence of the Employer making these payments for a significant period of time (and not to the correct amount) is taken into account in judging the appropriate amount as arrived at after the *Sprigg* calculation is made. This factor of incorrect payment weighs in support of the Applicant.

Section 392(3) – Misconduct reduces amount

[77] There were no allegations of misconduct. Therefore, this factor is considered neutral.

Order of compensation – calculation

[78] The Applicant sought $17,122.95 (gross) plus superannuation. The Applicant noted that this was the maximum that could be awarded. She sought this figure based on her rate of $29.27 per hour for 22.5 hours per week for 26 weeks; as the Applicant was out of work for the totality of this period (and for more). This was despite her applying for other roles, a number of which were applied for during the 26 week period. As noted above, the Respondent did not put any evidence, nor submissions before the Commission on the issue of remedy.

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

> "Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost). I am also required to consider the length of service with the employer[24] and the ability to find a new role as a relevant factor in calculating compensation per s392(2).
>
> Step 2: Deduct monies earned since termination.[25]

Step 3: Discount the remaining amount for contingencies.[26]

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

[80] In accordance with the *Sprigg* calculation, I must first determine the estimated remuneration that the Applicant would have received if she were not dismissed. It is clear from the evidence and submissions of the Applicant that under the first limb of the *Sprigg* formula, the Applicant would have received $17,122.95 (gross), less applicable taxation, plus superannuation for the 26 weeks she was out of work after the dismissal. The Applicant received the incorrect amount of payment in lieu of notice, and this was only after a significant period of 10 weeks after the dismissal. In accordance with *Burke v Suncorp Group Pty Ltd*, "I make no deduction for the period of notice. In my view, the requirement to take such amounts into account does not necessitate that they are deducted from an award of compensation".[27] Further, from the evidence, after the change of ownership, Ms Mercer was not being adequately paid her sick leave, nor was it being accrued accurately while she remained employed (the payslips submitted by the Applicant demonstrated that at no point was she accruing annual or personal leave while Little Ted's was under the ownership of Mrs Kapoor; no evidence was filed by the Employer indicating otherwise). This takes into account the Applicant's exemplary service record of over five years with Little Ted's, and her inability to obtain new employment despite her efforts.

[81] While Ms Mercer does have cancer, and was undergoing treatment at the time of dismissal, there was no evidence to demonstrate that during the 26 weeks after the dismissal that she would not have been able to continue to meet her employment contract. That is, the Applicant had a fairly significant period of leave accrued during her five years of service, and before her dismissal she was clearly dedicated to her employment as she was working at least four of her six regular shifts every two weeks despite going through chemotherapy treatment. Therefore, no deductions need to be made in this matter.

[82] It is noted that in accordance with s.392(4) of the Act, that the amount of compensation cannot include a component for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

[83] There is nothing to redeem the Employer in this case. The dismissal was wanting in every facet of required merits and procedural fairness. The Applicant had been employed for over five years and was an admired educator of the children at the Centre. She was in her mid-60s at the time of the termination of employment and had anticipated working in her job until her retirement. There was no evidence of any performance or conduct issues with her employment. In fact, the Applicant had exhibited her significant commitment to working around her chemotherapy treatments until this Employer's abrupt implementation of the termination. She had been a valued member of the staff. The Employer had not consulted with the Applicant in any way before dismissing her. Mrs Kapoor had made no enquiry of the Applicant as to Applicant's required 'chemo plan'. In the circumstances of the Applicant's required treatment she had enough leave to cover the legitimate absence. It was also a known fact in the consideration of the Employer's operations, that they had casual staff to cover the leave of staff. This casual employment could have been utilised to cover Ms Mercer's period of treatment and allow her to continue in her employment.

Conclusion

[84] Taking into account all of the circumstances, and the omission of any procedurally fair steps being provided to the Applicant, in fairness, the amount of compensation awarded for all of the reasons as set out is $17,122.95 plus superannuation. A separate Order (PR797878) is made for the payment of this amount within 14 days of the date of this decision.

COMMISSIONER

Appearances:

D Tuxworth, for the Applicant
R Kapoor, for the Respondent

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[1] [2025] FWC 3933.

[2] Ibid.

[3] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[4] Ibid.

[5] (1930) 60 CLR 336.

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

[7] *Chubb Security Australia Pty Ltd v Thomas*, Print S2679 at [41].

[8] [2021] FWCFB 3457.

[9] *Fair Work Act 2009* (Cth) s.387(d).

[10] *Fair Work Act 2009* (Cth) s.387(e).

[11] *Annetta v Ansett Australia Ltd* (2000) 98 IR 233 at 237.

[12] *Fair Work Act 2009* (Cth) s.387(f).

[13] *Fair Work Act* 2009 (Cth) s.387(g).

[14] *Sykes v Heatly Pty Ltd t/a Heatly Sports*, PR914149 at [20].

[15] *Williams v The Chuang Family Trust t/a Top Hair Design* [2012] FWA 9517 at [40].

[16] [2019] FWC 3177.

[17] To this point, the Applicant's representative cited *Kurt Wallace v AFS Security 24/7 Pty Ltd* [2019] FWC 4292 at [51]; *Van-Son Thai v Email Ventilation Pty Ltd* [2019] FWC 4116 at [65] citing *Knutson v Chesson Pty Ltd t/a Pay Per Click* [2018] FWC 2080 at [47] with approval.

[18] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [17].

[19] Ibid at [27].

[20] *Sprigg v Paul's Licensed Festival Supermarket*, (Munro J, Duncan DP and Jones C), (1998) 88IR 21.

[21] *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey* [2013] FWCFB 431; *Jetstar Airways Pty Ltd v Neeteson-Lemkes* [2014] FWCFB 8683.

[22] *Cincotta v Pepperleaf.Com.Au Pty Ltd* [2025] FWC 3272.

[23] [2015] FWC 3357.

[24] *Fair Work Act 2009* (Cth) ss.392(2)(b)-(c) and (g).

[25] Ibid s.392(2)(e).

[26] Ibid ss.392(2)(a), (d) and (f).

[27] [2015] FWC 3357.