DECISION

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

Lina Ramirez

v

Gonva Group Pty Ltd
(U2023/10993)

COMMISSIONER THORNTON ADELAIDE, 13 JUNE 2024

Application for an unfair dismissal remedy – jurisdictional objection – whether employer complied with Small Business Fair Dismissal Code – Code not complied with – consideration of merits of application – dismissal found to be unfair – remedy granted – compensation ordered

[1] On 9 November 2023, Ms Lina Ramirez (**Ms Ramirez** or **Applicant**) made an application seeking a remedy for an alleged unfair dismissal under s.394 of the *Fair Work Act 2009* (the **Act**). Ms Ramirez did not seek reinstatement but rather 13 weeks' of pay as compensation.

[2] Gonva Group Pty Ltd (**Respondent**) denies it unfairly dismissed the Applicant and asserts it complied with the Small Business Fair Dismissal Code (**the Code**). In accordance with the Act, I am required to consider and determine the Respondent's claim that it complied with the Code. If I find that the employer complied with the Code, their objection to the Commission exercising jurisdiction in this matter is upheld and the matter is dismissed. If I determine that the employer did not comply with the Code, then I am required to determine whether the Applicant was unfairly dismissed, taking into account the relevant considerations in the Act.

[3] The parties both filed written statements and submissions before a hearing was held to hear evidence and argument in respect of both the jurisdictional objection and the merits of the claim itself. This decision considers the written material and oral evidence and determines both the jurisdictional objection and the merits of the claim.

[4] There was some initial disagreement regarding the date of dismissal, but ultimately the parties agreed that the Applicant was dismissed on 28 October 2023 by email sent by the Respondent. The termination of employment took effect on the same day. It is clear that the Respondent notified the Applicant that she was dismissed for serious misconduct and she was not paid any wages in lieu of notice.

[5] It is uncontested that at the time of the Applicant's dismissal, the Respondent employed fewer than 15 employees and is therefore a small business in accordance with the definition in section 23 of the Act.

[6] The Applicant was unrepresented and gave evidence on her own behalf. The Applicant's husband, Mr Nelson, also gave evidence on her behalf. The Respondent was represented by Mr Gonzalez, Business Owner and the Managing Director of the Respondent, who also gave oral evidence on behalf of the Respondent. Mr Gonzalez's wife, Ms Rocha, gave evidence on behalf of the Respondent. Ms Ramirez and Mr Gonzalez gave the evidence relevant to the matters in dispute. I have no reason to doubt the evidence of Mr Nelson and Ms Rocha, but neither of these witnesses observed the key events and communications that led to the Respondent terminating the employment of the Applicant.

[7] The Applicant and Respondent are both of Columbian descent and speak Spanish as their first language. They often communicated with each other in Spanish, both inside and outside of the workplace. Many of the relevant written exchanges between them were in Spanish. Some but not all of the exchanges, including transcripts of voicemail messages, were translated for the hearing of this matter. Where a translation of a document or transcript of a voicemail was relied upon by one party, the other party was given an opportunity to confirm that they agreed with the translation.

[8] For the reasons set out below, I find that the Respondent did not comply with the Code and unfairly dismissed the Applicant. My orders with respect to the remedy for the Applicant are also addressed in this decision.

The cases of the parties

[9] The Respondent is a small food and beverage business that trades as Cafetal Coffee Company. The business operates a café serving food and beverages with a focus on South American food and Columbian coffee, and also undertakes importation, roasting and wholesaling of Colombian coffee.

[10] The Applicant commenced her employment with the Respondent on 10 October 2022 as a food and beverage attendant. The Applicant was employed on a permanent part-time basis and worked a regular roster of 32 hours per week, initially undertaking shifts on two weekdays and a Saturday. When the café started opening on Sundays, she increased her hours to be performed on two weekdays and both weekend days. For the last five months of her employment, Ms Ramirez continued to work four days but regularly worked Monday, Wednesday, Friday and Saturday.

[11] Ms Ramirez gave evidence that prior to the events leading to her dismissal, she had a friendly relationship with Mr Gonzalez. Mr Gonzalez agrees that their relationship was a good relationship for most of the Applicant's employment. Ms Ramirez says that she assisted the business by shopping for food outside of her working hours and using her own money to pay for the goods before being reimbursed. She did not seek reimbursement for her time or fuel used in attending to the shopping. Ms Ramirez says she brought some of her own utensils into the business as they were necessary to do her work and they were not provided by the

Respondent. She was happy to assist the business in these ways. This evidence was not disputed in any notable way by the Respondent.

[12] In September 2023, Mr Gonzalez became the sole owner and director of the Respondent when his business partner, Mr Valencia, left the business.

[13] Before Mr Valencia left the partnership, the Applicant says she raised concerns with Mr Valencia that permanent employees were not being paid for public holidays when the café was closed. Ms Ramirez says that she had worked in hospitality businesses prior to the Respondent's business and had previously been paid public holidays. She gave evidence that she asked her co-workers about it after she commenced with the Respondent and had been told that public holidays were not paid in this business.

[14] Ms Ramirez said that she was seeking approval of an application for a home loan and didn't want to jeopardise her job by asking about payment on public holidays before the home loan was approved, which occurred in approximately August 2023.

[15] Ms Ramirez attended a staff meeting held on 27 September 2023 online because it was held when she was sick with influenza. Ms Ramirez says that she asked a question about whether she would be paid for public holidays when the café was closed because she had not been paid public holidays previously by the Respondent. She says that she raised the question because of the upcoming long weekend. Ms Ramirez says that after she asked the question she was "*cut off abruptly and belittled in front of other staff*"[1]. She says that Mr Gonzalez said that the Applicant was wrong, he did not have to pay public holidays and he had "*checked himself and already had this information*." The Applicant decided that she would not take the issue any further at the meeting in front of other staff members and gave evidence that she did not probe further because she was avoiding causing any embarrassment to Mr Gonzalez.

[16] Mr Gonzalez took exception to the manner of Ms Ramirez's communication in two staff meetings (including the meeting of 27 September 2023) where he described that Ms Ramirez was "*constantly interrupting our staff members and me before we were done speaking and making rude, snide or belittling comments."* He went on to say: *"As a business owner and staff member, I consider these actions a "lack of respect in the workplace"."*[2] Mr Gonzalez complained that Ms Ramirez was "*always questioning*" him in staff meetings.

[17] Mr Gonzalez said that he found Ms Ramirez disrespectful when she suggested in a staff meeting that he work at the business on a Saturday to assist with what she submitted was understaffing in peak service time. He said that she was disrespectful in suggesting he work at a time he considered to be his "*family time*". Ms Ramirez said that it was not her intention to disrespect Mr Gonzalez and was rather suggesting a way to assist the efficiency of the business. She offered Mr Gonzalez an apology in the hearing if he interpreted her suggestion as disrespectful.

[18] The Applicant says that the day after the staff meeting she sought advice from the Fair Work Ombudsman about her entitlement to payment on public holidays. She says that when she heard the message that the call was being recorded, she thought that she could also record the call so she could refer back to it. The recording was appropriately not provided as evidence. Ms Ramirez says the officer she spoke with at the Fair Work Ombudsman advised her that she

should be paid for public holidays and she told the officer that in her view, the failure of the Respondent to pay public holidays "*was a matter of misinformation as he is not a bad person*." Ms Ramirez said that she thought it was a simple mistake because Mr Gonzalez had recently taken over management of all aspects of the shop from Mr Valencia.

[19] Ms Ramirez then sent a copy of the recording of the phone call to the kitchen manager, whom each party referred to as Carolina, with what she says was the intention of informing her of the advice. Carolina was the Applicant's first point of contact for work-related matters. Ms Ramirez says that in the voicemail she left for Carolina when she sent the recording, she said she "*didn't want to bring issues or controversy*" to the workplace but wanted everyone to "*be informed and work on the same page*."

[20] Ms Ramirez then says Mr Gonzalez called and left her a voicemail to the effect that he had also sought advice from the Fair Work Ombudsman. She says that he complained in the voicemail that he had to pay employees when the business was closed.

[21] Mr Gonzalez told the Applicant that he would have to remove her and Carolina from the Monday roster because as part-time employees he would have to pay them when the majority of public holidays fell on a Monday and he did not want to do that. The Applicant was upset about this and suggested that she convert her employment to casual to retain the Monday shift. As a mother of a 19-month old child at the time, Ms Ramirez had available care for her child on Mondays. She says: "*I was willing to change my permanent position to casual, so he* [Mr Gonzalez] *didn't have to take Mondays off me*."[3] No change was subsequently made prior to the dismissal which occurred shortly after.

[22] Mr Gonzalez alleged that Ms Ramirez on occasion recorded their telephone conversations. He said that recording the conversations without his consent was "*illegal activity*"[4] and was relied on by him in his decision to terminate Ms Ramirez for serious misconduct.

[23] Ms Ramirez denied that she had recorded any conversations between her and Mr Gonzalez. The parties used a social media platform to communicate with each other. The evidence of Ms Ramirez was that the platform saves any text and voicemail messages sent or received by the parties so that voicemails left by one party for the other remain accessible to the party who left the message. Ms Ramirez says that she had access to the voicemails that she left and received. Any reference she made to details of conversations she had with Mr Gonzalez came from those voicemails or her recollection and were not recorded by her.

[24] Mr Gonzalez also said that he relied on the Applicant's use of her mobile phone during work time in the kitchen as serious misconduct, justifying her dismissal. He says that: "*I saw Lina Ramirez on many occasions that she was using her mobile phone during the service in the kitchen for personal matters. She knew that the usage of mobile phones in the kitchen was a bad practice, however, she kept doing so because she argued that was always an important matter*."

[25] Ms Ramirez denies regularly or excessively using her phone in the kitchen. She says that there were times when she had to keep it with her for reasons including the bank contacting her with information about her impending home loan or in the event she was contacted by her

child's childcare centre, but otherwise she said she did not use her mobile phone in the manner described by Mr Gonzalez. Ms Ramirez gave evidence that she never received any warnings about the conduct in the past.

[26] Ms Ramirez had abdominal surgery planned for 6 October 2023. She says she was open with Mr Gonzalez about the surgery and her need to have two weeks' away from work after her surgery. She says that she requested a leave balance from him in advance of her surgery because her payslips did not show her accrued annual and sick leave balances. Ms Ramirez said that Mr Gonzalez had difficulty providing her with the information she requested, but following her request the information was then added to her payslip.

[27] Mr Gonzalez says in his statement that "*[w]e did not have enough staff to replace her during the two weeks she was expecting to be on leave, so we hired a new kitchen staff to be trained by her, in order to replace her. We invested 28 hours of paid training, just to replace her for two part-time weeks. … The economic cost for our small business was significant*."[5]

[28] Ms Ramirez's surgery was unfortunately cancelled because she contracted influenza A. The Applicant's doctors re-booked the surgery for 25 October 2023. Ms Ramirez notified Carolina that she would return to work after she had recovered from influenza, which she did without any issues arising.

[29] In advance of the rescheduled surgery on 25 October 2023, the Applicant developed a cough that caused her doctors to again delay the surgery. The cough was not serious enough to prevent her from attending work, but she could not have anaesthetic. Ms Ramirez says she told Carolina by text message on Sunday, 22 October 2023 that she was concerned that her doctor would likely cancel the surgery when she spoke with the doctor the next day. She suggested the person employed to back fill her work the following day in her place so as not to give that person late notice and she return from Wednesday, 25 October 2023.

[30] Carolina published the following week's roster with Ms Ramirez on the roster for her regular days from Wednesday, 25 October 2023.

[31] On Monday, 23 October 2023 Ms Ramirez left a voicemail for Carolina confirming that her surgery could not take place as scheduled and had been rescheduled again for 8 November 2023. Ms Ramirez says that Carolina then informed her by text message that Mr Gonzalez became very upset about the short notice of her cancelled surgery and she had to remove her from the roster for her shifts on Wednesday, Friday and Saturday. Ms Ramirez offered to take annual leave for the remainder of the week starting 23 October so she "*did not bother anyone*".

[32] However, Ms Ramirez insisted on returning to work the week of 30 October 2023. She did not consider it was fair that she had to take annual leave for two weeks and not be able to use her leave to spend time with her family. Mr Gonzalez called Ms Ramirez and said that she had to take leave for the two weeks because his wife had made arrangements to work in the business in that period of time.

[33] Ms Ramirez then sought advice from the Fair Work Ombudsman who she says advised her she had an entitlement to her permanent shifts in the following week, as a permanent part-time employee.

[34] Mr Gonzalez in his evidence complained of the inconvenience to his business of the Applicant taking leave after surgery, particularly in circumstances where the surgery was cancelled. He inferred that another employee had been hired on a casual basis simply to cover the shifts that would otherwise be worked by Ms Ramirez and he had made representations to the worker that he would receive work in that period. Mr Gonzalez also spoke about the cost and inconvenience of training another person to replace Ms Ramirez and the work that would go into re-doing the completed rosters. When Mr Gonzalez did not want to put Ms Ramirez on the roster for the following week, he says that she said she was going to "*call Fair Work*".

[35] Ms Ramirez called Mr Gonzalez on 24 October 2023 to tell him of her advice and again ask to be returned to the roster the following week. In that call she says she referred to what she described to Mr Gonzalez as his "*bad practices*" and says that he became very upset when she used that phrase. She says Mr Gonzalez said to her that her use of the term 'bad practices' was very emotionally triggering for him because it was raised by his former business partner in their separation. Mr Gonzalez confirmed this in his evidence.

[36] After that conversation, a number of emails were exchanged between Ms Ramirez and Mr Gonzalez on 26 October 2023 that addressed a range of matters, including:

(a) Mr Gonzalez requiring Ms Ramirez to apply for annual and sick leave in writing;
(b) Ms Ramirez confirming she would provide a medical certificate after she had been given one when she had surgery;
(c) Mr Gonzalez asking Ms Ramirez to confirm in writing her intentions with respect to a return to work after her surgery;
(d) Ms Ramirez requesting Mr Gonzalez to confirm if she would be returned to the roster after her week of annual leave (on two occasions); and
(e) Ms Ramirez confirming her intention to return to her permanent shifts after her surgery if the Respondent would offer them to her.

[37] Mr Gonzalez asserts that he spent time between 25 and 28 October 2023 reading, understanding and compiling the Small Business Fair Dismissal Code and considering the definition of serious misconduct.[6] It appears that Mr Gonzalez was referring to the Small Business Fair Dismissal Code Checklist that the Respondent placed into evidence, which he says he completed on 27 October 2023.

[38] The source of the checklist was not identified by Mr Gonzalez but it appears to be a document available on the Fair Work Ombudsman's website. On that checklist, Mr Gonzalez answers yes to the question 4(c) which asks the respondent to tick 'yes' or 'no' to: "*The employee threatened me or other employees, or clients, with violence or actually carried out violence in the workplace*." He also answered yes to the question "*Did you dismiss the employee for some other form of serious misconduct?*" and went on to specify that it was for: "*Intimidation, Illegal activity: Recording private conversations without the other party's consent. Tendency towards anger or verbal confrontation, Lack of respect in the workplace, Mobile Phone use during the service at the kitchen for personal matters*."

[39] He then says that "*I decided to proceed with the dismissal … on Saturday 28 October 2023, based on the Small Business Fair Dismissal Code .*"[7]

[40] At 1:29pm on Saturday, 28 October 2023, Mr Gonzalez sent an email to Ms Ramirez terminating her employment.[8] The email contained the following assertions and reasons with respect to Ms Ramirez:

(a) She was not currently on the roster because she requested time off for personal matters;
(b) Her request for time off caused "*many inconveniences in the operation of the business*";
(c) The business had had "*many problems with you due to your aggressive verbal behaviour, where I myself have spoken with you … But there has been no change and on the contrary you have reached completely unacceptable levels like the one I've had to deal with it myself this week*";
(d) The issue of aggressive verbal behaviour was not a new issue and had been happening for a long time, including when the Applicant had worked with Mr Gonzalez's former business partner;
(e) Mr Gonzalez had defended the Applicant on many occasions to other staff following complaints about aggressive verbal behaviour;
(f) the Applicant had been given enough time to improve her behaviour;
(g) that despite "*meeting all your requirements*" the aggressive verbal behaviour continued to be a serious problem;
(h) the alleged aggressive verbal behaviour "*is unacceptable and should not be accepted in any healthy work environment*"; and
(i) that he had an obligation to protect his personal well-being and that of the business.

[41] Mr Gonzalez then included in the email: "*Based on the "Small Business Fair Dismissal Code," I have decided to terminate our employment relationship with immediate effect*."[9]

[42] It was Ms Ramirez's evidence that as at the date of hearing, she had not been paid in lieu of notice.

[43] Mr Gonzalez accepted in cross examination that he did not issue the Applicant with any warnings in writing about what he now asserts is inappropriate conduct that went back to at least when he owned the business with Mr Valencia, prior to September 2023.

[44] Mr Gonzalez did not advance any evidence that Ms Ramirez had threatened him, co-workers or customers of his business with any violence or in fact carried out any violence. The highest he put his allegations against Ms Ramirez was of inappropriate communication when she raised issues related to her workplace conditions.

[45] Ms Ramirez denies the allegations put by Mr Gonzalez that she used swear words in communication with him or ever threatened violence against him or anyone else in the workplace. However, Ms Ramirez accepts that she intended to be direct in the way she spoke to Mr Gonzalez and may have raised her voice in discussions with him, but had no specific recollection of doing so. She said that she did use the phrase "bad practices" when referring in a telephone call to Mr Gonzalez's management of her, and in particular his response to her request to be paid for public holidays. Ms Ramirez said that Mr Gonzalez then said that the phrase 'bad practices' was "*triggering for him*" and he ended the call. Mr Gonzalez did not dispute Ms Ramirez's evidence in that regard.

[46] Mr Gonzalez says in his evidence that he was intimidated by the Applicant "*on several occasions*"[10] when she said words to the effect "*I am going to take you to the court, to pay huge fines and legal advice fees*".[11] He reports that he was present on three occasions when Ms Ramirez was "*shouting and screaming at a staff member during the opening hours of the business, with customers present in the coffee shop*." He did not offer dates of these occasions but his evidence suggested these were well before the events leading to termination.

[47] When asked whether he had specific allegations to put to Ms Ramirez for her response about instances of intimidation, Mr Gonzalez referred to an incident where he says there was conflict between Ms Ramirez and Mr Valencia, before he left the business, and he says Ms Ramirez spoke loudly and inappropriately and he had to intervene. He otherwise generally alleged that Ms Ramirez raised her voice in the workplace at various times and he had to ask her to speak more quietly.

[48] Ms Ramirez did not recall the event with Mr Valencia. Ms Ramirez otherwise denies that inappropriate communication by her was raised with her before the events leading to termination. She accepts that she spoke forthrightly and robustly, but not inappropriately.

[49] Ms Ramirez gave evidence that Mr Gonzalez attempted to visit her at her house on 30 October 2023, after her dismissal, but accidentally visited her former residence, contacting her by phone when he realised his mistake. Ms Ramirez found his attempt to visit her for the first time at her house "*confronting*" and she did not answer his telephone call.

Observations on the evidence and findings of fact

[50] Before I am able to determine the essential matters in accordance with the relevant parts of the Act, it is necessary that I make findings of fact based on the evidence.

[51] I prefer the evidence of the Applicant over that of the Respondent with respect to the conduct that precipitated the dismissal.

[52] The Applicant was measured in her evidence, direct in her answers and made some concessions where appropriate, even if against her own interests.

[53] Mr Gonzalez appeared to overstate the conduct of the Applicant at the relevant times, conveyed his personal hurt and grievances at what he perceived to be disrespectful and aggressive communication by the Applicant, and could only rarely provide specific detail to his allegations against the Applicant. In contrast to the Applicant's evidence, Mr Gonzalez made accusations about the Applicant's conduct that were not supported in the evidence presented by him and made clear that he took Ms Ramirez's questions about her employment as disrespectful to him personally. His evidence was given in a way that revealed his personal aggrievement with the challenges posed to him by the Applicant in remedying her concerns about her conditions of employment.

[54] The written communications between the Applicant and Respondent that were translated showed no inappropriate communication from either party.

[55] It is my view that the Applicant asked legitimate questions and raised reasonable issues with the Respondent about her conditions of employment, including payment for public holidays, understaffing on busy Saturdays, transparency regarding her leave accruals and a return to her shifts when her surgery was cancelled. The Applicant denies communicating with the Respondent in an aggressive or intimidating manner. There was no evidence to support Mr Gonzalez's submission that he had to raise inappropriate communication with Ms Ramirez at other times during her employment. I find that the Applicant did not communicate with Mr Gonzalez in an aggressive or inappropriate manner as he has claimed.

[56] Mr Gonzalez offered only vague allegations of verbal intimidation that he has relied on to assert a course of conduct that was sufficiently serious to justify immediate dismissal. When asked to clearly set out examples of the alleged intimidation, anger or verbal confrontation, he referred to past instances that he could not describe in detail and which he agreed had not been previously addressed with the Applicant. He further referred, in a general sense, to comments made by the Applicant in staff meetings that he described as rude and belittling of him and other staff. Mr Gonzalez gave little detail of what he says was in fact said by the Applicant in those meetings that could have been said to be rude or belittling.

[57] It is apparent to me, after witnessing the parties give evidence, that the Respondent saw the raising of these issues, including in front of other staff members, as a lack of respect for him as the employer. The Applicant denies intending to cause any embarrassment to the Respondent and I accept her evidence in that regard. She even apologised, during her evidence, to the Respondent if her queries were perceived as disrespectful as she had not intended them to be so.

[58] Mr Gonzalez appears to me to have interpreted the Applicant's queries and requests about her employment as problematic and non-compliant with how he wished to treat his employees and run his business. Mr Gonzalez then described his reaction to the Applicant's behaviour as personal offence to what he saw as disrespectful behaviour.

[59] I find that the raising of the complaints in and of themselves was not misconduct[12], and that further, the manner in which they were raised by the Applicant in the relevant meeting or meetings was not misconduct. I find that the Applicant raised reasonable questions and issues about her employment, in a reasonable manner, in an appropriate forum. Any prior instances of inappropriate communication alleged by the Respondent are unreliable because of the vagueness of the allegations and the absence of evidence to support the allegations.

[60] I reject the assertion of the Respondent made on the checklist provided as evidence of compliance with the Code, that the Applicant threatened him or other employees or customers with violence or carried out violence in the workplace. The allegation is very serious but entirely unsupported by any evidence. In fact, no evidence at all was advanced that even suggested any threats of violence were made, let alone violence being committed by the Applicant.

[61] I accept the evidence given by the Applicant regarding the alleged recording of telephone calls. Ms Ramirez agrees that she recorded the telephone call with the Fair Work Ombudsman and that it may have been inappropriate to do so. I accept her evidence that she believed the telephone call could be recorded because she heard a message when waiting in the

call queue that the Ombudsman's office were recording the call and that she wanted a record to use to inform the Respondent of the advice she received.

[62] I accept Ms Ramirez's explanation that she had access to voicemails she had left and received from the social media application used to communicate with Mr Gonzalez. Mr Gonzalez advanced no evidence to substantiate his assertion that the Applicant had otherwise recorded telephone calls between them. He asserted that if the Applicant could record "*an authority*" that she would have recorded their telephone calls. I find that Ms Ramirez did not record telephone calls between her and Mr Gonzalez.

[63] I also find that the Respondent has not established that the Applicant inappropriately used her mobile phone at work. Mr Gonzalez again did not submit any evidence of specific circumstances where he says Ms Ramirez had her phone in the kitchen, whether the Respondent had a policy about phone use, or directions had been issued to employees about the use of phones in the workplace and that Ms Ramirez had acted contrary to a policy or directions from the Respondent. Ms Ramirez honestly accepted that there were times she had her phone with her in the kitchen for what she says were legitimate reasons, however, could not otherwise respond to the allegation of inappropriate phone use because there were insufficient details to the allegation.

[64] In summary, I accept the Applicant's version of the events that led to the termination of her employment.

Legislation

[65] Section 385 of the Act outlines the meaning of "unfair dismissal":

> "**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."

[66] Section 396 of the Act sets out the following:

> "The FWC must decide the following matters relating to an application for an order under Division 4 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;

(b) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(c) whether the dismissal was a case of genuine redundancy."

[67] Section 388 of the Act outlines the Small Business Fair Dismissal Code objection:

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

(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."

Compliance with the Code

[68] As set out above in s.396 of the Act, the Commission must determine whether the dismissal was consistent with the Small Business Fair Dismissal Code before considering the merits of the application.

[69] The effect of s.385(c) of the Act is that when a dismissal is consistent with the Code, it is not an unfair dismissal, and the application must then be dismissed. In the instance that the dismissal is not consistent with the Code, the Commission must then consider whether the dismissal is unfair on the basis of the general criteria in s.387 of the Act. The Code deals with 'summary dismissal' on the ground of serious misconduct and 'other dismissal' on the basis of the employee's conduct or capacity to do the job.

[70] It is not contested, and I am satisfied, that the Applicant was a person protected from unfair dismissal and the claim was made within the statutory time limit. I must now consider whether the Respondent complied with the Code in dismissing the Applicant.

[71] As the Respondent summarily dismissed the Applicant, I have considered the part of the Code relating to summary dismissal and other procedural matters of relevance.

[72] The Code relevantly provides:

"**Small Business Fair Dismissal 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.

…

Procedural Matters

…

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 the Fair Work Commission, 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."

[73] In the matter of *Ryman v Thrash Pty Ltd T/A Wishart's Automotive Services*[13] (**Ryman**), the Full Bench of the Commission considered the Code and said:

"*In assessing whether the "Summary dismissal" section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, and second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element."*[14]

[74] The approach required to assess whether the Respondent's genuinely held belief was objectively reasonable, has been described by a Full Bench of the Commission in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo*[15] (**Pinawin***)* in the following terms:

"*[29]… … There are two steps in the process of determining whether this aspect of the Small Business Fair Dismissal Code is satisfied. First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.*

[30] Acting reasonably does not require a single course of action. Different employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned."[16]

[75] The Full Bench considered other authorities when reaching their view:

"[27] Deputy President Bartel in *Khammaneechan v Nanakhon Pty Ltd* said:

> *"[60] At the outset it is appropriate to note that unlike a consideration of the dismissal of an employee of a business that is not a small business employer, the function of FWA is not to determine on the evidence whether there was a valid reason for dismissal. That is, the exercise in the present matter does not involve a finding on the evidence as to whether the applicant did or did not steal the money. The application of the Small Business Fair Dismissal Code involves a determination as to whether there were reasonable grounds on which the respondent reached the view that the applicant's conduct was serious enough to justify immediate dismissal. As such, the determination is to be based on the knowledge available to the employer at the time of the dismissal, and necessarily involves an assessment of the reasonableness of the steps taken by the employer to gather relevant information on which the decision to dismiss was based*."

[28] Senior Deputy President O'Callaghan *in Harley v Rosecrest Asset Pty Ltd (t/as Can Do International)* said:

> *"[8] For an employer to believe on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal, it is firstly necessary for the employer to establish that the employer did in fact hold the belief that as a matter of fact that (i) the conduct was by the employee; (ii) the conduct was serious; and (iii) that the conduct justified immediate dismissal. This is to be contrasted to the provisions of s 387(a) where FWA, in determining whether there was a valid reason for the dismissal, must find whether the conduct in fact occurred.*
>
> *[9] Secondly, it is necessary for the employer to establish that there are reasonable grounds for the employer holding the belief. It is thus necessary for the employer to establish a basis for the belief held which is reasonable. In this regard it would usually be necessary for the employer to establish what inquiries or investigations were made to support a basis for holding the belief. It would also ordinarily be expected that the belief held be put to the employee, even though the grounds for holding it may not be. Failure to make sufficient inquiries or to put the accusation to the employee in many circumstances might lead to a view that there were no reasonable grounds for the belief to be held.""*[17] (references omitted)

[76] The evidence shows that the dismissal was an immediate or summary dismissal as contemplated by the Code. The Respondent dismissed the Applicant because Mr Gonzalez considered that Ms Ramirez's conduct was serious misconduct.

[77] Mr Gonzalez's evidence persuaded me that he had a genuine belief that Ms Ramirez's conduct was sufficiently serious to justify her immediate dismissal. His notes on the checklist, referenced above, confirm that he was of the view that Ms Ramirez threatened him with violence and committed other misconduct including verbal intimidation, illegally recording telephone calls with him, inappropriately using her mobile phone in the workplace and showing him a lack of respect. Mr Gonzalez's evidence was clear that it was his subjective and genuinely held view that the conduct he alleged against Ms Ramirez in fact occurred and was serious misconduct.

[78] However, the more difficult question is whether Mr Gonzalez's belief was based on reasonable grounds. It is not for me, when considering this question, to determine whether there was a valid reason for dismissal or consider whether the dismissal was harsh, unjust or unreasonable. These are considerations to be made only if the Respondent is found not to have complied with the Code. The present question for determination is whether Mr Gonzalez had reasonable grounds for his belief that the Applicant's conduct was sufficiently serious to justify dismissal. This is to be determined objectively.

[79] The matters of Pinawin and Ryman make reference to the relevance of a reasonable investigation to determine whether the Respondent had reasonable grounds to form a view that the conduct was sufficiently serious to warrant summary dismissal. If the Respondent did rely on observations of the alleged conduct from other parties, it would have been necessary for them to conduct an investigation to support their contention of reasonable grounds for the view held. However, in this case, Mr Gonzalez was a direct participant in the communications and events said to be the serious misconduct that led to the Applicant's dismissal and no investigation was necessary to establish whether the conduct occurred or to consider the context of the conduct and communications.[18]

[80] Therefore, it is necessary for me to determine in an objective manner, whether Mr Gonzalez could reasonably have formed a view, in the circumstances of this matter, that the conduct of the Applicant was sufficiently serious to justify immediate dismissal.

[81] Weighing in favour of a finding that Mr Gonzalez had reasonable grounds for his belief is the consideration he undertook of the elements of the Code and the checklist I accept that he completed prior to terminating the Applicant's employment.

[82] However, weighing against such a finding is that Mr Gonzalez made representations on that checklist that he must have known had no basis in fact. That is because whilst answering yes to the statement "*The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace*" he could not have reasonably believed that to be correct. I say this because Mr Gonzalez offered no evidence at all in this proceeding that could be said to be threats of, or actual violence committed by Ms Ramirez. A Respondent relying on the Code as a jurisdictional bar to a claim for unfair dismissal cannot simply tick a box on the checklist listing conduct likely to be serious misconduct and rely on that checklist as evidence of a reasonably formed belief if there is no fact or evidence to support the assertion.

[83] Given my earlier findings that Ms Ramirez's queries and concerns about her employment were not inappropriate of themselves and were not made in an aggressive or disrespectful manner, and the other allegations of misconduct, being alleged threats of violence or actual violence, the recording of telephone calls and inappropriate use of a mobile phone in the workplace did not occur as alleged, I find that the Respondent could not, in the circumstances of this matter, have reasonably formed the view he did that the Applicant committed misconduct, let alone serious misconduct. As the events did not occur as the Respondent has described them, objectively speaking, the Respondent has not established that the basis for the belief it held is reasonable.

[84] Accordingly, I am not satisfied that the Respondent complied with the Code. The Respondent's jurisdictional objection is dismissed.

The Merits of the dismissal

[85] As I have dismissed the jurisdictional objection, it is now for me to determine whether the dismissal by the Respondent was harsh, unjust or unreasonable. Section 387 of the Act provides the criteria for consideration of whether a dismissal was harsh, unjust or unreasonable:

> "**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

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

Consideration of the merits

Was the dismissal harsh, unjust or unreasonable?

[86] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[19]

> "*It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted*."

[87] I am required to consider each of the criteria set out in s.387 of the Act in determining this matter.[20] I now turn my consideration to each of these criteria.

s.387(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)

[88] In order to be a valid reason, the reason for the dismissal should be "*sound, defensible, or well founded*" and should not be "*capricious, fanciful, spiteful or prejudiced*".[21] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[22]

[89] Where the dismissal related to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[23] The test with respect to whether there was a valid reason is not whether the employer believed on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it.

[90] It is my view that the conduct relied upon by the Respondent to dismiss the Applicant is unsupported by the evidence. I have set out my findings with respect to evidence and facts in detail above at paragraphs [50] to [64]. I have found that the conduct relied upon by the Respondent to dismiss the Applicant, did not occur in the manner described by the Respondent. I have rejected the evidence of the Respondent with respect to each of the grounds of misconduct relied upon by them and found that there was no misconduct committed by the Applicant.

[91] Mr Gonzalez was offended by what he perceived to be actions of the Applicant that were disrespectful to him. He is entitled to feel that the actions of the Applicant were

disrespectful, but I do not accept that the Applicant was in fact disrespectful or otherwise inappropriate in her communications with the Respondent. It was not demonstrated to me that the Applicant committed misconduct at all, and certainly not misconduct that could justify a decision to terminate her employment. Therefore, the action to dismiss the Applicant was not sound or defensible.

[92] On that basis, I find there was no valid reason for the dismissal.

s.387(b) Whether the person was notified of that reason

[93] Proper consideration of s.387(b) of the Act requires a finding to be made as to whether the Applicant was 'notified of that reason'. Contextually, the reference to 'that reason' is the valid reason found to exist under s.387(a).[25]

[94] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate,[26] in explicit,[27] plain and clear terms.[28]

[95] The Applicant was advised of the reasons relied upon by the Respondent to terminate her employment in the email sent to her by the Respondent on 28 October 2023.

s.387(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[96] The Respondent summarily dismissed the Applicant and in doing so, did not give her an opportunity to respond to the reasons advanced.

[97] The Respondent purported to have raised these matters with the Applicant before notifying her of her termination. Mr Gonzalez said in the email: "*unfortunately we have already had many problems with you due to your aggressive verbal behaviour, where I myself have spoken with you*"[29]. However, the Respondent offered little detail about when and how they had raised these complaints with the Applicant and offered only vague examples of the "aggressive verbal behaviour" alleged. The Applicant denies any issues were raised with her about alleged misconduct. There was no evidence of any meetings scheduled to discuss the alleged misconduct, formal counselling or notes of discussions.

[98] I find that the Applicant was not given an opportunity to respond to the misconduct alleged and relied on to terminate her employment.

s.387(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

[99] As there were no discussions, this is not a relevant consideration in this matter.

s.387(e) If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal

[100] This matter does not concern allegations of unsatisfactory performance, but rather of misconduct.

> *s.387(f) The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal and s.387(g) - whether the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise impacted on the procedures followed*

[101] It is not contested that the Respondent is a small business of fewer than 15 employees. Mr Gonzalez did not put into evidence that the size of his business was a relevant factor for consideration.

[102] However, what is in evidence from both parties is that when Mr Gonzalez became the sole director of the business only a month prior, he did not have significant experience in managing his staff, as Mr Valencia took more responsibility for that side of the business when he was a partner.

[103] It was also borne out in evidence that Mr Gonzalez took some steps to inform himself of his responsibilities as an employer and sought advice about the issues raised by Ms Ramirez. He also spent time completing the Code questionnaire referred to earlier in this decision.

[104] However, there were no dedicated human resource management specialists in the business or otherwise engaged by the Respondent. This is not unusual for a small business. The absence of expertise in addressing the enquiries and issues raised by Ms Ramirez did have an impact on the response of the Respondent. Independent advice may have assisted Mr Gonzalez to understand the legal and industrial aspects of the employment relationship better and assist him to see the issues raised as enquiries about employment, and not as disrespectful conduct towards him.

[105] The nature of the Respondent's small business and the absence of human resource expertise did have an impact on the procedures adopted in the lead up to the termination of the Applicant's employment and is a relevant factor for consideration with respect to the fairness of the dismissal.

> *s.387(h) Any other matters that the FWC considers relevant*

[106] Ms Ramirez submitted in her opening statement that cultural issues were influential in the events leading to her dismissal. She made a submission, not contradicted by the Respondent, that in Colombia, where the parties are both from, that people "*live in a culture of fear. We don't normally speak up or ask for anything, even our basics. I feel, I believe, that when I got dismissed by [Mr Gonzalez] … that I was asking for basics, for something that was a right for me as an employee. … I have been in the country for 12 years. I have taken that time to change that chip in my mind. … Unfortunately, many people that come here, like Mr Gonzalez, operate the business as if they were back home. But we are in a country where the law protects us. Being in hospitality all this time, I have never been in this situation. I find it confronting that giving a personal opinion, placing on the table or raising questions about entitlements can be taken as a personal attack".* Ms Ramirez went on to say that in Columbia "*the boss*" is considered high in social standing and an employee is considered low which is why employees "*cannot say*

anything because it is considered disrespect. I understand if I used bad words, threats … but to speak out for myself, to raise questions or to confront someone about something that has gone on for some time should not be taken as an attack."

[107] The Respondent did not respond to this submission in particular.

[108] Ms Ramirez's submission in this regard gives important context to the response that I observed of Mr Gonzalez's personal offence taken to the Applicant raising queries about her conditions of employment.

[109] Ultimately, this cultural consideration, while relevant to the events that occurred in this matter, does not override applicable industrial laws that protect employees from dismissal if they ask questions or raise queries with respect to their conditions of employment in an appropriate and lawful manner.

Conclusion on merits

[110] I find that the dismissal was harsh, unjust and unreasonable.

[111] It is unjust because the Respondent found that the Applicant committed misconduct which I have found did not occur. I accept that the Applicant raised appropriate queries about her conditions of employment and did so in an appropriate manner that could not be said to be misconduct. The Respondent also relied on a number of other allegations of misconduct that were not supported by evidence or were made on suspicion or conjecture.

[112] Both parties gave evidence that prior to the Applicant raising enquiries about her employment that their working relationship was a good one. Whilst the Applicant denies assertions that she had previously communicated with others in the workplace unhelpfully, the Respondent suggests he tolerated that issue, until she started to raise issues about her conditions of employment. The raising of employment conditions in a reasonable manner is not a valid reason for the dismissal of the Applicant.

[113] I have considered and taken into account the Respondent's inexperience in industrial relations and the lack of expertise to assist him. However, this does not outweigh the other considerations in deciding the merits of the claim.

[114] The termination was also unreasonable because it was decided on inferences not reasonably open to the Respondent. I appreciate the cultural differences the Applicant has described in Colombia that she says vary from Australia. Those differences may explain, in part, the response of the Respondent to the Applicant's queries. However, objectively viewed, and considering the operation of the law, the Applicant had an entitlement to raise her queries in an appropriate manner. The other misconduct relied on by the Respondent lacked merit.

[115] The dismissal is also harsh. The Applicant was terminated from a job, within her expertise, with shifts suited to her caring responsibilities of a small child, working with other native Spanish speakers. The Applicant views Spanish being her first language as an impediment to obtaining other work. The Applicant, at the time of the hearing, had not been able to secure other employment.

Remedy

[116] In determining whether to order a remedy for this dismissal which I have found to be unfair, it is necessary that I address the elements of section 390 of the Act.

[117] Section 390 provides:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> …
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case."

[118] I consider it appropriate to order a remedy.

[119] The Applicant has not sought reinstatement. I am satisfied that the relationship has irretrievably broken down, such that reinstatement would be inappropriate. The Applicant made it clear that she did not hold any personal ill will towards Mr Gonzalez, but that she did not seek reinstatement.

[120] Mr Gonzalez was emotional at the conclusion of the hearing, continuing to express his hurt and confusion about why the Applicant had been, in his words, disrespectful to him. With Mr Gonzalez maintaining this attitude toward the Applicant, I do not consider an employment relationship can be re-established.

[121] As I have found that reinstatement is inappropriate, I must now consider whether an order for compensation is appropriate under s.390(3)(b) of the Act. The Full Bench in *Vennix Mayfield Childcare Limited*[30] has noted that the question of whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one, and whether an applicant has suffered a financial loss may be a relevant consideration.[31]

[122] I am satisfied that Ms Ramirez has suffered a financial loss, and in these circumstances, I consider that I ought to exercise discretion and order a remedy in the form of compensation as provided by the Act.

[123] In *Sprigg v Paul Licensed Festival Supermarket* (**Sprigg**),[32] the Full Bench sets out the approach to assessing compensation in unfair dismissal matters which has since been applied under the current Act.[33] The Sprigg formula can be summarised as follows:

1. Estimate the renumeration the employee would have received, or would have been likely to receive, if the employer had not terminated the employment;

2. Deduct monies earned since the termination. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered;

3. Discount the remaining amount for contingencies;

4. Calculate the impact of taxation to ensure the employee receives the actual amount he or she would have received if they had continued in their employment;

5. Apply the legislative cap on compensation.

[124] Any amount provisionally arrived at by application of these steps is subject to whether weight is given to other circumstances that may lead to offsetting of compensation[34], including those that now must be taken into account by the operation of Section 392 of the Act.

[125] The overall consideration is that the level of compensation must nevertheless be appropriate (that is, neither clearly excessive nor clearly inadequate) having regard to all the circumstances of the case.[35]

[126] The specific criteria listed in section 392 of the Act provides as follows:

"**392 – Remedy—compensation**

Compensation

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

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

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

(b) the length of the person's service with the employer; and

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

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

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

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

Misconduct reduces amount

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

Shock, distress etc. disregarded

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

Compensation cap

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

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

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

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

> (b) if the employee was on leave without pay or without full pay while so employed during any part of that period--the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[127] The Full Bench in *Balaclava Pastoral Co Pty Ltd t/a Australian Hotel Cowra v Darren Nurcombe*[36], stated that in quantifying compensation, it is necessary to set out with some precision the way in which the various matters required to be taken into account under s.392(2) and the steps in the *Sprigg* formula, have been assessed and quantified.[37]

Viability: section 392(2)(a)

[128] The Respondent did not offer any evidence with respect to the viability of its business, should compensation be awarded. Mr Gonzalez did say at the end of the hearing that he could not afford any compensation but there was no detail to that submission.

[129] I appreciate that Mr Gonzalez operates a small business. I have also taken into account the evidence of Ms Ramirez that the Respondent was considering removing her from the roster on a Monday so as to avoid paying her wages on a public holiday when the business was closed, as being indicative of a concern about revenue and profitability.

[130] However, in the absence of evidence from the Respondent regarding viability, I am unable to discount any compensation awarded on this basis.

Length of Service: section 392(2)(b)

[131] The Applicant was employed by the Respondent for just over 12 months. That is not a particularly long length of service.

[132] Both parties indicated in their evidence that their relationship was a good one, until Ms Ramirez started raising issues about her employment entitlements. In the absence of those queries, it was likely that, given the suitability of the work to Ms Ramirez, the employment would have continued until Ms Ramirez became dissatisfied with her conditions of employment and found alternative work or the employer no longer offered work.

[133] Neither party made submissions about length of service and any impact it should have on remedy.

[134] Given the above considerations, I do not consider length of service should have an impact on compensation awarded.

Renumeration that would have been received: section 392(2)(c)

[135] The Full Court in the decision of *He v Lewin* [38] said:

> *"[I]n determining the renumeration 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 renumeration the employee would have received, or would have been likely to receive, if there had not been the actual termination*."[39]

[136] I note the Applicant sought 13 weeks wages as compensation in her application but made no further submission in respect of her entitlement to compensation in the hearing. I am not bound to what the Applicant sought in her application but have considered this in my overall assessment of compensation.

[137] It is my view that if the termination had not occurred it was likely the employment would have continued for a period of approximately a further 18 weeks, including a period of notice. In the matter of Sprigg, the Full Bench noted: "*we acknowledge that there is a speculative element involved in all such assessments. … we accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law*."[40] I base this assessment on the evidence that the work was suitable to the Applicant, and she had appropriate skills and experience for the business. However, if the Applicant had not raised her concerns about her conditions of employment, it is likely she would have become dissatisfied with her conditions of employment and sought alternative employment. This is particularly the case given she sought advice from the Fair Work Ombudsman and became aware of her entitlement to be paid on public holidays.

[138] The business is also a small business with changing needs for labour. There was evidence given during the course of the proceedings that the business had decided to open on Sundays during the period of the Applicant's employment over the previous 12 months but had also trialled opening on some public holidays but not others, whilst the viability of public holiday trading was considered. Mr Gonzalez had only become the sole owner of the Respondent approximately a month prior to the Applicant's dismissal, and had indicated roster changes may be effected in the future. Further, the employment relationship was not of such length that I could infer a long and viable period of work would have been offered to the Applicant into the future.

[139] The Applicant's intention to take sick leave following future surgery is not disputed. The evidence showed that she had 23.6 hours of sick leave accrued at the time of her termination. She required, on her evidence, at least 2 weeks sick leave for recovery, being a total of 60 hours. As the Applicant did not have that leave accrued, she would have taken the remaining hours in sick leave as unpaid leave. Any compensation awarded to the Applicant should take into account the amount of leave that she would not have been paid should she have remained employed as a component of her projected loss of income.

[140] A review of the Applicant's payslips over at least a two-month period prior to her termination reveals her regular income to be based on pay for 30 ordinary hours of work, including 6 hours with rates paid for her Saturday shift. The Applicant was paid $24.87 for each of the 24 hours of weekday work she performed and $31.09 per hour for the 6 hours she worked on a Saturday. These rates of pay align with the rates prescribed for a Level 3 Food and Beverage Attendant in the *Restaurant Industry Award 2020*. The Applicant's standard weekly

earnings total $783.42 gross. This equates to what the Respondent notes on the Applicant's payslip as annual earnings of $40,738.00 gross.

[141] As I find that the Applicant would likely have been employed for at least a further 18 weeks, the remuneration she would have received but for the termination would have been $14,101.56 gross.

[142] The Applicant's surgery took place on 8 November 2023. The Applicant said in her evidence that her doctors advised she would need two weeks to recover from the surgery. In the recovery period, the Applicant would have otherwise worked 6 days of ordinary time and two Saturday shifts. Ms Ramirez's payslips show that her weekday shifts were each 8 hours long and her Saturday shift was 6 hours. As Ms Ramirez had 23.6 hours of sick leave accrued, she would have used those accrued hours on the first Wednesday, Friday and Saturday of the first week of her incapacity, and 1.6 hours from her next Monday shift. Ms Ramirez would then have reverted to leave without pay for 6.4 hours on the next Monday shift and 8 hours respectively for the following Wednesday, Friday and Monday shifts. Ms Ramirez would have lost income for 30.4 hours of weekday shifts, reaching a total of $756.05. Ms Ramirez would also not have accrued sick leave for 6 hours on the Saturday shift for which she would have missed out on $186.54 of wages. The total of unpaid sick leave in the relevant period was $942.59.

[143] Therefore, the Applicant's lost remuneration in the following 18 weeks would have been $14,101.56 gross less unpaid sick leave in the period of $942.59, reaching a total of **$13,158.97**.

[144] In addition, the Applicant's loss of income included 11% superannuation that would otherwise have been paid to her in the amount of **$1,447.49.**

Mitigating efforts: section 392(2)(d)

[145] The Applicant provided evidence of her efforts to mitigate her loss. Her evidence was that she applied for more than 42 jobs since her termination. Ms Ramirez provided records from the recruitment website Seek, that evidenced the 42 roles she had applied for since her termination. Her evidence was that she had applied for a small number of jobs outside of the Seek website. The roles Ms Ramirez applied for appear to be primarily entry level roles in a range of industries, including hospitality. It appears on the evidence that she was making a genuine and appropriate effort to find work.

[146] It was the Applicant's evidence that she was offered only one interview from those applications, but she did not proceed with her application as the role was at a hospital some way from her home and also involved night shift work that she was not able to do with a small child.

[147] The Applicant did submit that she was exploring work through a personal contact but when the matter was heard over 17 weeks after the termination, the role had not been offered to her.

[148] In her evidence, Ms Ramirez indicated that her main spoken language being Spanish is an impediment to gaining employment. Mr Gonzalez challenged this statement, but Ms Ramirez remained firm in her view.

[149] Ms Ramirez also said her inability to use the Respondent as a reference has affected her ability to get work.

[150] Given the Applicant's extensive efforts to mitigate her loss, there is no deduction to any compensation for a failure to do so.

Renumeration earned: section 392(2)(e)

[151] The Applicant gave evidence that she had not earned any remuneration since her termination.

Income likely to be earned: section 392(2)(f)

[152] I do not consider that it is appropriate to make any further deduction under the above section, given the defined period over which the projected loss of remuneration has been calculated, which does not include the period between the order and the payment.

Other matters: section 392(2)(g)

[153] As I have found that compensation ought to be awarded for a period of time that has passed, no allowances need to be made for contingencies in this matter.

Misconduct: section 392(3)

[154] I have found no misconduct on the part of the Applicant and therefore, no deduction is warranted on this basis.

Shock, distress disregarded: section 392(4)

[155] I make no allowance for any shock, distress or humiliation that may have been caused to the Applicant on account of her dismissal.

Compensation cap: section 392(5)

[156] The cap on compensation awarded is, as set out in section 392(5), the lesser of half of the high income cap or the higher of the total remuneration the Applicant received in the 26 weeks prior to her dismissal.

[157] As I have not found that the employment would have continued for 26 weeks, the compensation in this case does not reach the compensation cap. The compensation otherwise arising from the statutory considerations is less than the lower figure.

Conclusion on compensation

[158] Having regard to the circumstances of the matter, the considerations in section 392 of the Act and the requirements arising from the case of Sprigg, I find that it is appropriate to make

an award of compensation to Ms Ramirez in lieu of reinstatement in the amount of **$13,158.97** gross plus 11% superannuation of **$1,447.49**, less any appropriate taxation.

[159] Section 393 of the Act allows for an order for compensation to provide for payment in instalments. The Respondent did not make any submissions on this point, but as they are a small business and were not represented in these proceedings, I would be amenable to considering whether the order that will accompany this decision should be amended to allow for the payment of the compensation in instalments.

[160] Should the Respondent seek the amendment of the order to this effect, they must make an application to the Commission within 14 days of the date of the order, providing reasons and evidence as to why the compensation amount cannot be paid in full.

Conclusion

[161] Having considered all of the relevant factors, I find that Ms Ramirez's dismissal by Gonva Group Pty Ltd was harsh, unjust and unreasonable. I am satisfied that Ms Ramirez was dismissed unfairly within the meaning of section 385 of the Act.

[162] I consider that a remedy of compensation is appropriate. The amount of compensation payable by Gonva Group Pty Ltd under section 392 of the Act will be **$13,158.97** gross plus 11% superannuation of **$1,447.49**, less any applicable taxation.

[163] Payment of the sum will be required within 28 days of this decision.

[164] An order to this effect will be issued in conjunction with the publication of this decision.[41]

[165] Should the Respondent seek that the compensation be paid in instalments, I grant liberty to apply to seek an amendment to the order above.

COMMISSIONER

Appearances:

L Ramirez¸ Applicant on her own behalf.

J Gonzalez for the Respondent, Gonva Group Pty Ltd.

Hearing details:

Adelaide
2024
29 February.

Printed by authority of the Commonwealth Government Printer

<PR775893>

---

[1] Witness statement of Ms Lina Ramirez, dated 18 February 2024 at paragraph 7.

[2] Witness statement of Mr Julian Gonzalez, dated 25 January 2024 at paragraph 7.

[3] Witness statement of Ms Lina Ramirez, dated 18 February 2024 at paragraph 16.

[4] Outline of submissions for the Respondent, dated 25 January 2024 at paragraph IV B.

[5] Form F3 – Employer response to unfair dismissal application dated 23 November 2023 at paragraph 3.2.

[6] Witness statement of Mr Julian Gonzalez, dated 25 January 2024 at paragraph 9.

[7] Witness statement of Mr Julian Gonzalez, dated 25 January 2024 at paragraph 12.

[8] The email was in Spanish but was translated by Ms Ramirez. Mr Gonzalez agreed with the translation.

[9] Email from Respondent to Applicant dated 28 October 2023 at 1:29pm.

[10] Witness statement of Mr Julian Gonzalez, dated 25 January 2024 at paragraph 3.

[11] Ibid.

[12] The raising of complaints about employment is a workplace right protected by the Act.

[13] [2015] FWCFB 5264.

[14] As above at [41].

[15] (2012) 219 IR 128.

[16] Ibid. at [29]-[30].

[17] (2012) 219 IR 128 at [27]-[28].

[18] See *Nesbitt v Dragon Mountain Gold Limited* [2015] FWCFB 3505 at [36] to [40] and *Ismail v Safico Pty Ltd T/A Smokemart* [2022] FWC 2349 at [108].

[19] (1995) 185 CLR 410 at [465].

[20] *Sayer v Melsteel* [2011] FWAFB 7498 at [20].

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

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

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

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

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

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

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

[28] Ibid.

[29] Email from Respondent to Applicant dated 28 October 2023.

[30] *Vennix v Mayfield Childcare Limited* [2020] FWCFB 550.

[31] Ibid at [20].

[32] (1988) 88 IR 21 ('Sprigg').

[33] *ERGT Australia Pty Ltd v Govender* [2021] FWCFB 4508 at [35].

[34] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000).

[35] *McCulloch v Calvary Health Care Adelaide* [2015] FWCFB 873 at [29].

[36] [2017] FWCFB 429 at [43].

[37] See Dimkovski v Majorsite Property Group Pty Ltd [2023] FWC 726.

[38] *He v Lewin* [2004] FCAFC 161.

[39] Ibid at [58].

[40] Sprigg at [6].

[41] PR775894.