

[2024] FWC 1654

The attached document replaces the document previously issued with the above code on 24 June 2024.

The appearances at the end of the document have been amended.

Charlotte Linehan
Associate to Commissioner Matheson

Dated 12 July 2024



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Oula Kabbara

v

Settlement Services International Limited
(U2023/10611)

COMMISSIONER MATHESON

SYDNEY, 24 JUNE 2024

Application for an unfair dismissal remedy – perceived conflict of interest – failure to disclose – dismissal not unfair – application dismissed.

[1] Ms Oula Kabbara (Applicant) has made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that she has been unfairly dismissed from her employment with Settlement Services International Limited (Respondent). The Applicant seeks financial compensation.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[4] Section 382 of the FW 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.

When has a person been unfairly dismissed?

[5] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

Background

[6] The uncontested factual background to the matter is as follows:

- The Respondent partners with the National Disability Insurance Agency (NDIA) to deliver local area coordination (LAC) services within regions of Sydney.
- The Respondent's LAC program employs 187 staff and supports 23,000 participants.¹
- The Applicant commenced working for the Respondent on 29 June 2020 as a Local Area Coordinator within the Disability Services Division on a full-time basis.
- The role of Local Area Coordinator is intended to help participants in the National Disability Insurance Scheme (NDIS) access funds under the NDIS and support participants to implement their NDIS plan and utilise available funds with registered NDIS service providers to meet their needs and improve their quality of life.
- On 18 August 2023 the Respondent advised the Applicant that it was investigating allegations regarding an alleged conflict of interest concerning an affiliation with Advance Minds, a registered NDIS service provider, and that she would be placed on paid suspension until the conclusion of the investigation.
- On 21 August 2023 the Applicant was advised in writing that the Respondent was investigating allegations that she had breached the Respondent's Code of Conduct, Conflict of Interest Policy and relevant NDIA and LAC guidelines due to an alleged professional or personal affiliation with a registered NDIS provider, Advance Minds, to whom she was alleged to have referred NDIS participants. In particular, it was alleged that:

- as at 18 August 2023 the Applicant's personal email was listed as the contact for a NDIS services provider, Advance Minds;
 - between October 2021 and 18 August 2023 the Applicant failed to declare to the Respondent that she had a potential conflict of interest due to an affiliation with Advance Minds;
 - between October 2021 and 18 August 2023 the Applicant failed to provide NDIS participants with an informed and independent choice of provider as she referred participants to Advance Minds whilst not offering a selection of providers as options;
 - on or around 15 October 2021, 30 June 2022, 13 December 2023 and 19 January 2023 the Applicant failed to update the Client Relationship Management System (CRM) with full details of information obtained and provided in plan implementation meetings with participants, including details of referrals made in relation to Advance Mind.
- The Applicant was directed to attend an investigation interview to be held on 23 August 2023 via Microsoft Teams to respond to the allegations. The letter of 21 August 2023 invited the Applicant to attend the office on 22 August 2023 in order to view the client records in the system in order to prepare a response to the allegations. The meeting to enable the Applicant to respond to the allegations went ahead that same day rather than 23 August 2023 and the Respondent says this was at the Applicant's request.
 - On 20 September 2023 the Applicant was provided with further written allegations including:
 - that between 18 August 2023 and 19 September 2023, during the course of a disciplinary investigation when questioned about her connection with Advance Minds, the Applicant failed to declare that she had been a client of Advance Minds since 2019 as evidenced in a counselling report from Advance Minds dated 2 November 2021 which stated that the Applicant "has been receiving therapy for two years and three months" (Allegation 1);
 - that on 29 March 2022 the Applicant sent 15 separate emails from an NDIS email to her work email containing confidential and sensitive NDIS participant records in contravention of NDIA guidelines that require participant information not to be shared outside the NDIS working environment without due authorisation (Allegation 2);
 - The letter of 20 September 2023 indicated that the details of the emails were provided to the Applicant in an email dated 18 September 2023 and that a copy of the counselling report was provided to the Applicant on 18 September 2023. The letter of 20 September 2023 directed the Applicant to attend a meeting on 21 September 2023 via Microsoft Teams to respond to the allegations.
 - On 21 September 2023 the Applicant emailed her response to the allegations to Sarah Vickers of the Respondent and by way of summary said in that email:

- in relation to Allegation 1, she did “technically” recommend Advance Minds as an NDIS provider by including them in a list of NDIS providers in the local area and it was then the participant or their nominee’s choice and control as to which providers they chose;
 - she did not disclose she was a client of Advance Minds because she compartmentalised her personal and professional lives and she was accessing the services of Advance Minds for personal reasons; and
 - in relation to Allegation 2, she sent the emails under advisement because she was transitioning from one system to another remote desktop and there was a possibility the files could be lost and she could not nominate the NDIS or SSI employee who gave the advice; and
 - the files remained within the NDIS environment and were not shared externally.
- On 22 September 2023 the Respondent wrote to the Applicant informing her that it had conducted an investigation and found, by way of summary, that:
 - as at 18 August 2023, the Applicant’s personal email was listed as the contact person for an NDIS registered service provider, Advance Minds;
 - between October 2021 and 18 August 2023 the Applicant failed to declare a potential conflict of interest due to an affiliation with an NDIS registered service provider, Advance Minds;
 - between October 2021 and 18 August 2023 the Applicant failed to provide NDIS participants an informed and independent choice of provider, as she referred participants to Advance Minds, with whom she was affiliated, whilst also not offering a selection of providers as options;
 - on four occasions the Applicant failed to update the CRM with full details of information obtained and provided in plan implementation meetings with participants, including details of referrals she made for the participant to use the registered support provider, Advance Minds;
 - between 18 August 2023 and 19 September 2023, during the course of a disciplinary investigation, when questioned relating to her connection with NDIS provider Advance Minds, the Applicant failed to declare that she had been a client of Advance Minds since 2019, as evidenced in a counselling report dated 2 November 2021 which stated that she had been receiving therapy for two years and three months;
 - on 29 March 2022 the Applicant sent 15 separate emails from an NDIS email to her work email containing confidential and sensitive NDIS participant records in direct contravention of NDIA guidelines that require participant information not to be shared outside of the NDIS working environment without due authorisation.
 - The letter of 22 September 2023 invited the Applicant to a meeting on 3 October 2023 via Microsoft Teams and on 3 October 2023 the Applicant participated in that meeting with in which she was invited to show cause as to why her employment should not be terminated.

- The Applicant was dismissed on 6 October 2023 with the Respondent providing the following reasons for the dismissal:
 - non-disclosure of a conflict of interest;
 - not adhering to LAC Conflict of Interest protocols to recommend three service providers;
 - transferring NDIS participant information outside of the NDIS environment and misleading; and
 - statements made by the Applicant during the investigation regarding their relationship with the service provider Advance Minds.

- Immediately before her dismissal the Applicant was earning \$88,277.80 per annum or \$1,697.65 per week.²

The conference

[7] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[8] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a conference for the matter (s.399 of the FW Act). The conference was held on 5 February 2024 and both parties were self represented.

Witnesses

[9] The Applicant gave evidence on her own behalf and her former partner, Mr Kodar El-hallak, also gave evidence on her behalf.

[10] The following witnesses gave evidence on behalf of the Respondent:

- Taner Omac, Head of Employee Relations for the Respondent;
- Sarah Vickers, People and Culture Business Partner for the Respondent;
- Ben Fioramonte, Head of Disability Services for the Respondent;
- Nick Ong, District Manager for the Respondent;
- George Ioannides, Senior IT Consultant for the Respondent.

Submissions

[11] The Applicant filed her application on 27 October 2023 and elected not to file further submissions. The Respondent filed submissions in the Commission on 19 January 2024.

Has the Applicant been dismissed?

[12] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[13] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[14] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[15] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[16] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[17] Under section 396 of the FW Act, the Commission is obliged to decide the following matters 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;
- (d) whether the dismissal was a case of genuine redundancy.

Was the application made within the period required?

[18] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[19] It is not disputed and I find that the Applicant was dismissed from her employment on 6 October 2023 and made the application on 27 October 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[20] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[21] It was not in dispute and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[22] I find that the Applicant was an employee, who commenced their employment with the Respondent on 29 June 2020³⁴ and was dismissed on 6 October 2023, a period in excess of 6 months.

[23] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Applicant's annual rate of earnings

[24] It was not in dispute and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings (being \$88,277.80)⁵ was less than the high income threshold, which, for a dismissal taking effect on or after 1 July 2020, is \$167,500.

[25] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[26] Section 388 of the FW Act provides that 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.

[27] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis).

[28] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

Was the dismissal a case of genuine redundancy?

[29] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[30] It was not in dispute and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[31] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[32] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[33] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

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

[34] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.⁶

[35] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[36] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"⁷ and should not be "capricious, fanciful, spiteful or prejudiced."⁸ 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.⁹

[37] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.¹⁰ "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."¹¹

Submissions

[38] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's conduct.

[39] The Respondent submitted, by way of context:¹²

- There are strict compliance requirements for the Respondent as a Partner in the Community (PITC) through NDIA/NDIS and that there is an increased expectation that PITC companies are vigilant in their monitoring and actions in managing conflicts of interest and breaches of privacy and IT security protocols as a result of recent high-profile fraudulent activity within the NDIS.
- The Local Area Coordination (LAC) program has strict conflict of interest requirements and these are embedded in the Respondent's policies at the direction of NDIS.
- Employees are trained and briefed on the strict requirements to declare conflicts both actual and potential/perceived, so that appropriate mitigation strategies can be explored to protect the program and its participants, many of whom are vulnerable and potential targets for exploitation and fraud.
- The Respondent's LAC program staff must conduct all program or participant related communications entirely within the NDIS online environment.
- Email protocols require staff to ensure that information in relation to NDIS participants must not be sent to another email address unless it is an NDIS email address.
- All interactions between Local Area Coordinators and the participants they are supporting must be recorded in the NDIA's CRM database, to which the Local Area Coordinator is granted access to by the Agency.

[40] As noted above, following allegations were the subject of a disciplinary investigation by the Respondent:

- as at 18 August 2023, the Applicant's personal email was listed as the contact person for an NDIS registered service provider, Advance Minds;

- between October 2021 and 18 August 2023, the Applicant failed to declare a potential conflict of interest due to an affiliation with an NDIS registered service provider, Advance Minds;
- between October 2021 and 18 August 2023, the Applicant failed to provide NDIS participants an informed and independent choice of provider, as she referred participants to Advance Minds, with whom she was affiliated, whilst also not offering a selection of providers as options;
- the Applicant failed to update the CRM with full details of information obtained and provided in plan implementation meetings with participants, including details of referrals she made for the participant to use the registered support provider, Advance Minds;
- between 18 August 2023 and 19 September 2023, during the course of a disciplinary investigation, when questioned relating to her connection with NDIS provider Advance Minds, the Applicant failed to declare that she had been a client of Advance Minds since 2019, as evidenced in a counselling report dated 2 November 2021 which stated that she had been receiving therapy for two years and three months;
- on 29 March 2022 the Applicant sent 15 separate emails from an NDIS email to her work email containing confidential and sensitive NDIS participant records in direct contravention of NDIA guidelines that require participant information not to be shared outside of the NDIS working environment without due authorisation.

[41] The Respondent submitted that the Applicant has engaged in the conduct described above and this constituted a serious breach of the Respondent's Code of Conduct Policy (CPAC.PO.01)(Code of Conduct) by failing to meet the requirements:¹³

- to act honestly and with integrity;
- to exercise due care and diligence in fulfilling the duties and exercising the powers which may be attached to the position;
- to ensure that nothing conflicts with the Respondent's responsibilities, both inside and outside work and informing of any conflicts of interest, whether it is actual or potential;
- to set a standard of professionalism, fairness, integrity, diligence and competency so that the Applicant's conduct did not discredit the Respondent; and
- to adhere to service delivery models and practices which build client independence and meet program delivery standards.

[42] The Respondent also submitted that the Applicant's conduct contravened the following procedures and guidelines:¹⁴

- CPAC.PO.04 Conflict of Interest Policy and Procedure V2.1 (Conflict of Interest Policy and Procedure);
- PLAC.WI.04 LAC Conflict of Interest Work Instruction (Conflict of Interest Instruction);
- PLAC.GD.05 “Which email address should I use?” (Email Guideline).

[43] The Respondent submitted that during the course of the investigation and show cause meeting the Applicant was misleading, deceptive and non-transparent in her responses and that her responses to the allegations would at times contradict her previous responses.¹⁵ The Respondent submitted that the Applicant’s behaviour during the investigation resulted in a loss of trust and confidence in her ability to remain employed by the Respondent.¹⁶

[44] By way of summary, the Applicant submitted that there was no valid reason for the dismissal related to the Applicant’s capacity or conduct because:

- the Respondent’s investigation did not establish that the Applicant’s alleged conduct was sufficient to constitute serious misconduct;¹⁷
- the Respondent has not established that the Applicant’s behaviour was wilful or deliberate;¹⁸
- the Respondent did not substantiate its claim that the Applicant favoured the NDIS service provider, Advance Minds, over other NDIS service providers;¹⁹
- while she should have disclosed her treatment with Advance Minds, she was experiencing a traumatic period in her life and her failure to make the disclosure was not wilful or deliberate;²⁰
- she refutes the allegation that the lack of detail in the CRM about interactions with participants was wilful and deliberate;²¹
- in March 2022 she transferred multiple emails containing NDIS information from her NDIS email address to her work (Respondent’s) email address on the advice of the Respondent’s IT staff.²²

Respondent’s Code of Conduct

[45] The Respondent’s Code of Conduct says the following under the heading ‘Ethical behaviour’:

‘Everyone is required to meet the following standards of ethical behaviour:

- Act honestly and with integrity
- Exercise due care and diligence in fulfilling the duties and exercising the powers which may be attached to the position

- Observe the principles of independence in decisions and dealings with both internal and external stakeholders
- Set a standard of professionalism, fairness, integrity, diligence and competency in all that we do, so that our conduct will not discredit SSI Group.
- Comply with all lawful and reasonable directions given by the position's line manager or other authorised staff members'.

[46] The Code of Conduct requires the following in relation to conflicts of interest:

'Whilst working at SSI Group, it is important that nothing conflicts with the organisation's responsibilities, both inside and outside of work. Conflicts of interest include both financial and non-financial interests and can arise through engaging in private employment outside of SSI Group either paid or unpaid, and through voluntary engagements with charities, professional associations or other work. Staff members are responsible for informing SSI Group of any conflicts of interest, whether it is actual or potential. This information is recorded in the Conflict of Interest Register and maintained in line with SSI Group's Conflict of Interest Policy and Procedure. (Refer to Conflict of Interest Policy and Procedure for further information).'

[47] The Code of Conduct identifies that a breach of it 'may result in disciplinary (up to and including termination) or other action'.

[48] The Code of Conduct filed by the Respondent indicates that it was issued in December 2021 and that it is Version 2.1 of that document dated 8 November 2022. As such this document may not have been in the same terms of the policy and procedure that existed at the time of the referral relating to Participant 1 however it would have been in place at the time of the referral in relation to Participant 2 and was in place during the period of the investigation.

Respondent's 'Conflict of Interest Documents'

[49] The Respondent filed with its materials a copy of emails dated 31 March 2022 and 22 June 2022 to all staff attaching a document clearly states:

- "Each staff member is responsible for notifying SSI of any actual or perceived conflict of interest, either inside or outside of work".
- "It is important that all staff involved in the LAC program avoid any action which could favour one service provider over others (eg recommending a service provider, holding meetings in a service provider's office)."
- "It is also important to avoid any situation which could be perceived as a conflict of interest".

Respondent's Conflict of Interest Policy and Procedure

[50] The Conflict of Interest Policy and Procedure provides that its purpose is to help employees effectively identify, disclose and manage any actual, potential or perceived conflicts of interest in order to protect the integrity of the Respondent and indicates that it should be read in conjunction with the Code of Conduct.

[51] The Conflict of Interest Policy and Procedure defines conflict of interest as follows:

‘A conflict of interest occurs when an individual’s personal interests’ conflict with their responsibility to act in the best interests of the SSI Group. This may include, but is not limited to:

- financial interests
- family relationships
- personal relationships that may be perceived to a conflict (e.g. friendships)
- relationships with external stakeholders/government officials.

It may also include business activities and projects which may put SSI Group in conflict with its interests or regulatory requirements.

Personal interests include direct interests, as well as those of family, friends, or other organisations a person may be involved with or have an interest in (for example, as a shareholder).

It also includes a conflict between a board member’s duty to SSI Group and another duty or personal interest that the board member has (for example, to another charity). A conflict of interest may be actual, potential or perceived and may be financial or non-financial. These situations present the risk that a person will make a decision based on, or affected by, these influences, rather than in the best interests of SSI Group’.

[52] The responsibilities of employees under the Conflict of Interest Policy and Procedure are described as follows:

‘Employees have a responsibility to disclose any conflicts (including but not limited to):

- prior to employment or change of role within the SSI Group
- when recruiting employees for the SSI Group
- when working in an SSI Group program or service whilst the employee has a close friend, relative or family member who is a participant or client of that same program/service pertaining to alternative employment, business activity, or volunteering outside the SSI Group that may be a conflict
- when potential commercial arrangements may create a conflict for the SSI Group in meeting its contractual or regulatory commitments and obligations
- regarding gifts from suppliers, customers or competitors
- when procuring or directing business to suppliers when these are owned or managed by family members, relatives or close friends, and
- when personal relationships may conflict with SSI Group responsibilities or compromise company interests’.

SSI Group does not permit a staff member (either directly and indirectly through layers of management) to manage family members or relatives, and any potential or actual conflict of this nature must be reported immediately. This also extends to the use of third-party consultants’.

[53] In relation to identification and disclosure of conflicts of interest the Conflict of Interest Policy and Procedure states:

‘All business activities must be vetted for conflicts of interest issues by the Program Managers before execution. New projects must not commence unless the person responsible for such projects, has ensured that the project does not put the SSI Group in conflict with its interests or regulatory requirements. Where such projects pose a threat to the SSI Group’s strategy, or could create a substantial commercial or reputational risk, the project should be reported to the Board. The Board may seek external advice on the existence of possible conflicts of interest and responses.

Any potential Individual employee conflicts must be disclosed prior to commencing employment with the SSI Group, prior to any promotion or transfer, or whenever the employee’s personal circumstances change where it creates a potential conflict.

For all potential conflicts, once an actual, potential or perceived conflict of interest is identified, it must be entered into the SSI Group’s register of interests using the Conflict Notification Form (CPAC.FM.04.1) and sent to the relevant Conflicts Manager.

The register of interests must be maintained by the relevant Conflicts Manager. The register must record information related to a conflict of interest (including the nature and extent of the conflict of interest and any steps taken to address it). The Conflicts Managers will each maintain a register of interests to record the interests of employees (including volunteers) that is separate from the record of interests of board members and the CEO’.

[54] The Conflict of Interest Policy and Procedure also states:

‘Where a conflict of interested has been identified or declared by an employee the conflict officer (or their delegate) will then:

- enter details of the conflict in the Conflict of Interest Register (using the CPAC.TE.04.1 template) which is then available for inspection by all decision makers and in accordance with the SSI Group’s Privacy Policy
- evaluate the conflict and the appropriate actions that should be taken, and
- monitor, manage and disclose the conflict.

Where a conflict of interest may constitute a repudiation of the employee’s contract of employment or where it inhibits the employee from carrying out the requirements of their job, the Conflicts Manager may recommend the commencement of disciplinary investigations and action. Such action may include a decision up to and including termination of the employee’s employment with SSI Group’.

[55] The Conflict of Interest Policy and Procedure is dated 8 November 2022 and appears to be version 2.1 of the document with the original issue date being December 2021. As such this document may not have been in the same terms of the policy and procedure that existed at the time of the referral relating to Participant 1 however it would have been in place at the time of the referral in relation to Participant 2 and was in place during the period of the investigation.

Respondent's Conflict of Interest Instruction

[56] The Conflict of Interest Instruction defines a conflict of interest as follows:

‘A conflict of interest (COI) is a situation where a person or organisation can benefit from actions or decisions. It is where a person or organisation is subject to coexisting interests that directly conflict. A conflict of interest occurs when an individual’s personal interests could compromise their judgment, decisions, or actions at the workplace’.

[57] It goes on to distinguish actual and perceived conflicts of interest as follows:

‘**Actual conflicts of interest** arise when there is a direct conflict between your professional duties and responsibilities and your personal interests.

E.g. A hiring manager recruiting a family member.

Perceived conflicts of interest: In these situations, there may be no actual or potential conflict, but someone could reasonably think there is one and this can have its own ramifications.

E.g. an LAC is allocated a participant who happens to be an unknown estranged family member’.

[58] The Conflict of Interest Instruction identifies three categories of conflict of interest that its employees need to be aware of, one of which is described as follows:

‘**Provider of Services:** As employees of the SSI LAC Program, staff must not engage professionally with NDIS participants or organisations in any capacity outside of their LAC Program role. This includes but is not limited to working in another role that includes service provision paid from an NDIS plan, collaborating on initiatives with NDIS service providers, or discussing internal LAC or NDIS processes with anyone outside the program/Agency.

This is particularly important regarding SSI Member organisations and registered providers of services. However, this also applies to unregistered providers.

Sometimes a perceived conflict of interest can arise. For example, if you have a family member or friend who provides services paid from an NDIS plan to NDIS participants. Or if you hold a professional qualification (e.g. Occupational Therapist) that requires ongoing minimum professional hours with patients who may be NDIS participants. When/if this occurs, mitigation strategies are put in place to mitigate the risks and impact of the COI’.

[59] The Conflict of Interest Instruction describes employee responsibilities as follows:

‘1. Stay informed and ready to identify a conflict of interest (COI).

- Review COI information provided at onboarding (such as SSI's Code of Conduct Policy) and throughout the year.
 - Refer to relevant forms on Yurana and NDIS:
 - SSI Conflict of Interest Policy & Procedure
 - SSI Conflict Notification Form
 - PITC COI Form – Employee
 - PITC COI Form - General
 - Refer to Attachment 1: Conflict Scenarios and Actions for Staff.
2. Each staff member is responsible for notifying SSI of any actual or perceived conflict of interest, either inside or outside of work, following the steps below (examples in Attachment 1: Conflict Scenarios and Actions for Staff).
 3. It is essential that all staff involved in the LAC program avoid any action which could favour one service provider over others (e.g. Staff should avoid recommending a service provider. In case of providing recommendations, staff must recommend at least three service providers.
 4. Avoid any situation that could be perceived as a conflict of interest.
 5. If you become aware of a conflict of interest related to another staff member, do not discuss this with colleagues. Speak to the manager in your area about how to progress.
 6. Employees are not permitted to access their own records or those of a family member or friend under any circumstances.

If you inadvertently access personal information beyond your role's requirements, including information related to a colleague or a friend/family member/etc., discuss this promptly with your line manager'.

[60] The Conflict of Interest Instruction sets out a work instruction which:

- at 'Step 1. Identify Conflict of Interest' requires employees to:
 - review conflict of interest information provided at onboarding and yearly reviews;
 - consult with their line manager about conflicts of interest;
 - refer to the Conflict of Interest Policy and Procedure;
 - refer to an attachment entitled 'Attachment 1: Conflict Scenarios and Actions for Staff';
- at 'Step 2. Report conflict using the appropriate form' requires employees to:
 - consult with their manager to identify the relevant form/s;
 - complete the correct form/s with their line manager and manager of their area (e.g. District Manager);
- at 'Step 3. Notify using form' requires employees to send the completed form/s to the District Manager's NDIS email within five working days of the initial discussion;

- at ‘Step 5. Confirm and complete your responsibilities’ requires employees to notify the District Manager immediately of any developments or changes to their conflict of interest.

[61] The Conflict of Interest Instruction states:

‘Consequences of not declaring a known COI can be severe. At a program level, non-disclosure or poor management of an actual or perceived COI could lead to program/contract termination. Non-disclosure of employee-related COIs may also lead to serious consequences as outlined in employment contracts and SSI’s Conflict of Interest Policy’.

[62] The Conflict of Interest Instruction is dated July 2023 and appears to be the third version of this document. While this document was not in place at the time the Applicant is alleged to have made the referrals to Advance Minds, it was in place for the period of the investigation.

Respondent’s Email Guideline

[63] The Respondent has an Email Guideline titled ‘Which email address should I use?’. The Email Guideline provides:

‘SSI email address

Your SSI email address is to be used for communication relating to your employment details, and SSI related information.

You should use this email address for:

- Employment details and admin (HR, Payroll, Work Health & Safety, SSI IT)
- SSI documents, policy and procedure.

You must not use this email to send:

- Internal documents from the NDIA intranet
- Information about NDIS participants.

Please advise your Team Leader if an email containing NDIA internal documents or any information that identifies a NDIS participant is sent to your SSI email address. Do not forward this email to any email address outside the NDIS system.

NDIS email address

Your NDIS email address is to be used for communication related to NDIA internal processes and information about NDIS participants.

You should use this email address for:

- Internal documents from the NDIA intranet (only to other NDIS email addresses)
- Information about NDIS participants (only to other NDIS email addresses)
- Information relating to day-to-day operations related to your role within the LAC program.

When emailing official information from your NDIS email, you need to select the appropriate protective marking to protect the information before sending. This includes sending meeting invitations via email which contain official information in the body or attachments.

Mark all non-work-related emails as **UNOFFICIAL**.

OFFICIAL: Sensitive information is information such as but not limited to, legal advice, commercially sensitive, audit reports, information that could compromise the Agency ICT system and Sensitive personal information as defined in Section 6 of the Privacy Act. All other information from business operations and services requires a routine level of protection and is treated as OFFICIAL.

When forwarding emails from your NDIS email to an external email address (such as SSI email address), do not change or remove the classification because the receiver tells you they cannot open it. This puts the security of the information at risk and could result in a security breach notification’.

Training in relation to policies and procedures

[64] A copy of the Applicant’s training record was filed by the Respondent and indicates that the Applicant had completed a significant number of learning tasks including in relation to ‘Information Handling and the NDIA’ on 24 January 2018 and ‘APS Values & Employment Principles and the Code of Conduct’ on 22 January 2018 and 30 June 2022.

Applicant’s contractual obligations

[65] A copy of the Applicant’s employment contract (Employment Contract) was filed by the Respondent. The Employment Contract states in relation to policies and procedures:

‘Policies & Procedures

30. You are directed to read and comply with the obligations imposed upon you from to time pursuant to SSI policies, procedures and practices, including the Code Conduct (“Policies”) as they relate to your employment. Those Policies may be varied from time to time at the absolute discretion of SSI and you are directed to comply such variations. However, the Policies do not form part of your Contract and nothing in SSI’s policies or procedures gives rise to a legal right or benefit enforceable by either directly or indirectly.
31. The Policies can be viewed on the SSI Intranet.

32. A breach of your obligations under the Policies may result in disciplinary action being taken against you, including the immediate termination of your employment’.

Evidence of Mr Ong

[66] Mr Ong is the Respondent’s District Manager. Mr Ong’s evidence was that:

- in July 2023, he was made aware via a Team Leader of a written participant complaint received by the LAC program against a service provider, Advance Minds, and the Applicant. During the hearing Mr Ong said that this complaint was received as part of the Respondent’s internal feedback process;
- he was informed by the Team Leader, who spoke to the participant’s nominee (the parent), that the participant nominee alleged that the Applicant had pressured her to use one particular service provider, Advance Minds, and that the Applicant did not provide multiple options of service provider for the participant to choose from;
- it is a requirement of Local Area Coordinators to never express an opinion about a service provider or favour one provider over another when discussing options with a participant;
- it is also a requirement of the staff to provide a participant who requests assistance to connect with a service with details of at least three independent providers;
- he arranged to speak to the Applicant to gather the facts regarding what discussions had taken place with the participant nominee;
- the Applicant initially stated she had provided three options to the participant;
- later in the conversation with him the Applicant admitted to him that she had provided details of only Advance Minds as a possible service provider and acknowledged that this presented a conflict of interest;
- the Applicant has been provided with regular reminders of the need to avoid and declare any conflict of interest in their role in the LAC program and the requirement to provide at least three providers to participants in order to ensure there is no favouring of one provider over another;
- he was subsequently made aware by a Team Leader of a further complaint by another participant nominee, alleging that the Applicant had pressured them to use one particular service provider Advance Minds, and that the Applicant had not provided the participant nominee with multiple choices of providers to select;
- he was advised on 17 August 2023 by the Team Leader that the Applicant’s personal email address was listed on the NDIS online register of service providers as a contact for the service provider Advance Minds;
- he checked and confirmed that this was the case.
- on 18 August 2023, he met with the Applicant and Sarah Vickers, People and Culture Business Partner and advised the Applicant that she was suspended from duty effective immediately due to the commencement of an investigation;
- he arranged a private room and a computer to be made available on 22 August 2023 for the Applicant to come to the Ashfield office to view participant records under supervision;
- the Applicant arrived with a support person and sat at the computer for 10 minutes before saying that she did not need to see the records.²³

Evidence of Ms Vickers

[67] Sarah Vickers is the Respondent's People and Culture Business Partner. Ms Vickers' evidence was that:

- on 18 August 2023 she was provided with information gathered during an investigation by management into a participant complaint received by the LAC program and was asked to investigate allegations against the Applicant regarding an alleged conflict of interest in her role as a Local Area Coordinator;
- she met with the Applicant on 18 August 2023 and advised the Applicant that she would be suspended on full pay effective immediately whilst the investigation was conducted.
- She investigated the allegations against the Applicant between 18 August 2023 and 22 September 2023;
- she met with the Applicant to interview her regarding the allegations on 22 August 2023 and 7 September 2023 and also considered emails received from the Applicant responding to the allegations and/or evidence on 30 August 2023, 31 August 2023, 8 September 2023 and 21 September 2023;
- she reviewed social media activity by the Applicant on social media pages belonging to the service provider and/or the business owner and found the two parties had been connected on the platforms over a period of time;
- she reviewed the SSI mailbox of the Applicant as part of the investigation and found a large number of confidential and sensitive participant data in files in emails sent by the Applicant from her NDIS email address to her Respondent provided email address;
- she also found a copy of a letter/report from the provider stating that the Applicant had been a client of the provider for 2 years and 3 months;
- she notified the Applicant of new additional allegations due to the discoveries detailed above and provided the Applicant with an opportunity to respond;
- she completed a report detailing the findings and found all of the allegations against the Applicant substantiated;
- she recommended the Applicant be dismissed due to serious misconduct.²⁴

Ms Vickers' Investigation Report and information relied on by the Respondent

[68] The Respondent filed a copy of the investigation report referred to in Ms Vickers' evidence (Investigation Report) and a number of documents referred to in that report.

The First Complaint

[69] The Investigation Report states that on 5 July 2023 a written complaint was received by a participant in relation to the Applicant. A copy of a redacted document dated 5 July 2023 was filed by the Respondent (First Complaint) and the parts that are unredacted state:

'1. I am writing to request an N schedule review- ressesment change of circumstances of my sons (sic) funding
I would also like make a formal complaint and address my concerns regarding your staff Oula Kabbara and and the ndis provider she highly recommended to me - Advance Minds in Regents Park.

2. We were unfortunately without any help or support from our previous Lac/Oula Kabbara and were left in the dark after multiple attempts at utilizing (sic) my son's core funding to better his wellbeing.

...

My old Lac- Oula Kabbara from Settlement Services International in Bankstown & my son's old counsellor- Shuv Homsy from Advance Minds in Regents Park (who was highly recommended by Oula/Lac). Oula was telling me numerous times "your son don't need speech therapy or occupational therapy. Shuv can provide that or why do you want to use them. They just need counselling & you will be able to save money by just staying with one therapy".

...

Last year I was so stressed out. I was crying begging to Oula/Lac to guide me how to use the core support.

I need help in how my son can utilise the community access with a support worker.

I need help for my son. I had no knowledge about ndis. I was new to all this. I was too vulnerable weak to do anything.

Oula/Lac's response every time I asked, was "stick with Shuv Homsy, you don't need any other therapist. He can do everything"

I had to speak to other parents and ndis directly to educate myself about ndis especially the core support funding.

...

5. There is a parent I know who I spoke to recently, who has 2 kids with special needs . There Lac was Oula Kabbara from Settle Services International in Bankstown. She also recommended them to go to the counsellor from Advance Minds-Shuv Homsy.

...

I want this matter investigated escalated to your manager urgently and dealt with accordingly...

...

If nothing is done about this. The next steps to take this complaint will be the ombudsman and my local Mp (who's federal) who will take this complaint to Ndis Minister Bill Shorten. My local Mp and the ombudman has advised me to email ndis first.

Can you pls let me know the steps we need to take for the review reassessment.

Thank you for your assistance'.

[70] The Respondent filed a briefing document said to have been prepared by Mr Ong on 18 August 2023 and provided to Ms Vickers (Briefing Document). The Briefing Document is referred to in the Investigation Report. In relation to the First Complaint the Briefing Document states:

‘Formal complaint in regards to concerns with LAC Oula Kabbara and NDIS provider Advance minds in Regents Park, which was recommended by LAC Oula Kabbara. The family were only given one option at this time as it was alleged that Oula pressured the family to link in with Advance Minds.

LAC Oula Kabbara did not give clear insight to the funding that was approved and communicated that provider Advance Minds is all the family needs.

TL Jessica who was supporting the team at the time, contacted family on the 6/7/2023 at 9am to further investigate complaint, identify issues and pass on complaint to District Manager.’

[71] The Investigation Report states that the First Complaint was initially discussed with the Applicant on 7 July 2023. The Briefing Document states:

‘District Manager Nick Ong- Phone call on 7/7/2023 in the morning

District Manager spoke with LAC Oula Kabbara regarding complaint on this phone call. While Oula was originally defensive and denied that she did not recommend the one provider. Oula did confirm that she only offered the family one provider which is Advance Minds at the end of the phone call. LAC acknowledged this was a conflict of interest’.

[72] The Briefing Document indicates:

- the first payment by Advance Minds was claimed on 31 May 2022 in relation to the participant the subject of the First Complaint (Participant 1);
- the final payment by Advance Minds was claimed 1 December 2022;
- there are total of 20 claims made by Advance Minds during this period in relation to Participant 1;
- the CRM entry made by the Applicant in relation to an implementation meeting on 30 June 2022 states: “Implementation Meeting completed over the phone, no services in place, no action required”
- the CRM entry in relation to an implementation meeting on 30 June 2022 states: “Implementation meeting completed over the phone, no action is required”;
- the CRM notes did not indicate that the Applicant had provided at least three provider options.

The Second Complaint

[73] The Investigation Report states that further inquiries were made and on 17 August 2023 another participant made allegations that the Applicant had pressured them to use the same provider and not provided other options (Second Complaint).

[74] In relation to the Second Complaint the Briefing Document states:

‘Summary of Record:

TL Sean contacted a family which was given to us by the complainant. After discussions the second family identified that LAC Oula Kabbara was their LAC for a period of time and only recommended that the family should use Advance Minds, and did not offer any other options at this time.

Allegations towards LAC:

“Felt forced into Advance Minds and was told my child does not need OT or Speech therapy by Oula””

[75] The Briefing Document indicates:

- the first payment by Advance Minds was claimed on 3 February 2023 in relation to the participant the subject of the Second Complaint (Participant 2);
- the final payment by Advance Minds was claimed 31 May 2023;
- there are total of 5 claims made by Advance Minds during this period in relation to Participant 2;
- the CRM entry made by the Applicant in relation to an implementation meeting on 19 January 2023 states: “Plan Implementation Meeting completed over the phone with participants Father Mark, all services in place, no further actions in place”
- the CRM notes did not indicate that the Applicant had provided at least three provider options.

The emails from the Applicant’s NDIS email to her Respondent provided email

[76] The Investigation Report states that during the investigation the Applicant’s mailbox was reviewed and it was discovered that a large number of NDIS participant files in 15 emails were sent on 29 March 2022 from the Applicant’s NDIS email address to the Applicant’s SSI address.

The counseling report email

[77] The Investigation Report states that during the investigation the Applicant’s mailbox was reviewed and among the Applicant’s emails was a counselling report for the Applicant dated 2 November 2021 describing the Applicant as a long term client of Advance Minds.

[78] The Respondent filed a redacted copy of a letter from Ms El-Homsi, Director of Advance Minds, dated 2 November 2021 which states that the Applicant has been receiving therapy for two years and three months.

Advance Minds’ contact email

[79] The Investigation Report states that a search of the NDIS database of service providers on the NDIS website showed the Applicant’s personal email address as the email for Advance Minds. The Respondent filed copies of these emails with its materials.

Social media engagement with Advance Minds

[80] The Investigation Report states that on 7 September 2023 the Applicant was provided with an email with a file of copies of images taken from social media. The Respondent filed screen shots of the social media activity with its materials and consistent with what is stated in the Investigation Report, those screen shots depict:

- an Instagram profile called ‘Oula Ka’ is a follower of the Advance Minds Instagram account;
- an Instagram profile called ‘lulu.ka.182’ is a follower of the Advance Minds Instagram account;
- the Facebook profile of ‘Lulu Ka’ shows ‘Oula Ka’ as a friend;
- a post by ‘Shuv Homs’ to that personal account on 12 December 2020 was responded to by ‘Oula Ka’ and ‘Oula Ka’ is tagged in the post by Shuv Homs;
- posts by Advance Minds to its Facebook page on 1 and 17 February 2022 were ‘liked’ by ‘Oula Ka’;
- a post on Oula Ka’s Facebook page on 27 February 2023 (being an update to the profile’s cover photo showing two children in a monkey forest) was ‘liked’ by Shiv Homs’ account.

The Applicant’s response to the allegations on 22 August 2023

[81] The Investigation Report indicates that:

- on 22 August 2023 at 10am the Applicant attended the Respondent’s office with her partner present as her support person for the purpose of viewing the CRM records of the participants;
- after reviewing the CRM records for 15 minutes, the Applicant requested to be interviewed that day to respond to the allegations and the interview went ahead.

[82] In relation to the NDIS website showing the Applicant’s personal email address as the email for Advance Minds, the Investigation Report indicates that the Applicant said, by way of summary:

- before she became involved in LAC work the Applicant was in a relationship with someone who sought counselling through Advance Minds;
- she attended at least one session with her partner at the time and at least one session alone with one of the counselors, Mr el Homs;
- in or around 2017, when she was employed by St Vincent De Paul as an LAC, Mr el Homs became aware that the Applicant had some experience with NDIS;
- Mr el Homs asked the Applicant’s former partner (who was his client at the time) if he could use the Applicant’s email address as a “cc” to look at the reply from the Commission regarding an application for Advance Minds to become an NDIS therapeutic support provider;
- she believed that her former partner must have mentioned to Mr el Homs that she had NDIS experience and that he wanted her to check the document to see if they were set up correctly;

- she scanned the document, which she believed to be a “Scope of Work” document briefly and skim read it to check that Advance Minds had set it up properly;
- she did not have a copy of the email asking for her to review the application for Advance Minds as an NDIS provider;
- since 2018 she has had no further interactions with Advance Minds;
- she is not aware of how her email address ended up on the website as a contact for Advance Minds and assumes it was due to the “Scope of Work” document being sent to her;
- she was not aware she was listed as a contact on the website;
- on 8 February 2022 she noticed she was receiving worker screening checks and COVID-19 vaccination information for Advance Minds on her personal email address;
- she wrote to the NDIS Commission to try and stop receiving the emails and the Commission asked for further information about the provider registration, which she couldn’t provide, so she did not follow up any further;
- she did not contact Advance Minds to ask them to remove her email address as a contact.

[83] The Respondent filed a copy of an email from the Applicant to Ms Vickers dated 11 September 2023 which includes an email from the Applicant to the NDIS Commission dated 8 February 2022 which states:

‘Hi team,

It has come to my attention that i (sic) have been receiving (sic) emails that is ment (sic) to be addressed to [Ms El-Homsi of Advance Minds] please rectify this as there is private and confidential information coming through’.

[84] Also filed with the materials is the email response from the NDIS dated 9 February 2022 which states:

‘Dear Oula,

Thank you for your email to the NDIS Quality and Safeguards Commission (NDIS Commission).

Can you please provide more information with regard to what information is coming through to you and an application/registration ID that may be in reference to, so that we can locate the applicable records and update them. Thank you

Information on the NDIS Commission’s roles and functions, including NDIS provider registration, is available on the NDIS Commission website.

Should you have any further enquiries, please contact us on 1800 035 544’.

[85] In relation to the allegation concerning her referral of participants to Advance Minds without providing NDIS participants with an informed and independent choice of provider, the Investigation Report indicates that the Applicant said, by way of summary:

- she did not favour any provider;
- she had a list on her computer of providers in the district and Advance Minds were one of them along with other providers;

- she provided the names of the providers verbally to the participants so had no record of which ones she referred them to;
- she believes the other names of the providers she gave were TLC in Bankstown and Afford;
- the mother of one of the participants (Participant 1) was referred by her to Advance Minds as she was using other providers and was not happy with the service and she gave the mother a list and they made contact themselves;
- the mother was seeking counselling for herself;
- she did not give only one option to the mother or recommend Advance Minds;
- she later received emails from the mother saying how happy she was with the service from Advance Minds;
- she believed she sent the mother a list of providers, that the mother attended for herself and then connected Participant 1 to Advance Minds later;
- the mother of Participant 1 is close to the father of another participant (Participant 2);
- she was supporting the father of Participant 2, recommended Advance Minds to the father for counselling for himself and Advance Minds were not connected to the Participant child at the time;
- she believes she made the referral to Advance Minds in around mid-2021 to 2022.
- she believes the child, Participant 2, must have connected to Advance Minds at a later time.

[86] In relation to the allegations concerning deficiencies in the interaction details records the Investigation Report indicates that the Applicant said, by way of summary:

- she didn't add much detail in the interactions as the participants had been in the scheme for many years and were already linked so they didn't need much detail;
- she realised this was an oversight, as she was busy and acknowledges that she should have made more interactions;
- she did not think she has provided Advance Minds details to any other participants.

[87] In relation to the allegations concerning a conflict of interest the Investigation Report indicates that the Applicant said, by way of summary:

- she has not affiliation with, nor has benefited from, Advance Minds;
- she did not flag any potential conflict of interest issue with the Respondent regarding receiving emails for them on her personal email, didn't think anything of it and acknowledged she should have let management know that there was an issue;
- she knows she should not show any favouritism to any particular provider when offering referrals to participant and was meant to provide between 3 and 5 options of providers to choose from;
- she knew it looked 'really bad';
- she understood the policies and procedures for LAC, including conflict of interest, and has had training.

The Applicant's response to the allegations on 7 September 2023

[88] The Investigation Report indicates that a second interview of the Applicant was conducted by Ms Vickers via Microsoft Teams on 7 September 2023 to clarify aspects of the Applicant's response and in that interview the Applicant said:

- she did not refer the children participants to Advance Minds but referred the parents to Advance Minds for their own support;
- when referring the parents to Advance Minds she gave them a choice of a number of providers and believes that the mother of Participant 1 went to the other providers as well;
- in relation to Mr Ong's notes of the phone call on 7 July 2023, she denied admitting to Mr Ong in that conversation that she only gave one option of provider to Participant 1;
- in relation to the phone call with Mr Ong on 7 July 2023 said that Mr Ong called her and said there was a complaint that she did not provide options and that she told him that she did provide a list and that the participant originally went to iFit group and then swapped to Advance Minds;
- she denied not offering choice to the participant parent;
- in relation to her social media interaction with Advance Minds she said this may have been her daughter who uses her social media from time to time and that she very rarely uses social media.

The Applicant's email response regarding social media activity

[89] The Investigation Report indicates that the Applicant was emailed a series of questions to respond to in relation to the identified social media activity including:

1. Is Oula Ka a social media profile of yours?
2. Is Lulu Ka a connection of yours or an alias for you? If it is a connection please advise who this is and their connection to you.
3. Do you have or manage any other Instagram or Facebook profiles, groups or aliases?
4. If these are your profiles, or that of your family or friends, was this, in your view, a conflict of interest to refer participants through your work as an LAC? If not, please comment why not.

[90] The Investigation Report indicates that the Applicant said in her email response:

- the images do not show, in her opinion, that she is following Advance Minds;
- she did not promote businesses that are a conflict of interest for her role of LAC;
- she liked some pages as part of her own professional research;
- she has never promoted Advance Minds;
- her social media accounts are locked and private and not shared;
- she was being unfairly blamed for the complaints by the Participants;
- she wanted to know what the definition of COI was.

The Applicant's written response to the allegations about her failure to declare she was a client of Advance Minds and that she sent 15 emails from her NDIS email to her Respondent provided email in contravention of NDIA guidelines

[91] The Investigation Report indicates that the Applicant said in her written response:

- she was a client of Advance Minds and did not disclose this to the Respondent;
- she did not disclose this because she prefers to compartmentalise her personal life from her professional life;
- she was a client solely due to difficult personal circumstances encountered in her life and her trauma has been retriggered due to this being raised;
- she has been an LAC for two different employers for 7 years and has worked with over 250 participants;
- she has always behaved professionally;
- she recommended Advance Minds only by adding them to a list of NDIS providers in the local area;
- the participants always had choice and control regarding which provider they use
- she transferred a large number of files from her NDIS account to her SSI account on 29 March 2023 as there was a planned change to the remote desk top and she was advised that the H drive was not accessible;
- she received advice that there was a possibility that critical files could be lost due to the transition.
- she was provided advice to transfer files in this way;
- she does not recall who provided this advice, nor whether it was an NDIA or SSI employee who did so;
- She believes that the files remained within the NDIS environment and were not shared externally at any point.

[92] A copy of the Applicant's written response provided to Ms Vickers by the Applicant on 21 September 2023 was filed with the Respondent's materials and reflects the above.

The Investigation Report findings

[93] The Investigation Report indicates that six allegations were substantiated. The first of these allegations was that as at 18 August 2023, whilst working as a Local Area Coordinator for the Bankstown LAC Office, the Applicant's personal email was listed as the contact person for an NDIS registered service provider, Advance Minds (Allegation 1).

[94] The second allegation Ms Vickers considered to be substantiated was that between October 2021 and 18 August 2023 the Applicant failed to declare to the Respondent that she had a potential conflict of interest in performing her role as Local Area Coordinator due to an affiliation with an NDIS registered service provider, Advance Minds (Allegation 2). The Investigation Report indicates that in support of this finding Ms Vickers took into account that:

- The Applicant and her former partner had both been clients of Advance Minds.
- The Applicant was a client of Advance Minds whilst employed by the Respondent from July 2019 until at least November 2021.
- The Applicant admitted that she had assisted Advance Minds in becoming an NDIS provider prior to joining the Respondent.
- In February 2022, whilst working with the Respondent, the Applicant made contact with the NDIS Commission advising them that she had been receiving confidential client information addressed to Advance Minds to her personal email.

- The Applicant has maintained social media connection with Advance Minds and the owner of Advance Minds, Shuv Homsy, over several years, including on 1 and 17 February 2022.
- The Applicant proposed Advance Minds as a possible support provider to at least two participants' parents and multiple claims were subsequently made for use of NDIS funds for both families between May 2022 and May 2023.
- Those participant families later claimed to the District Manager Nick Ong in August 2023 that they felt forced by the Applicant to use Advance Minds and that they were not offered choices.
- The policies for SSI and LAC staff clearly outline that it is the responsibility of staff to assess the potential for a conflict of interest and to declare any conflict, even if the matter may be perceived as a conflict.

[95] The Investigation Report indicates that in relation to Allegation 2 Ms Vickers considered that:

- the Applicant could have, and should have, made the decision to notify the Respondent of the use of her personal email and allow the Respondent to explore any possible mitigation strategies but instead she did not share this information and then also increased the risk further by choosing to refer Advance Minds to her participants as a possible service provider, whilst knowing and not revealing her own connection to them;
- even if it could be established by the Applicant that she had provided multiple names of providers along with Advance Minds, there remained an unacceptable conflict of interest for the Applicant to present Advance Minds to the participants at all during this period;
- in order to make some effort to mitigate a potential for conflict of interest in her role, the Applicant could have removed Advance Minds from the list of providers for those participants involved with her;
- the Applicant took none of the reasonable options for action available to her.

[96] The third allegation Ms Vickers considered to be substantiated was that between October 2021 and 18 August 2023 the Applicant failed to provide NDIS participants an informed and independent choice of provider, as she referred participants to Advance Minds, with whom she was affiliated, whilst also not offering a selection of providers as options (Allegation 3). The Investigation Report indicates that in support of this finding Ms Vickers took into account that:

- evidence was available that established a variety of connections of the Applicant to Advance Minds about which the Applicant was not forthcoming including a long-standing personal client/provider relationship, the Applicant's personal email address being used as an NDIS contact address for the company, assisting the company with their application to the NDIS, as well as connections via social media, including the owner of Advance Minds viewing and liking posts about her overseas holiday;
- the Applicant had an undisclosed potential conflict of interest at the time regarding her connection with Advance Minds, of which the participants were not aware;

- two separate participant families have provided consistent, credible allegations that the Applicant actively pushed her participants to use Advance Minds without providing different options;
- Nick Ong’s record of conversation with the Applicant on 7 July 2023 when he raised the allegation made by Participant 1, was that the Applicant initially denied that she had not provided options but later changed her response and admitted it, however the Applicant denied that she made any such admission;
- the Applicant claimed that she had provided at least two other names of providers to either participant however presented no evidence to support this claim and claims she provided the details verbally;
- the CRM updates recorded by the Applicant regarding her many interactions with the participants were scant and did not include any details supporting the Applicant’s claims regarding the referrals and how she made them.

[97] The fourth allegation Ms Vickers considered to be substantiated was that on or around the following dates the Applicant failed to update the CRM with full details of information obtained and provided in plan implementation meetings with participants, including details of referrals made by the Applicant to the participant to use the registered support provider, Advance Minds (Allegation 4):

- on 15 October 2021 the Applicant wrote “Plan implementation meeting completed”;
- on 30 June 2022 the Applicant wrote “Implementation Meeting completed over the phone, no services in place, no action required”;
- on 13 December 2023 the Applicant wrote “Implementation meeting completed over the phone, no action is required”; and
- on 19 January 2023 the Applicant wrote “Plan Implementation Meeting completed over the phone with participants Father Mark, all services in place, no further actions in place”.

[98] The fifth allegation Ms Vickers considered to be substantiated was that between 18 August 2023 and 19 September 2023, during the course of a disciplinary investigation, when questioned relating to her connection with NDIS provider Advance Minds, the Applicant failed to declare that she had been a client of Advance Minds since 2019, as evidenced in a counselling report dated 2 November 2021 by Aisha El-Homsi from Advance Minds, which states “Aula Kabbara has been receiving therapy for two years and three months” (Allegation 5).

[99] The sixth allegation Ms Vickers considered to be substantiated was that on 29 March 2022 the Applicant sent 15 separate emails from her personal NDIS email to her Respondent provided email containing confidential and sensitive NDIS participant records and that this was in direct contravention of NDIA guidelines that require participant information not to be shared outside of the NDIS working environment without due authorisation (Allegation 6).

Evidence of Mr Fioramonte

[100] Mr Fioramonte leads the Respondent’s LAC program. Mr Fioramonte’s evidence was that:

- he was made aware of the allegations against the Applicant and approved to suspend the Applicant, pending an investigation;
- he was provided with the findings and recommendations of the investigator which found that there had been serious misconduct by the Applicant;
- he invited the Applicant to attend a show cause meeting on 3 October 2023 to explain why she believed her employment should not be terminated;
- he considered the information provided by the Applicant and the substantiated findings of the investigator;
- he formed the view that the Applicant had not been entirely candid during the investigation;
- the Applicant was also evasive and at times incoherent in her versions of events presented to him in the show cause meeting, particularly about the extent of her connection with the service provider and the origin and purpose of the counselling report from Advance Minds;
- he was satisfied that the Applicant had an unacceptable conflict of interest in her role and that she knowingly had breached company and NDIA/LAC guidelines;
- he terminated the Applicant's employment effective 6 October 2023 and considered the substantiated misconduct by the Applicant as very serious;
- the Respondent has strict contractual obligations concerning conflict of interest as part of its contract with the NDIA;
- the Respondent was required to take action to address the privacy and security breach created by the Applicant, along with the conflict of interest she did not disclose;
- the Respondent had lost trust and confidence in the Applicant for her employment to continue;
- all staff complete compulsory training issued by the NDIA and specific to the LAC program regarding the NDIA's code of conduct and the requirements of LAC program staff and are briefed regularly and reminded of the need to ensure participants always have as much choice and control as possible over how and where their plan funds are spent;
- key to this value is the requirement of NDIA partners, such as SSI LAC program and its staff, to not favour one service provider over another or influence the participant to engage with one service provider over another;
- all program staff are provided with clear definitions and examples for conflicts of interest, instructed how to declare or raise a conflict of interest and explained the possible consequences of not declaring or appropriately managing conflicts of interest in a timely manner at an organisational and employee level;
- LAC staff are all issued with NDIS emails, separate to their Respondent provided email accounts, through which all NDIS related activity is managed. Staff are trained and briefed on the work instructions requiring that participant data and other sensitive information regarding the NDIS must not be sent anywhere other than to another NDIS email address;
- the NDIA has shared media releases regarding massive fraud being perpetrated against the scheme by unscrupulous service providers;
- NDIA data security protocols were put in place to protect the privacy and security of NDIS Participants across Australia;

- the risks and potential for misuse are incredibly high which is why the NDIA contractually bind LAC partners to maintain Participant information on their servers only;
- NDIA and Partner Employees are trained to keep all participant information on NDIA servers;
- LAC Partner organisations are contractually bound to maintain impartiality in regard to NDIS Service Providers or ‘Registered Providers of Supports’ (RPOS);
- the LAC Contract requires the Respondent to “facilitate optimal choice for Participants in the selection of funded supports” and ensure that “no relationship between SSI and any other organisation impacts or restricts this choice due to a conflict of interest”;
- the NDIS Service Provider List is a public document that is used by most participants and providers;
- he considered it to be serious that the Applicant was the primary contact on the NDIS Service Provider List for Advance Minds, a business to whom she was referring participants, considering that this was a clear breach of organisational policies, procedures and trust and may give rise to concern by the NDIA or other service providers that SSI may give preference to another provider based on staff relationships, which is what the Respondent strives to ensure does not happen.²⁵

Evidence of Mr Omac

[101] Mr Omac’s evidence was that:

- the Applicant said during the show cause meeting held on 3 October 2023 that she did not know how the counselling report had originated and she had never asked for it;
- the Applicant said the counselling report was not accurate and that she has not been a client of Advance Minds for two years and three months;
- the Applicant later stated that she believes her Lawyers asked for the letter from Advance Minds and stated that when she had received the counselling report she simply forwarded the email on without looking at it or what the contents of it were;
- the Applicant stated that she never sent an email from the NDIS email/network to her Respondent provided SSI email address;
- when Mr Fioramonte confirmed that it had been sent she stated she must have sent it by accident.

Evidence of Mr Ioannides

[102] The Respondent filed a Statutory Declaration sworn by Mr Ioannides, employed by the Respondent as a Senior IT Consultant, who said:²⁶

- In 2020 when the LAC program commenced all LAC staff were either issued with NDIA owned Surface Pros (laptops) or brought their previously issued Surface Pros from the St Vincent de Paul Society to perform their day to day tasks.
- As of December 2021 the NDIA Remote Desktop was developed which enables employees to access the NDIA environment via the Respondent’s laptops.
- At that time, he managed the transition of issuing new SSI DELL laptops to the LAC employees and then some months later, in around March 2022, he began the process of collecting and returning (to the NDIA) the older NDIA Surface Pros.

- The Respondent's employees were not advised to send any emails (with or without attachments) from their NDIS mailboxes to their SSI mailboxes.

Evidence of the Applicant

[103] The Applicant gave evidence that:²⁷

- before her involvement in LAC work her partner had personal issues, and she separated from that partner;
- her former partner sought counseling through Advance Minds, facilitated by Mr and Ms el Homs; el Homs; el Homs;
- she attended at least one session with her former partner and had a separate session with Ms el Homs;
- when she accessed Advance Minds services she was not employed by the Respondent;²⁸
- in 2017 or 2018 her former partner emailed her an application for Advance Minds to become an NDIS therapeutic support provider;
- she believed Mr el Homs asked her former partner to check if the document was set up correctly;
- she had minimal interaction with Advance Minds since 2018, apart from Ms el Homs sending her reports for Participant 2 at some point;
- she discovered her email on Advance Minds' website on 8 February 2022 and she received worker screening checks and COVID-19 vaccination information;
- she contacted the NDIS Commission to cease the emails but lacked the necessary provider registration details;
- she did not flag this email issue with the Respondent and accepts she should have informed management;
- she denies any affiliation with or benefit from Advance Minds, though they were on a list she provided with other providers verbally, including TLC in Bankstown an Afford;
- the mother of Participant 1 was referred to Advance Minds after the Applicant gave her a list of providers and denies offering only one option;
- she later received positive feedback from her about Advance Minds;
- she recommended Advance Minds to the father of Participant 2 for grief counselling and the child must have connected with Advance Minds at a later time;
- she acknowledges her oversight in providing insufficient interaction details due to a busy schedule;
- she recognises the importance of impartiality in provider referrals, understanding policies, procedures and conflict of interest protocols through training.

Consideration – was there a valid reason for dismissal related to the Applicant's conduct?

[104] Based on the evidence before the Commission I am satisfied of the following facts in relation to the Applicant's conduct:

1. Before commencing her role with the Respondent the Applicant attended at least one counseling session with Advance Minds with her former partner and one counseling session alone.

2. Before commencing her role with the Respondent the Applicant assisted Advance Minds with its application as an NDIS service provider.
3. The Applicant was a client of Advance Minds for a period of two years and three months.
4. The Applicant's personal email was recorded as the contact for Advance Minds on the NDIS website and the Applicant was aware of this by 8 February 2022 at the latest.
5. The Applicant received worker screening checks and COVID-19 vaccination information for Advance Minds, emailed the NDIS about this on 8 February 2023 but did not follow up or bring this to anyone else's attention when the NDIS requested more information from her.
6. The Applicant had a social media connection with Advance Minds and the owner of Advance Minds and this included her 'liking' an Advance Minds post on 17 February 2022 when she was already aware that her personal email was recorded as the contact for Advance Minds and that she has been receiving sensitive information from the NDIS that should have gone to Advance Minds.
7. The Applicant referred participants to Advance Minds even after being aware that her personal email was recorded as the contact for Advance Minds and that she has been receiving sensitive information from the NDIS that should have gone to Advance Minds.
8. The Applicant did not raise these issues with the Respondent until the investigation and was initially dishonest in failing to disclose her connection to Advance Minds as a client for a period exceeding two years, when questioned about her connection with Advance Minds.
9. The CRM updates recorded by the Applicant did not include any details supporting the Applicant's claims that details of other providers were provided to the participant families when the referrals to Advance Minds were made.
10. The Applicant understood the importance of impartiality in provider referrals, understanding policies, procedures and conflict of interest protocols and had been provided with training in relation to these.
11. The Applicant sent emails containing personal information from her NDIS email to her Respondent provided email in contravention of NDIS guidelines.

[105] The Applicant's conduct needs to be understood in the context of her role. In particular the Respondent partners with the NDIA to deliver coordination services and the Applicant's role of Local Area Coordinator was intended to help participants in the NDIS access funds under the NDIS to help them use these funds to connect them to registered NDIS service providers who can help them meet their needs and improve their quality of life. Conflict of interest and privacy requirements are embedded in the Respondent's policies and procedures for a very good reason as many NDIS participants are vulnerable members of the community and potential targets for exploitation and fraud. I am satisfied that the Applicant was well aware of the Code of Conduct, the need to maintain participant confidentiality in the NDIS environment and recognised the importance of impartiality in provider referrals and in understanding policies, procedures and conflict of interest protocols.

[106] I am satisfied that the Applicant had a connection to Advance Minds including as a client of Advance Minds for a period exceeding two years. When the Respondent sought to investigate the extent of the connection, the Applicant was initially dishonest in that she did not disclose that she was a client of Advance Minds. While the Applicant may have had discomfort

about sharing her personal reasons for accessing the service, she should still have disclosed her connection given the importance of managing actual and perceived conflicts of interest in the NDIS environment. Further, the Applicant did not take adequate steps to ensure that her personal email was removed from Advance Minds details on the NDIS website after receiving personal information directed at the NDIS. The Applicant's explanation that she did not do so because the NDIS Commission asked for more information is an inadequate explanation for this and there was nothing to prevent her from seeking the further assistance of the NDIS, Respondent and/or Advance Minds itself if she felt an error had been made and needed to be corrected. In failing to act, the Applicant's email continued to be held out as the appropriate contact for Advance Minds on the NDIS website until it was discovered by the Respondent. Further, the Applicant maintained a social media connection with Advance Minds after these events and continued to refer participants to Advance Minds. There is no evidence to support the Applicant's assertion that she provided the names of other service providers when she referred the participants' parents to Advance Minds and I am not satisfied that she did so. I am satisfied based on the evidence that Applicant's connection with Advance Minds extends beyond a professional relationship. The Applicant has a personal connection with Advance Minds and I am satisfied that the Applicant's conduct created at least a perceived conflict of interest, that her steps to manage this were inadequate and were in breach of the Respondent's requirements regarding management of conflict of interest.

[107] Having regard to the matters I have referred to above, I find that there was a valid reason for the dismissal related to the Applicant's conduct.

[108] Further, I am not persuaded that the Applicant was told by her IT department to email sensitive participant information from her NDIS email to her Respondent provided email. There is no evidence of such a request having been made to her, Mr Ioannides evidence is that he did not provide any such instruction and it seems very unlikely that such a request would be made in an environment where privacy considerations concerning sensitive participant information are paramount. This also suggests dishonesty during the investigation process.

Was the Applicant notified of the valid reason?

[109] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).²⁹

[110] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,³⁰ and in explicit³¹ and plain and clear terms.³²

[111] The allegations concerning the Applicant's conduct were presented to her in the letters of allegation dated 21 August 2023 and 20 September 2023. The letter of 20 September 2023 directed the Applicant to attend a meeting on 21 September 2023 via Microsoft Teams to respond to the allegations. A letter of 22 September 2023 set out the Respondent's view that the allegations had been substantiated and invited the Applicant to a meeting on 3 October 2023 via Microsoft Teams. On 3 October 2023 the Applicant participated in that meeting with in which she was invited to show cause as to why her employment should not be terminated. The

Applicant was dismissed on 6 October 2023 with the Respondent providing a termination letter setting out the following reasons for the dismissal:

- non-disclosure of a conflict of interest;
- not adhering to LAC Conflict of Interest protocols to recommend three service providers;
- transferring NDIS Participant information outside of the NDIS environment and misleading; and
- statements made by the Applicant during the investigation regarding her relationship with the service provider Advance Minds.

[112] Having regard to the matters referred to above, I find that the Applicant was notified of the reason for her dismissal prior to the decision to dismiss being made, and in explicit and plain and clear terms.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[113] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.³³

[114] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.³⁴ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.³⁵

[115] During the course of the investigation the Applicant was provided multiple opportunities to respond to the allegations via interviews conducted on 22 August 2023, 7 September 2023, and also via email on 30 August 2023, 31 August 2023, 8 September 2023, and 21 September 2023.

[116] As noted above, a letter of 22 September 2023 set out the Respondent's view that the allegations had been substantiated and invited the Applicant to a meeting on 3 October 2023 via Microsoft Teams. On 3 October 2023 the Applicant participated in that meeting with in which she was invited to show cause as to why her employment should not be terminated.

[117] In all the circumstances, I find that the Applicant was given an opportunity to respond to the reason for her dismissal prior to the decision to dismiss being made.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[118] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[119] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”³⁶

[120] The Applicant’s support person was present during the interview held on 22 August 2023 in which the Applicant responded to the allegations. The Applicant was invited to have a support person present at the meetings on 7 September 2023 and 3 October 2023 and I find there is no evidence of a request for a support person being made by the Applicant and refused by the Respondent.

[121] In all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[122] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[123] Neither party submitted that the size of the Respondent’s enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent’s enterprise had no such impact.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[124] The Respondent’s enterprise did not lack dedicated human resource management specialists and expertise.

What other matters are relevant?

[125] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[126] Among the Applicant’s submissions in her application were assertions that:

- she was experiencing a traumatic period in her life and that the Respondent did not take this into consideration during the investigation;
- she sought to keep her private and professional life separate;

- while acknowledging that the disclosure of her treatment with Advance Minds should have been made, her actions were not wilful and deliberate and she was simply trying to move on with her life after experiencing difficult personal circumstances;
- the lack of detail in the CRM entries was not wilful and deliberate;
- the Respondent had not undertaken a fair investigation.

[127] The Respondent submitted that had the Applicant simply disclosed an affiliation with Advance Minds, she would not have been required to disclose any further details of the nature of her interactions with them and it would have created risk mitigation strategies to ensure the Applicant would not have been permitted to provide Advance Minds as an option as a provider to participants. The Respondent also submitted that while the Applicant had stated that she did not want to relive that period of her life which is why she did not disclose the information, she was engaging with Advance Minds through social media and the counselling report stated she was an ongoing client. The Respondent submitted this indicated the Applicant was not consistent with her reasons for not disclosing the affiliation and her reasoning that her affiliation with Advance Minds was for a short period of time and in her past was not truthful.

[128] While the Applicant may have experienced some challenging personal circumstances, I do not accept that this was a good reason for her not to disclose her connection to Advance Minds or for her dishonesty during the investigation. The Respondent is accustomed to dealing with sensitive personal information and had the disclosure been made, it seems unlikely that the Respondent would have pushed her for the reasons for her seeking the counselling or the particulars of the counselling sessions. As noted above, the Applicant's role involves working with members of the community who are vulnerable to fraud and exploitation and the need to manage conflicts of interest appropriately in this environment is important and the Applicant's own difficult personal circumstances do not absolve her from this requirement. I am also not persuaded that there were any deficiencies in the investigation that denied the Applicant procedural fairness.

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

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

[130] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.³⁷

[131] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable because the Applicant had at least a perceived conflict of interest arising as a result of her personal connection with Advance Minds, she failed to disclose this or manage this appropriately leading to a breach of the Respondent's requirements relating to conflict of interest and she was initially dishonest in failing to disclose her personal connection as a client with Advance Minds when this was investigated. I am satisfied that there was a valid reason for the Applicant's dismissal based on her conduct and that the Applicant's conduct during the investigation process has resulted in the Respondent losing trust and confidence in the relationship. The Applicant's conduct is compounded due to her working with persons within the NDIS environment who are vulnerable

to fraud and exploitation and where management of conflicts of interest is of particular importance.

Conclusion

[132] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act. The Applicant's application is therefore dismissed.



COMMISSIONER

Appearances:

Ms *O Kabbara* on her own behalf.
Mr *T Omac* and Ms *K Dalton* on behalf of the Respondent.

Hearing details:

2024.
Sydney.
February 5.

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¹ Witness statement of Ben Fioramonte.

² Applicant's 'Form F2 – Unfair dismissal application', question 2.1, Respondent's 'Form F3 – Employer response to unfair dismissal application, question 1.5, Respondent's submissions, question 2a.

³ Respondent's 'Form F3 – Employer response to unfair dismissal application, question 1.2.

⁴ Applicant's 'Form F2 – Unfair dismissal application', question 1.1.

⁵ Respondent's submissions, questions 2b and 2c.

⁶ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

⁷ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁸ *Ibid.*

⁹ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

¹⁰ *Edwards v Justice Giudice* [1999] FCA 1836, [7].

¹¹ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

¹² Respondent's submissions, question 4.

¹³ Respondent's submissions, question 4.

¹⁴ Respondent's submissions, question 4.

¹⁵ Respondent's submissions, question 4.

¹⁶ Respondent's submissions, question 4.

¹⁷ Applicant's 'Form F2 – Unfair dismissal application', response to q. 3.2 at [1].

¹⁸ Applicant's 'Form F2 – Unfair dismissal application', response to q. 3.2 at [2].

¹⁹ Applicant's 'Form F2 – Unfair dismissal application', response to q. 3.2 at [2].

²⁰ Applicant's 'Form F2 – Unfair dismissal application', response to q. 3.2 at [9].

²¹ *Ibid* at [12].

²² *Ibid* at [13].

²³ Witness Statement of Nick Ong.

²⁴ Witness Statement of Sarah Vickers.

²⁵ Witness Statement of Ben Fioramonte

²⁶ Statutory Declaration of George Iaonnides.

²⁷ Affidavit of Applicant at [1] – [12].

²⁸ Affidavit of Applicant at [3].

²⁹ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].

³⁰ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

³¹ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

³² *Ibid*.

³³ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

³⁴ *RMIT v Asher* (2010) 194 IR 1, 14-15.

³⁵ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

³⁶ Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

³⁷ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].