DECISION

Fair Work Act 2009
s 394—Unfair dismissal

Bonita Sullivan
v
United Media Group Pty Ltd
(U2023/10261)

COMMISSIONER LIM PERTH, 1 JULY 2024

Application for an unfair dismissal remedy – dismissal was not consistent with the Small Business Fair Dismissal Code – dismissal was harsh, unjust or unreasonable – unfairly dismissed.

1. Introduction

[1] On Wednesday 18 October 2023, Ms Bonita Sullivan applied to the Fair Work Commission alleging United Media Group Pty Ltd (**Respondent**) unfairly dismissed from her employment.

[2] The Respondent initially objected to Ms Sullivan's application on the basis it had not dismissed her. I dealt with this in my decision, *Bonita Sullivan v United Media Group Pty Ltd*[1] (**Jurisdictional Decision**).

[3] In the Jurisdictional Decision, I found that the Respondent did dismiss Ms Sullivan within the definition of s 386(1)(a) of the *Fair Work Act 2009* (Cth) (**Act**) on Friday 6 October 2023. I accordingly programmed the matter for a hearing of the merits on Monday 15 April 2024.

[4] At the hearing Ms Sullivan represented herself and gave evidence in support of her application. Mr Dirk Fielding, CEO for the Respondent, and Mr Sam Fielding, Sales/HR for the Respondent, gave evidence. Mr D Fielding represented the Respondent.

[5] Having considered the relevant evidence and submissions of the parties, I find that Ms Sullivan's dismissal was harsh, unjust or unreasonable. I find that she was unfairly dismissed. I also find that it is appropriate to award Ms Sullivan a remedy of $3,741.16.

[6] My detailed reasons follow.

2. What were the events leading up to this matter?

2.1 The dismissal

[7] It is convenient to start with the circumstances of Ms Sullivan's dismissal. I adopt the factual matrix and findings in the Jurisdictional Decision, which can be summarised as follows:

(a) The Respondent is in the business of selling advertising space. Ms Sullivan commenced her employment with the Respondent on Monday 12 September 2022. She was employed as a Media Sales Representative.

(b) On Monday 2 October 2023 at approximately 2:00pm or 2:30pm, Ms Sullivan received a phone call from Mr S Fielding (**2 October Phone Call**). Mr S Fielding asked Ms Sullivan what she had been doing all day. Ms Sullivan explained to Mr S Fielding that she had made calls to clients in the morning to deliver magazines and showcards, and that she was about to put through a booking for space at an upcoming expo.

(c) Mr S Fielding yelled at Ms Sullivan that she was not working hard enough and made the comment, "well I can't see any of that. You've got to work harder". Further, that Mr S Fielding told her that she was the worst performer in the company and had to work harder. Ms Sullivan's evidence is that she tried to defend herself, but Mr S Fielding then hung up on her.

(d) Ms Sullivan texted Mr S Fielding to find out if he had ended the call by accident, but Mr S Fielding did not reply. She continued with her work for the rest of the day.

(e) On Tuesday 3 October 2023, Ms Sullivan received the following email from Mr D Fielding (**Fielding 3 October Email**):

> "Bonnie
>
> I understand you told Sam you are not seeing clients because we came to Perth.
>
> The fact is again we had to come to Perth because you have the lowest work rate in the company. That's simply a fact. You gave me this excuse and I left the market to you for no result.
>
> It's a fact it has cost me again to fly 4 people to Perth it has cost me to hire 3 cars, it has cost me to pay for accommodation and living expenses. If we didn't come to Perth we would have no magazines or an Expo. It costs over 10k a trip.
>
> I spent 1000s again on an industry night to get leads and appointments for you. You had 3 appointments for that week while we had 50. And the following week you had 1. From what I've seen I spent thousands + a weeks work from the 4 of us to help you and our return from you has been Zero. We had an industry the following Tuesday in Melbourne. We'll get an additional 20-30k from the night.
>
> If you think for any reason we like coming to Perth and doing your Job we don't. If you think we don't resent giving up a week of our life to do your job while you see one person for the week, then you're wrong. We have never been to Sydney to do Marks job and don't want to. We all have family and commitments, including a 5 month old baby and parents in Melbourne who need care.

After you abused me and said I didn't understand etc etc and Sam did, I've given Sam the responsibility to look after you. Yesterday he got the same treatment. Sam asked you to go hard and finish off the wedding magazine in 2 weeks. You made one appointment for the week. That is an insult to Sam.

So Bonnie that's the facts. Pick up the phone, make appointments and sell ads in the 38 hours a week that you are paid and trusted to do. If not I'll start immediate action to recover our losses. I'm not going to spend 10's of thousands and have my family suffer. Sam can look after himself but that doesn't mean as a father I don't appreciate him not being treated with the respect he has earnt.

The only person responsible for your success or failure is you. I do not accept your refusal to work is our fault for coming to WA.

Kind regards,

Dirk Fielding"

(f) Ms Sullivan responded that same day with the below email (**Sullivan 3 October Email**):

"Dirk,

No I did not tell Sam I am not seeing clients because you came to Perth. Unfortunately this will be a situation of he-said-she-said. Sam rang me and asked me what I had been doing all day. I told him I had seen 2 clients that morning and I was chasing up a client and writing an order out for a sale and I was then going to be making calls. Please note the calls are on Hubspot and you can see from my phone and Hubspot that I made 17 calls and put through a sale of $1,200.

You state below that you came to Perth because I have the lowest work rate in the company and 'I gave you that excuse and you left the market to me for no result'. Not quite sure what you mean by that line as it does not make sense. You have never left the market to me Dirk. You sent me a message back in April asking me not to sell into the Home or Pools magazines. So what market are you referring to here?

I have the lowest work rate because I only have one magazine and one expo to sell into and I am not the only rep for WA, I compete with you Sam and Ben who all actively sell into not only the Vic mags and you retain some NSW ones too and also the WA market. My sales for the wedding magazine and expo have yielded over 200,000 in new business. Mark has even approached a Pool company here so I have a lot of competition. I do well working on just one magazine and one expo but it will not give me 3 appointments a day Dirk. Give me the Home and Pool Magazines and the entire WA Wedding Mag and expo and you will then see me making 3 calls a day. But you won't and you never will.

You have never given me the opportunity to work WA as my own.

You rang me a few months after I started working for the company apologising that you should have given me Pearl Bridal and you would eventually back out of WA and start coming over less and less. This never happened despite my sales success. I have the letter and your reply to all of that.

You state below – 'after you abused me'. Abuse is a very powerful word Dirk. Please give me a detailed account of how I abused you. I actually have the messages you sent me personally

and on teams during that incident, which shows you as the abuser not me. I have kept every message. After you sent me those rants you then ceased talking to me.

Once again I did not tell Sam I was not working because of anything be it the Home mags Pool mags you coming over whatever. I am still working and selling. My sales figures for the past 12 months prove that. Sam asked me what I had been doing all day and I told him and he then started shouting at me and when I answered him back he put the phone down on me. I then text him as I wondered if it was an accident and he did not reply.

I did not abuse Sam and I did not abuse you. Once again you really do need to clarify this with proof as it's a very strong accusation.

I am sure Sam can look after himself with you by his side, but I wonder if he would have spoken to a man like he did to me. How can a 33 year old man act like a petulant child and put the phone down on me when I was defending myself against his accusations of my not doing any work yesterday. Instead of talking to me he shouted at me then put the phone down and then ran to his daddy complaining. What is he 33 or 3? I would be very ashamed if my son treated a woman or anyone like Sam did, but my son wouldn't, he has been taught to treat everyone with respect.

You are all bad mannered and show no respect to me. Not one of you apart from Kaye said hello to me at the Networking evening and Ben did not say hello or goodbye. What is it with you people have you never been taught basic manners.

I have not refused to work Dirk, that is just a lie and Sam needs to come clean here as I did not say that. You also need to explain and prove this so called abuse I have given to yourself and Sam.

Bonnie"

(g) On Wednesday 4 October 2023, Ms Sullivan emailed Mr D Fielding to notify him that she would be seeing her doctor later that day. Ms Sullivan was certified as unfit for work from Wednesday 4 October to Wednesday 11 October 2023 inclusive. Ms Sullivan then sent her medical certificate to Mr D Fielding.

(h) On Thursday 5 October 2023, Ms Sullivan noticed that she had not been paid her wages, which were normally paid on a Wednesday. Ms Sullivan also noticed that her access to her work email had been revoked.

(i) On Thursday 5 October 2023, Ms Sullivan sent the below from her personal email account to the Respondent's generic accounts email address:

"Hello Sam

I haven't as yet received my pay slip for last week and no money has been deposited in my bank account. If you are running late doing the wages all good please advise when my wages will be paid. If you do not intend paying me please advise why.

I need to know this information for Fair Work Australia.

Regards,

Bonnie Sullivan"

(j) This email was internally forwarded to Mr S Fielding and Ms Kaye Fielding. Ms Fielding is Mr D Fielding's wife and performs general support work for the Respondent.

(k) On 6 October 2023, Mr D Fielding sent the below email to Ms Sullivan:

> "Bonnie
>
> You are correct. This matter should be handled by Fair Work. Should you need any help with contacting Fair Work please direct all enquiries to me and me only.
>
> I'm on annual leave so excuse the shortness of this email.
>
> Our company and staff reserve its rights to persue [sic] financial compensation for slander and defamation and will do so. Cease and desists imediatly [sic].
>
> Our company has the right to address an employee who refuses to work.
>
> This has been done in the appropriate manner and resulted in abuse from yourself. As is company policy Sam removed himself from the abuse and reported the incident as he is required to do.
>
> Please ensure Fair Work has your response "running to daddy, petulant child, etc etc. this type of further abuse for reporting abuse is not only slander but grounds for imefiste [sic] termination of employment. By law I must provide a safe workplace. I will be guided by and will cooperate with Fair Work.
>
> Any further contact with employees of umg will not be tolirated [sic].
>
> Any slander and defamation will be pursued legally."

(l) On Friday 6 October 2023, Ms Sullivan emailed Ms Fielding asking for confirmation that she had been terminated as she had not received a formal latter of termination.

(m) Mr D Fielding made the deliberate decision not to pay Ms Sullivan that week on the basis that in the Respondent's view, she had not worked that week.

(n) During this period, Ms Sullivan contacted the Fair Work Ombudsman (**FWO**) for assistance. The FWO facilitated conversations with Ms Sullivan and Mr D Fielding. This culminated in the below email from Mr D Fielding to the FWO on Wednesday 18 October 2023:

> "Max
>
> Further to our conversations.
>
> 1. Bonnie in her statement to fair work claims twice her employment was terminated effectively by email on the 6/10/23. You have the email. Bonnie's employment was not terminated by UMC by email on the 6/10/23. A blatant Lie and putting it bluntly, stupidity to make a claim something was put in writing when it was not.

2. The important point that I can see is in her statement dated October 6 she states her employment finished with UMG on the 6th. In my statement I said I did not know her employment status, but after reading her statement the only concusion[sic] is Bonnie Finished with UMG on the 6th.

3. As Bonnies statement is required by law to be correct I can not contradict that statement. As Bonnies employment was not terminated by UMG immediately, then Bonnie terminated her employment with UMG without notice on the 6th of October. Therefore UMG is entitled to compensation for lack of notice.

4. After talking to you I'm now led to believe Bonnie claims to have had her employment terminated by UMG by UMG 1) diverting her email, phone and Hubspot. Again this is stupidity. Firstly bonnie already claims in her statement her employment with UMG hd [sic] already finished. Secondly UMG had been presented with a doctors certificate say [sic] Bonnie was not working and therefore UMG had the right to take steps to still conduct business. Secondly as confirmed by fair work UMG could not direct work to Bonnie nor could UMG contact Bonnie while she had a medical certificate.

5. After talking to you, Bonnie claims that UMG has not contacted her, not provided her with work and blocked her private email address so she cannot contact UMG. In answer to this stupidity. We both have a statement from Bonnie to fairwork dated 6/10/23 where Bonnie has put her status as finished work on the 6th. How many times can Bonnie ell [sic] UMG she no longer works for them and still expect UMG to send her work.

6. Bonnie claiming her private email has been blocked preventing her from contacting UMG I answer this is again a lie and stupidity. If Bonnie has any proof her email has been blocked then send it to fair work.

7. I'll finish by saying this is 2023 post Covid. Programs like hub spot are CRM, task management, and contact management programs. This program is cross checked with phone bills, emails and other programs including a teams AP where sales people communicate. We have undisputable documentation provided by bonne that Bonnie was not working 38 hours a week as she has claimed in her statement to fair work.

8. To add to the stupidity UMG and Fairwork have emails from Bonnie stating she was not working 38 hours a week as UMG had other staff working in WA. Regardless of staff working in WA Bonnie has put in writing she was not working 38 hours a week. I'll answer stupid statements like UMG prevented her from working if needed.

Fair work is an independent body to protect the employer and employee. I've asked you for your help in this matter to make sure we have complied with the law in every way. UMG follows the law to the best of it's ability.

You mentioned Bonnie has rung you "upset". That's totally irrelevant. We've put up with Bonnie being upset, abusive and dishonest. I've sent you emails where she has abused staff, their family and her employer.

Under no circumstance will I be paying Bonnie money to go away.

I've copied in Bonnie as she is claims [sic] she is no longer employed by UMG. I believe that's my right

Kind regards,

Dirk Fielding"

(o) Ms Sullivan filed her unfair dismissal application that same day.

2.2 Additional evidence

[8] At the hearing Mr D Fielding gave the further following evidence:

(a) He considered the Sullivan 3 October Email to be serious bullying and harassment that justified summary dismissal.[2]

(b) Ms Sullivan's performance had been questioned many times.[3] Mr D Fielding said that on one occasion, Ms Sullivan had only made three calls in a week, whereas the expectation was that employees would make a minimum of 10 calls a day.[4]

[9] Mr D Fielding gave further evidence that he did not hear the phone call between Ms Sullivan and Mr S Fielding on Tuesday 3 October 2023. Mr S Fielding came to him and told him that Ms Sullivan "had gone off her nut" and was being abusive.[5] This conversation took no more than two or three minutes.[6]

[10] Mr S Fielding's evidence of the phone call conversation with Ms Sullivan was sparse. He could not recollect any of the words that were said, simply that it was a short phone conversation and that Ms Sullivan had gone "right off [her] head".[7] Mr S Fielding said that he then rang his father and said words to the effect of, "Bonnie abused me and I hung up on her". This conversation with his father was a few minutes long.[8]

[11] On Mr D Fielding's evidence, after learning about the phone call between Ms Sullivan and Mr S Fielding, he made no contact with Ms Sullivan to ascertain her perspective of the phone call.[9] Mr D Fielding said that he had been the recipient of Ms Sullivan's behaviour before and so had no reason not to believe Mr S Fielding.

[12] In assessing the difference between Ms Sullivan's and Mr S Fielding's accounts of their phone call on Tuesday 3 October 2023, I find Ms Sullivan's more persuasive. Her account is detailed and has remained consistent. Mr S Fielding could not offer details other than Ms Sullivan 'going off her head'. I accept Ms Sullivan's account of what occurred during that phone call.

3. Submissions and consideration

3.1 Initial matters

[13] I must be satisfied of four threshold matters before considering the merits of the application.[10]

[14] I am satisfied of three of the four matters referred to in ss 396(a)-(d) of the Act as follows:

(a) Ms Sullivan filed her unfair dismissal application on Wednesday 18 October 2023, 12 days after her dismissal on Friday 6 October 2023. Her application was therefore made within the time period prescribed in s 394(2) of the Act.

(b) Ms Sullivan had completed the minimum employment period pursuant to s 383 of the Act and earned an annual salary of $50,000. Ms Sullivan was therefore protected from unfair dismissal pursuant to s 382 of the Act.

(c) The employment relationship did not end by way of redundancy and so was not a case of genuine redundancy.

[15] The fourth matter I must be satisfied of under s 396 is whether the dismissal was consistent with the Small Business Fair Dismissal Code (**Code**). Section 388(2) of the Act provides that a person's dismissal was consistent with the 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 Code in relation to the dismissal.

[16] A small business employer is one that employs fewer than 15 employees.[11]

[17] The Respondent contended that it is a small business employer. The Respondent provided a payroll activity summary that shows that as of Friday 29 September 2023, the Respondent employed 13 employees.[12]

[18] Ms Sullivan queried two other people who worked in connection with the Respondent, Ms Karen Taylor and Mr Russell Smith.[13] The Respondent submitted that Ms Taylor is a licensed tax agent who operates under the business name 'KT Books'. I was able to verify this through a search of Ms Taylor's business name on the Australian Business Register using its ABN Lookup website.[14] I accept that Ms Taylor was not an employee of the Respondent. The Respondent also contended that Mr Smith is a consultant. Regardless of whether Mr Smith is an employee or not, it would not bring the number of employees to 15. I am therefore satisfied that the Respondent was a small-business employer.

3.1.1 Did the Respondent comply with the Code?

[19] The Code provides that it is fair for a small-business employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. The *Fair Work Regulations 2009* define serious misconduct for the purposes of the Act as including:

(a) Wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment.

(b) Conduct that causes serious and imminent risk to the health and safety of a person; or the reputation, viability or profitability of the employer's business.

(c) Theft, fraud or assault.

(d) The employee being intoxicated at work.

(e) The employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

[20] In assessing whether the "summary dismissal" section of the Code has been complied with, the Full Bench of the Commission in *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services*[15] set out the following guidance on how the "summary dismissal" section of the Code operates:

> "[41] In summary, drawing on the conclusions stated above and the ratio in *Pinawin,* we consider that the "Summary dismissal" section of the Code operates in the following way:
>
> (1) If a small business employer has dismissed an employee without notice - that is, with immediate effect - on the ground that the employee has committed serious misconduct that falls within the definition in reg.1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the "Summary dismissal" section of the Code. All other types of dismissals by small business employers are to be considered under the "Other dismissal" section of the Code.
>
> (2) In assessing whether the "Summary dismissal" section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, and second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element."[16]

[21] It is well-settled that the Commission does not have to make a finding, on the evidence, whether the conduct occurred.[17] The Commission's determination is whether the employer had a reasonable belief that the conduct of the employee was serious enough to warrant immediate dismissal.[18] It is not necessary for the Commission to determine whether the employer's belief was correct,[19] or to be satisfied that there was a valid reason for the dismissal.

[22] In this matter, Ms Sullivan's dismissal occurred with immediate effect. The Respondent submitted that Ms Sullivan engaged in bullying, and that such bullying was grounds for immediate dismissal.[20] The Respondent relied on the Sullivan 3 October Email and specifically submitted that Ms Sullivan:

(a) insulted Mr S Fielding's "manliness";

(b) called Mr S Fielding a petulant child and accused him of "running to daddy";

(c) said that she would be ashamed if her son acted that way;

(d) implied that Mr D Fielding and Ms Fielding are bad parents; and

(e) accused the Fielding family of never being taught any manners.

[23] On the basis of the evidence, I am satisfied that Mr D Fielding believed that Ms Sullivan engaged in conduct that was serious enough to warrant immediate dismissal. However, I am not satisfied that the belief was reasonable.

[24] Regulation 1.07 of the *Fair Work Regulations 2009* sets out the meaning of serious misconduct as follows:

> **"Meaning of serious misconduct**
>
> (1) For the definition of ***serious misconduct*** in section 12 of the Act, serious misconduct has its ordinary meaning.
>
> (2) For subregulation (1), conduct that is serious misconduct includes both of the following:
> (a) wilful deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
> (b) conduct that causes a serious and imminent risk to:
> (i) the health and safety of a person; or
> (ii) the reputation, viability or profitability of the employer's business.
>
> (3) For subregulation (1), conduct that is serious misconduct includes each of the following:
> (a) the employee, in the course of the employee's employment, engaging in:
> (i) theft; or
> (ii) fraud; or
> (iii) assault; or
> (iv) sexual harassment;
> (b) the employee being intoxicated at work;
> (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.
>
> (4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.
>
> (5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform."

[25] As seen above, the definition of serious misconduct is a high bar – it includes theft, fraud, assault, sexual harassment and conduct that causes a serious *and* imminent risk to health and safety. I accept that Ms Sullivan's email caused great offence to Mr D Fielding, but given what ordinarily constitutes serious misconduct, it was not reasonable for him to believe that her email warranted summary dismissal.

[26] Accordingly, I am not satisfied that the dismissal was compliant with the Code.

3.2 Was the dismissal "harsh, unjust or unreasonable"?

[27] I now turn to consider whether Ms Sullivan's dismissal was "harsh, unjust or unreasonable" per s 385(b).

[28] Section 387 of the Act requires me to take into account eight matters in assessing whether Ms Sullivan's dismissal was unfair. I set out my consideration below.

3.2.1 Section 387(a) – was there a valid reason for the dismissal related to Ms Sullivan's capacity or conduct?

[29] A valid reason is one that is "sound, defensible or well-founded"[21] and should not be "capricious, fanciful, spiteful or prejudiced".[22]

[30] Where the reason for dismissal relates to conduct, the Commission must find that the conduct occurred and that the conduct justified dismissal. Whether the conduct relied upon as a reason for dismissal actually occurred is to be determined based on the evidence,[23] and it is to be assessed on the balance of probabilities[24] taking into account the gravity of the allegations.[25] Where the reason for dismissal relates to capacity, the appropriate test is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.[26]

[31] Ms Sullivan submitted that there was no valid reason for dismissal. The Respondent effectively submitted that Ms Sullivan engaged in bullying conduct both in the Sullivan 3 October Email and over time towards Mr D Fielding and Mr S Fielding. The Respondent further submitted that the Applicant also had poor work performance. I now turn to examine these allegations, both in isolation and together.

[32] I find that though the Sullivan 3 October Email was inflammatory and constituted misconduct, it did not rise to the bar of serious misconduct. The email may have justified disciplinary action, however, by itself it does not constitute sufficient misconduct to establish a valid reason for dismissal. I also note the context of Ms Sullivan's email is that she had just received a phone call from Mr S Fielding where he had been aggressive towards her, and then had received the Fielding 3 October Email from Mr D Fielding, her employer, without him making inquiries of her account of the 2 October Phone Call.

[33] The Respondent made repeated assertions that Ms Sullivan had 'abused' Mr D Fielding. However, Mr D Fielding could not give any details such as dates or things that were said by Ms Sullivan. This was despite Mr D Fielding's opportunities to do so at the both the jurisdictional and merits hearings, and Ms Sullivan repeatedly asking for examples of her alleged abuse of Mr D Fielding.

[34] It was difficult to assess the Respondent's contention that Ms Sullivan had performance issues. This is because neither side presented objective evidence of Ms Sullivan's work performance. The Respondent repeatedly asserted that the company's CRM software, Hubspot, showed that Ms Sullivan had poor performance metrics such as low numbers of emails sent and phone calls made.[27] However, the Respondent did not tender this documentation such as screenshots or spreadsheets that detailed these metrics.

[35] Ms Sullivan contested that her work performance was poor. Her evidence was that in the week immediately before she was dismissed, she submitted three sales contracts and made dozens of phone calls. Ms Sullivan further said that in the 13 months she worked for the Respondent she brought in over $200,000 worth of advertising and exhibition revenue for the Respondent, and she introduced over 90 new clients to the Respondent.[28]

[36] Ms Sullivan's employment contract sets out the following performance metrics:

> "**Working for United Media Group**
>
> What is required of you while working for United Media Group
>
> (i) A minimum of 15 appointments to be executed each week, or 3 appointments each day.
> (ii) A minimum of 10 calls to be made each day with 10 genuine opportunities. 10 phone calls is an hour's work. Get a potential minimum 10 new clients every day.
> (iii) You must put yourself in a position where you have a genuine opportunity to write 10k every day from your appointments.
> (iv) Each week new business must be written to cover all clients you have lost, may lose, and to reach your minimum budget. Commissions are paid for a combination of new business and renewals.
> (v) Rates for new business are sold based on the rate card.
> (vi) Complete and record your figures daily – every call made, appointment made, appointment attended, sale converted, and the value of each booking signed. You are expected to send your report to sales administration at the end of each week.
> (vii) Contribute to the sales group email every day and report on your daily figures and appointments made.
> (viii) Ensure ACT, UMG's Customer Relationship Management (CRM) program, is completed and synchronised at the end of each day, with notes on all appointment completed and appointments made for the following days."[29]

[37] In the Sullivan 3 October Email, Ms Sullivan seems to acknowledge that she was not making the requisite number of phone calls or appointment, stating:

> "I have the lowest work rate because I only have one magazine and one expo to sell into and I am not the only rep for WA, I compete with you Same and Ben who all actively sell into not only the Vic mags and you retain some NSW ones too and also the WA market…I do well working on just one magazine and one expo but it will not give me 3 appointments a day Dirk. Give me the Hope and Pool Magazines and the entire WA Wedding Mag and expo and you will then see me making 3 calls a day. But you won't and you never will".

[38] On balance, there is enough from Mr D Fielding, Mr S Fielding and Ms Sullivan herself to find that Ms Sullivan was underperforming in her role. However, based on the lack of evidence, I am not satisfied that the underperformance was severe enough to justify dismissal by itself or in conjunction with the Sullivan 3 October Email.

[39] I find that on the evidence before me that there was no valid reason for Ms Sullivan's dismissal.

3.2.2 Section 387(b) and (c) – notification of valid reason and opportunity to respond

[40] An employee protected from unfair dismissal should be notified of the reason to terminate their employment before the decision to dismiss.[30] Failure to do so impacts on their ability to respond to that reason before the decision to terminate is made.[31]

[41] Ms Sullivan was not given notice of the reason for her dismissal prior to the event. She similarly was not given the opportunity to respond. This is a factor that weighs in favour of a finding of unfair dismissal.

3.2.3 Section 387(d) – any unreasonable refusal by the Respondent to allow a support person

[42] Ms Sullivan did not make any request for a support person, but she was also not given notice of her impending dismissal. I find that this is a neutral consideration in this case.

3.2.4 Section 387(e) – warnings concerning performance

[43] In his evidence, Mr D Fielding drew my attention to a photo of a partial email that he sent to Mr S Fielding, Mr Ben Fielding and Ms Sullivan, which reads:

> "…
>
> As we do in Melbourne, every client is phoned and appointed. As sales people we sell every client into the magazine and expo.
>
> We are happy to run the expo at a loss so we have an excuse to appoint clients and sell them into the magazine as well. It's marketing of the magazine. I'm strewing [sic] this as our previous rep in WA just emailed the expo clients asking them to book back in.
>
> Disastrous results as we all know.
>
> Sam Ben and I will come to WA, appoint and renew our clients into the magazine and expo as well. It's the only way you can be successful.
>
> As I said Ali knew better, took the east [sic] way out and laid [sic] the price.
>
> Thanks guys"[32]

[44] Mr D Fielding's evidence was that this was a warning about performance and was sent to Ms Sullivan because she wasn't meeting the requirements of her role.[33] I accept that this email was directed towards Ms Sullivan's performance, but on an objective reading of this partial email, it does not rise to the bar of a warning.

[45] Mr D Fielding further said that there were multiple phone conversations with Ms Sullivan regarding her performance.[34] He did not provide the details of these phone conversations such as dates or what specific performance issues were discussed. However, Ms Sullivan's evidence acknowledges that Mr S Fielding called her on Monday 2 October 2023 and raised that she was the lowest performing employee for the company.

[46] On balance, I find that there were warnings concerning Ms Sullivan's performance.

3.2.5 Section 387(f) and (g) – size of the Respondent's enterprise and whether the absence of dedicated human resource management specialists or enterprise would be likely to impact on the procedures followed

[47] The Respondent is a small, family-run business that does not appear to have dedicated human resource management specialists. I find that this did impact on the procedures (or lack of) that were followed.

3.2.6 Section 387(h) – any other matters the Commission considers relevant

[48] Ms Sullivan provided documentary evidence that she has had to seek the assistance of the Fair Work Ombudsman to pursue the Respondent for payment of her final two weeks of pay as well as the payment of her annual leave entitlements.[35] Mr D Fielding confirmed in the hearing of the jurisdictional objection that he had made a deliberate decision not to pay Ms Sullivan her final wages.[36]

3.2.7 Is the Commission satisfied that the Applicant's dismissal was harsh, unjust or unreasonable?

[49] I have made findings in relation to each matter in s 387 as relevant to this case.

[50] The absence of a valid reason or procedural fairness in Ms Sullivan's dismissal leads to my conclusion that her dismissal was harsh, unjust and unreasonable. It is harsh because Ms Sullivan's conduct was not sufficiently serious to warrant dismissal. It is unreasonable because the Respondent dismissed Ms Sullivan with no procedural fairness. The absence of a valid reason and procedural fairness outweighs the other considerations under s 387.

[51] Even if I had found that Ms Sullivan's misconduct and performance issues together formed a valid reason for dismissal, I still would have found that her dismissal was unfair. This is because of the weight I have given the Respondent's lack of procedural fairness when it dismissed Ms Sullivan.

4. Remedy

[52] I now turn to the issue the remedy, if any, that should be ordered in the circumstances. Section 390 of the Act sets out the circumstances in which an order for reinstatement or compensation may be made:

> **"390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.

> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case."

[53] I am satisfied pursuant to s 390(1) and (2) that Ms Sullivan made an application for unfair dismissal, is a person protected from unfair dismissal and was unfairly dismissed.

[54] Ms Sullivan does not seek reinstatement. I am satisfied that reinstatement is not appropriate given the strong enmity between the parties. Ms Sullivan is seeking the payment of four weeks, which she says was the applicable notice period.

[55] I turn now to consider s 390(3)(b). As stated by the Full Bench in *Nguyen v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australia Chapter*[37] (***Nguyen***), the question of whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one.[38] Section 390(3)(b) requires that all circumstances of the case to be taken into consideration. As to what this consideration requires, I respectfully adopt the reasoning of the Full Bench in *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge*[39] (***Bowden***) at [40]:

> "As to whether an order for the payment of compensation by Ottrey to Ms Bowden is appropriate in all the circumstances of the case, we note that the phrase "all the circumstances of the case" in s.390(3)(b) of the FW Act is also contained in s.392(2). However, in s.392(2) the phrase is followed by a reference to the matters in ss.392(2)(a) to (g) and s.392(2)(g) concerns "any other matter that the FWC considers relevant." In this case, we think the matters in ss.392(2)(a) to (g) embrace all the circumstances of the case relevant to our consideration of whether a compensation order is appropriate. In *Henderson v Department of Defence* it was recognised that the same matters may serve different purposes in s.170CH of the WR Act, as it was prior to the Work Choices amendments…"

[56] In this regard, it is necessary to take into account all the circumstances of the case, including the specific matters identified in ss 392(2)(a)-(g) and to consider the order relevant requirements of s 392.

[57] The well-established approach to the assessment of compensation is to apply the "*Sprigg* Formula", derived from the decision of the Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket (**Sprigg**)*.[40] This approach was articulated in the context of the current legislative framework in *Bowden.* I adopt the *Bowden* methodology but observe that *Bowden* and the formulation in *Sprigg* serve as a guide, rather than a decision rule.

[58] The approach in *Sprigg* can be summarised as follows:

> Step 1: Estimate the remuneration the employee would have received, or would have been likely to receive, if the employer had not terminated the employment.

Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

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

Step 5: Apply the legislative cap on compensation.

4.1 Remuneration that the Applicant would have received, or would have been likely to receive, if they had not been dismissed: s 392(2)(c)

[59] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the employee would have received, or would have been likely to receive… [the Commission must] address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[41]

[60] I accept that Ms Sullivan would have remained in employment for at least five weeks if her employment had not been terminated in the way that it was. Ms Sullivan was on a salary of $50,000 per annum, and therefore earned $961.54 per week. Ms Sullivan would have received $5,769.24 gross plus superannuation if she had not been dismissed.

4.2 Remuneration earned and remuneration likely to be earned: s 392(2)(e)-(f)

[61] Ms Sullivan gave evidence that she did not earn any remuneration for the rest of October 2023 and earned $2,441.58 from Monday 6 November 2023 until Monday 8 April 2024 from casual employment as a cleaner. Ms Sullivan also commenced new employment in January 2024, and as of the date of the hearing, had earned $6,931.06 from her new employment.

[62] As Ms Sullivan's earnings from 2023 was not particularised, I asked Ms Sullivan to give more detail about her earnings. Ms Sullivan provided the following information:

Week starting	Gross wages earned
30 October 2023	$0
6 November 2023	$105
13 November 2023	$70
20 November 2023	$105
27 November 2023	$0
4 December 2023	$140
11 December 2023	$193
18 December 2023	$210
25 December 2023	$105

[63] The Respondent challenged this evidence on the basis that Ms Sullivan had not provided payslips or tax records. Ms Sullivan explained that she is paid by an individual to perform work as a domestic cleaner and that she had not received payslips. Ms Sullivan also provided an email from this individual confirming how much Ms Sullivan earned from Monday 30 October to Sunday 31 December 2023. I accept Ms Sullivan's account of her earnings.

[64] Ms Sullivan also received payments from Centrelink, however, Centrelink payments are generally not deducted as 'remuneration'.[42]

4.3 Length of Ms Sullivan's service: s 392(2)(b)

[65] The Respondent employed Ms Sullivan for approximately 12-13 months. This is not a lengthy period of time. However, in the circumstances, I am not persuaded that any deduction should be made for this.

4.4 Other matters: s 392(2)(g)

[66] As was said in the Full Bench decision in *McCulloch v Calvary Health Care Adelaide* (***McCulloch***),[43] it is important to appreciate that a deduction for contingencies is applied to prospective losses, that is loss occasioned after the date of the hearing. Referring to *Ellawala v Australian Postal Corporation*,[44] the Full Bench in *McCulloch* stated that a discount for contingencies is a means of taking account of the various probabilities that might otherwise affect earning capacity. Of course, at the time of hearing, any such impact on an applicant's earning capacity between the date of termination and the hearing will be known. It will not be a matter of assessing prospective probabilities but of making a finding on the basis of whether an applicant's earning capacity has in fact been affected during the relevant period.

[67] In this case, I know Ms Sullivan's earnings during the anticipated period of employment. I therefore do not need to make a deduction for contingencies.

4.5 Effect of the order on the viability of Respondent's enterprise: s 392(2)(a)

[68] The Respondent did not lead any evidence on this point. I therefore cannot make any findings on this point.

4.6 Efforts of Ms Sullivan to mitigate the loss because of the dismissal: s 392(2)(d)

[69] Ms Sullivan led evidence that she has consistently applied for jobs on SEEK since 6 October 2023. She also applied for jobs through Workforce Australia. She started new employment at the start of 2024.[45] I am satisfied that Ms Sullivan has made efforts to mitigate her loss due to the dismissal and make no deductions in this respect.

4.7 Misconduct: s 392(3)

[70] I have found that Ms Sullivan engaged in misconduct by sending the Sullivan 3 October Email. This misconduct contributed to the Respondent's decision to dismiss her. I therefore make a deduction of one week.

4.8 No component for shock, distress, humiliation or other analogous hurt: s 392(4)

[71] I confirm that the compensation amount assessed contains no component for any shock, distress, humiliation, or analogous hurt Ms Sullivan suffered as a result of his dismissal.

4.9 Compensation cap: s 392(5)

[72] The amount of compensation the Commission may order is capped. If the quantum of compensation initially assessed exceeds that cap, then the Commission must reduce the compensation amount to the cap. The Act stipulates that the compensation cap is the lesser of:

(a) The amount of remuneration received by the person, or that he or she was entitled to receive (whichever is higher) in the 26 weeks before the dismissal (in this case, $90,000); and

(b) Half the amount of the high-income threshold immediately before dismissal ($83,750).

[73] In this matter I am satisfied that the amount for s 392(5) of the Act is $83,750 and a reduction is not required.

4.10 Instalments: s 393

[74] The Respondent did not make any submissions on this point.

4.11 Conclusion on compensation

[75] Having regard to all the circumstances of this matter applied to the considerations in s 392 of the Act, I consider it is appropriate to make an award of compensation to Ms Sullivan as summarised below:

Consideration	**Calculation**	**Gross Amount**
Anticipated employment period	5 weeks (6 October 2023 to 10 November 2023). $50,000 per annum/52 x 5	$4,807.69
Deduct monies earned since termination	$105 for week starting 6 November 2023.	$105
Deduction for misconduct	1 week $50,000 per annum/52 x 1	$961.53
	TOTAL	**$3,741.16**

[76] Given my findings above, I am satisfied in the circumstances that reinstatement is inappropriate, but a remedy is appropriate. In my view, the application of the *Sprigg* formula does not lead to an amount that is excessive or clearly inadequate, and I am satisfied that the

level of compensation is an amount that is appropriate having regard to all the circumstances of the case.[46] Accordingly, I order that the Respondent pay to Ms Sullivan compensation in the amount of **$3,741.16** to be taxed by law, plus make a 11% contribution to Ms Sullivan's nominated superannuation account.

[77] The Respondent is to pay Ms Sullivan within 14 days of this decision. An order to this effect will issue separately.[47]

COMMISSIONER

Appearances:

B Sullivan, Applicant
D Fielding, CEO for the Respondent

Hearing details:

2024
Perth:
15 April.

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[1] [2024] FWC 205.

[2] Transcript, 15 April 2024, PN117.

[3] Ibid PN119.

[4] Ibid PN122.

[5] Ibid PN159.

[6] Ibid PN165.

[7] Ibid PN216-PN220.

[8] Ibid PN222-PN227.

[9] Ibid PN167.

[10] Act, s 396.

[11] Ibid s 23.

[12] Digital Court Book (**DCB**), page 115.

[13] Ibid pages 85-86.

[14] Australian Government Australian Business Register, ABN Lookup Result for "KT Books", <https://abr.business.gov.au/ABN/View?abn=32845117125>

[15] [2015] FWCFB 5264.

[16] Ibid [41].

[17] *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* [2010] FWA 7891 (Bartel DP, 14 October 2010) at para. 60, [(2010) 204 IR 39]; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 (***Pinawin***) (Watson VP, Richards SDP, Cloghan C, 21 March 2012) at paras 27, 29, [(2012) 219 IR 128]; *Steri-Flow Filtration (Aust) Pty Ltd v Erskine* [2013] FWCFB 1943 (Acton SDP, Smith DP, Roe C, 24 April 2013.

[18] Ibid.

[19] *Pinawin* at para. 29, [(2012) 219 IR 128]

[20] Transcript, 15 April 2024, PN115.

[21] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), 62 IR 371, [373].

[22] Ibid.

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

[24] *Edwards v Justice Giudice* [1999] FCA 1836, (23 December 1999), [6]–[7], [(1999) 94 FCR 561].

[25] *Briginshaw v Briginshaw* [1938] HCA 34 (30 June 1938), [(1938) 60 CLR 336].

[26] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport*, Print S5897, (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [62], [(2000) 98 IR 137].

[27] Transcript, 15 April 2024, PN145-PN147.

[28] DCB, page 78.

[29] DCB, pages 37-38.

[30] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897, [70]-[73], [(2000) 98 IR 137].

[31] Ibid [75].

[32] DCB, page 25.

[33] Transcript, 15 April 2024, PN137-PN145.

[34] Ibid PN150.

[35] DCB, page 61.

[36] Jurisdictional Decision [37], [46].

[37] [2014] FWC 3574.

[38] Ibid [9].

[39] [2013] FWCFB 431.

[40] (1998) 99 IR 21.

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

[42] *Steggels Ltd v West* Print S5876 (AIRCFB, Watson SDP, Williams SDP, Smith C, 11 May 2000), [21]; citing *Sprigg v Paul's Licensed Festival Supermarket* Print R0235 (AIRCFB, Munro J, Duncan DP, Jones C, 24 December 1998), [(1998) 88 IR 21]; citing *Shorten v Australian Meat Holdings* Print N6928 (AIRC, Ross VP, 28 November 1996), [(1996) 70 IR 360, at p. 376].

[43] [2015] FWCFB 2267.

[44] [2000] AIRC 1151.

[45] DCB, pages 89-90.

[46] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].

[47] PR776563.