



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Ms Hellen Krizay**

**v**

**Life Without Barriers**

(U2024/625)

COMMISSIONER WILSON

MELBOURNE, 3 JULY 2024

*Application for an unfair dismissal remedy. Merits considered. Dismissal found to not be unfair.*

[1] This decision concerns an application for an unfair dismissal remedy made by Ms Hellen Krizay (the Applicant) pursuant to s.394 of the *Fair Work Act 2009* (the Act). The application was filed in the Fair Work Commission (the Commission) on 18 January 2024, after she was dismissed by Life Without Barriers (LWB or the Respondent), with effect from 12 January 2024.

[2] For the reasons set out below I find Ms Krizay was not unfairly dismissed.

## PRELIMINARIES

[1] Section 396 of the Act requires the determination of four initial matters before consideration of the merits of the application. Those matters are whether the application was made within the period required in s.394(2), whether the person was protected from unfair dismissal, whether the dismissal was consistent with the Small Business Fair Dismissal Code, and whether the dismissal was a case of genuine redundancy. Neither party put forward that any of the initial matters required consideration. In relation to the elements within s.396, I find that Ms Krizay's application was lodged with the Commission within the 21-day period for making such applications, that at the relevant time she was dismissed she was a person protected from unfair dismissal and that a question of whether her dismissal was a genuine redundancy does not arise. The Respondent is not a small business employer, and consideration of the Small Business Fair Dismissal Code is not required.

[2] The merits of the application were the subject of a determinative conference convened by me on 12 April 2024, at which Ms Krizay appeared for herself. Mr Andrew Frieberg, Senior Employee Relations Specialist, appeared for the Respondent.

[3] Evidence was given in these proceedings by Ms Krizay on her own behalf. Evidence was given on behalf of LWB by Mr John Adegoke, a Disability Support Worker; Mr

Muraliprabhu Subramamiam, a House Supervisor; and Mr Nigel Phillips, acting Director, Victorian Disability Accommodation Services (VDAS).

## **BACKGROUND**

[4] Ms Krizay commenced employment with LWB on 1 January 2021, as a Disability Development and Support Officer (DDSO). She was transferred into the role from the Department of Health and Human Services.

[5] Prior to her dismissal, Ms Krizay performed her role at a disability accommodation house where she was responsible for the support and care of four disability clients.

[6] In November 2023, an investigation was commenced by the Respondent in relation to two allegations that the Applicant had physically and emotionally abused two disability clients on separate occasions.

[7] The investigation substantiated the allegations. The investigation report was provided to the decision maker, Mr Nigel Phillips, who accepted its findings, resulting in a show cause process being commenced against Ms Krizay.

[8] As a result of the investigation and disciplinary process, it was found that Ms Krizay had engaged in serious misconduct, resulting in the termination of her employment.

[9] Ms Krizay was advised of the decision to terminate her employment on 12 January 2024, on the grounds of established serious misconduct in relation to both allegations.

[10] Ms Krizay acknowledges the conduct in part, and accepts it was not acceptable in respect of the second of the two allegations, while not accepting that it amounted to serious misconduct.

## **LEGISLATION**

[11] The legislative provisions relevant to this matter are set out in s.387 of the Act, which is as follows:

### **“387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

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

[12] Determination of whether the Applicant’s dismissal was harsh, unjust or unreasonable requires each of the matters specified in s.387 to be taken into account. The Full Bench has summarised the approach that should be taken by the Commission when considering the criteria within s.387 in the following way:<sup>1</sup>

“[28] The following propositions concerning consideration as to whether there is a valid reason for dismissal for the purpose of s.387 are well established:

- a valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced;<sup>2</sup>
- a reason would be valid because the conduct occurred and justified termination; conversely the reason might not be valid because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour);<sup>3</sup>
- it is not necessary to demonstrate “serious misconduct” or misconduct sufficiently serious to justify summary dismissal in order to establish a valid reason for dismissal;<sup>4</sup>
- the existence of a valid reason to dismiss is not assessed by reference to a legal right to dismiss<sup>5</sup> (so that, for example, where summary dismissal has occurred, it is not necessary to determine whether the right of summary dismissal was legally available); and
- the criterion for a valid reason is not whether serious misconduct as defined in reg.1.07 has occurred, since reg.1.07 has no application to s.387(a) (although a finding that misconduct of the type described might well ground a conclusion that there is a valid reason for dismissal based on the employee’s conduct).”<sup>6</sup> (original references)

[13] In cases where the reason for termination is based on misconduct, the Commission must determine whether the alleged conduct took place and what it involved.<sup>7</sup>

### **WAS MS KRIZAY UNFAIRLY DISMISSED?**

[14] So far as it is relevant to the circumstances of this case a dismissal is unfair, in the case of a person protected from unfair dismissal, when that person is dismissed in a manner that was harsh unjust or unreasonable, taking into account the criteria within s.387. I will deal with each of the criteria within s.387 in turn.

***(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)***

*Valid reason – general principles*

[15] To be a valid reason the reason must be “... sound, defensible or well-founded.” A reason which is “... capricious, fanciful, spiteful or prejudiced ...” cannot be a valid reason.<sup>8</sup> The reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.<sup>9</sup> The valid reason for termination is not to be judged by legal entitlement to terminate an employee, “... but [by] the existence of a reason for the exercise of that right” related to the facts of the matter.<sup>10</sup> Ascertainment of a valid reason involves a consideration of the overall context of the “practical sphere” of the employment relationship.<sup>11</sup>

*“Capacity”*

[16] Ms Krizay was not dismissed for reasons of capacity, but instead because of misconduct.

*“Conduct”*

[17] Where an employee has been dismissed without notice (summary dismissal) for serious misconduct the Commission may find that, although there was a valid reason for the dismissal, the dismissal was harsh because summary dismissal was a disproportionate response. Where the conduct involves serious misconduct, the principle established in *Briginshaw v Briginshaw*<sup>12</sup> may be relevant. While an “elevated standard”,<sup>13</sup> the standard of proof remains the balance of probabilities but “the nature of the issue necessarily affects the process by which reasonable satisfaction is attained” and such satisfaction “should not be produced by inexact proofs, indefinite testimony, or indirect inferences” or “by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion”.<sup>14</sup>

[18] It is not the Commission’s role to “stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court.”<sup>15</sup> However, the Commission “must consider the entire factual matrix in determining whether an employee’s termination was for a valid reason.”<sup>16</sup>

[19] For there to be a valid reason for the dismissal, related to the Applicant’s conduct, it must be found that the conduct actually occurred, as a necessary step in the process of determining whether a valid reason for dismissal existed.<sup>17</sup> Further, “[t]he 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.”<sup>18</sup>

[20] It has been said by the Full Bench, with reference to the definition of “serious misconduct” within the *Fair Work Regulations 2009*, that “the criterion for a valid reason is not whether serious misconduct as defined in reg.1.07 has occurred, since reg.1.07 has no application to s.387(a) (although a finding that misconduct of the type described might well ground a conclusion that there is a valid reason for dismissal based on the employee’s conduct).”<sup>19</sup> The Full Bench has also found there is not a “clear rule of law defining the degree of misconduct justifying summary dismissal”,<sup>20</sup> and that it “is certainly well established that, for the purposes of s.387(a), it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee’s dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).”<sup>21</sup>

[21] The Commission, when determining whether there was a valid reason for dismissal, must assess whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct.<sup>22</sup> In its assessment of whether there was a valid reason for dismissal, the Commission is not limited to the reason relied on by the employer for dismissing the employee.

[22] In matters involving an employer’s workplace investigation, it has been observed that employers are not required to have the investigative skills of police or legal investigators, but are expected to take reasonable steps to investigate allegations, and give employees an opportunity to respond.<sup>23</sup>

[23] In *AWU-FIME v Queensland Alumina Limited*, Moore J, when considering decisions of industrial tribunals involving employees who had been dismissed for fighting in the workplace, and relevant to the question of extenuating circumstances, remarked:

“What emerges from these decisions is that whether a dismissal or termination arising from a fight in the workplace is harsh, unjust or unreasonable will depend very much on the circumstances. However, generally the attitude of industrial tribunals tends to be that the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable. The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the length of service of the employee, including their work record, and whether he or she was in a supervisory position. As to the circumstances of the fight, relevant considerations include whether the dismissed employee was provoked and whether he or she was acting in self-defence.”<sup>24</sup>

[24] There are two relevant incidents related to the termination of the Applicant’s employment, the first on 10 July 2023 and the second on 5 September 2023. The two incidents relate to different clients. The first incident did not come to light as a matter needing Ms Krizay’s response until after the second incident had occurred and required her response.

#### *10 July 2023 incident*

[25] During Ms Krizay’s 10 July 2023 shift, she questioned her colleague Mr John Adegoke about a client’s location (Client BN). Client BN has diagnoses of intellectual disability, vision

(sensory), epilepsy, and psychotic disorder.<sup>25</sup> Mr Adegoke advised Ms Krizay that Client BN was in bed. Ms Krizay then entered Client BN's bedroom.

[26] The Respondent asserts that Ms Krizay shouted at Client BN to have him leave his bed and move to the living room to watch television. The House Supervisor, Mr Subramaniam and Mr Adegoke, a Disability Support Worker say they witnessed the incident. They later reported the incident, but apparently not until much later, August at the earliest.

[27] Mr Adegoke, who was a Disability Support Worker with the Respondent, gave evidence about the event on 10 July 2023. He says that Client BN was distressed after a disturbance during dinner by two other clients and expressed his distress by screaming and banging doors.<sup>26</sup> Mr Adegoke considered that the behaviours stemmed from Client BN being tired and Mr Adegoke assisted him in his evening routine and put the client to bed. Mr Adegoke says, by this time, Client BN had calmed down.

[28] When asked by Ms Krizay where Client BN was, he told her that he was in bed. Ms Krizay then entered the client's bedroom, told Client BN that it was not time for sleep and Client BN went to the living room to watch television.<sup>27</sup>

[29] Mr Subramaniam, a House Supervisor at the house in which Ms Krizay worked, also gave evidence. He was Ms Krizay's supervisor. Mr Subramaniam stayed beyond his usual end of shift time on 10 July 2023 to support Mr Adegoke until Ms Krizay and another employee finished a meeting. He observed Ms Krizay and Mr Adegoke's exchange about where Client BN was. He recalls Ms Krizay saying words to the effect that Client BN cannot go to bed early as he will disturb her during the night.<sup>28</sup> He considered that Ms Krizay's conduct was upsetting Client BN, who left his bedroom to watch television in the living area. Mr Subramaniam observes that Client BN does not normally watch television, as he has very poor vision, preferring to listen to music instead.<sup>29</sup>

[30] On 14 August 2023, five weeks later, Mr Adegoke emailed Mr Subramaniam about the 10 July 2023 incident, stating;

“Dear Murali,

A summary of the incidence that occurred with [Client BN] on the evening of 10/07/2023 is summarized below.

All Clients had their dinner including [Client BN] around 6pm. B.N demonstrated some distressing behaviour during dinner because of being disturbed by A.G and C.L. After dinner, he was screaming loudly and banging every door in sight and occasionally going to bathroom to undress himself.

Lucky was having meeting with Hellen in the office, and I could not reach out to her to know what she intends to do with B.N since each staff have their own tactics of handling clients when on sleep over. I perceived B.N was tired and will like to go to bed. His room was open, and he kept going into the room to sleep on the bed and bang his head on the bed. Murali (House supervisor) and I believed that he wanted to go to bed. This was around 7 pm. I took B.N to the bathroom, changed him into his pyjamas and put

him to bed. He became calm. Hellen, after her meeting with lucky, completely unaware of what has happened during dinner, asked where BN was and I told her he is in his room, Hellen said she has a different approach whenever she is on sleepover that works better for her and that is to keep him awake for a little while. So, B.N was brought out of his room into the living room to continue to watch TV until for a little while.”<sup>30</sup>

[31] In turn, Mr Subramaniam emailed the Operations Manager, Ms Lucky Shankupalla on 25 August 2023, stating the following:

“Hi Lucky,

I am forwarding this email which is sent by John Adegoke regarding the client incident.

On the day after dinner Bradley was so tired and went to bed approximately 7pm. Hellen came to John and asked in a very rude manner “where is [Client BN]?” John said “He is in Bed”. Hellen said “No he can’t go to bed now” “I have my own way when I do Sleep Over, and it works for me.” Then she opened and entered in to [Client BN]’s room and shouted “Hey” and Pulled the Doona out from him and started Threatening by shouting “GO,, GO OUT,, OUT,, OUT OF THIS ROOM,, THIS IS NOT THE TIME TO SLEEP,, GO AND WATCH TV,,” [Client BN] was totally upset and shocked and looking at her and went out.

This is absolutely abused and threatened [Client BN]. Which is not acceptable. It is his room. He is going to bed after the dinner because he was so tired. But she didn’t allow [Client BN] to go to bed because he may wake up early in the morning. Because of her personal reason she took an advantage on [Client BN] to apply force on him and not allowed him to go to bed.

John took some time to send this email and he is happy to explain more if he is asked for a meeting.

Please take appropriate action.

Thank you.

Kind Regards  
Murali”.<sup>31</sup>

[32] Ms Krizay was not informed of the allegations against her in relation to this matter until 14 November 2023, at which time she was informed not only about this allegation, but also the second.. Ms Krizay admits in relation to the first allegation that she did get Client BN out of his bed, however she does not admit she used force or acted inappropriately. In her response to a “show cause” process in January 2024, Ms Krizay put forward that her conduct was not wilful and deliberate, and it did not merit the extreme action of terminating her employment. She also contested that her conduct caused serious or imminent risk to Client BN, arguing that his health and safety was not compromised, with him being relaxed and that neither was LWB’s reputation compromised. She put forward that, in respect of the NDIS and LWB codes of conduct, she had

acted with respect; that support was provided in a safe and competent manner and that there was “no violence, exploitation, neglect or abuse”.<sup>32</sup>

*5 September 2023 incident*

[33] The second allegation against Ms Krizay involves Client CL, who has diagnoses of Epilepsy, Asthma, Intellectual Disability, and Autism Spectrum Disorder.<sup>33</sup>

[34] Mr Subramaniam alleges, on arrival at the house on the morning of 5 September 2023, he could hear screaming sounds coming from the kitchen area. He observes that it was not uncommon to hear screaming in the morning from client BN, who is a high behaviour client. However, on this morning, he heard Client CL screaming as well. Further;

“15. I normally go into the office first and check the diaries and count the client's money. Due to the ongoing screaming of Client CL, I stopped counting the client's money and I went into the dining room where I saw Hellen holding a bowl and trying to force feed client CL. I saw that Hellen was pushing the bowl towards Client CL and yelling 'eat it ... eat' over and over. I saw Client CL was pushing Hellen's hands away to stop her from force feeding him and screaming loudly.

16. Despite Client CL screaming and pushing her hands away from feeding him, Hellen persisted in her attempts to force feed Client CL, but CL continued to resist her attempts to feed him and screamed louder. I then saw Hellen slap Client CL across the back of the head with her open hand and start yelling at him. Hellen then told Client CL to take his bowl and go outside, she opened the door and pushed Client CL out the door and locked the door behind him, so Client CL could not come back in.”<sup>34</sup>

[35] Mr Subramaniam says that he attempted to speak to Ms Krizay after the incident however she would not speak to him.<sup>35</sup> The following day he made a report to the police over the incident.

[36] Ms Krizay admits to the conduct and provided mitigating circumstances for her behaviour during the investigation process.

[37] The allegation subject to the 5 September incident was substantiated by the investigator on the balance of probabilities based on the evidence that it was more probable than not that the conduct as alleged occurred.

[38] The incident was reported to Police by the Respondent and Ms Krizay was charged by police for assaulting Client CL.

*Investigation and Outcome*

[39] On or around 5 September 2023, Ms Krizay's employment was suspended on full pay, pending an investigation into allegations of inappropriate client conduct.<sup>36</sup> On 14 November 2023, a letter was sent by LWB to the Applicant outlining two allegations, relating separately to Client BN and Client CL.



[40] The matter was the subject of internal investigation by LWB, which substantiated both allegations. Mr Phillips, LWB's Victorian Director, Victorian Disability Accommodation Services, received a copy of the investigation report and a request to issue "show cause" correspondence to Ms Krizay. Mr Phillips reviewed the report and accepted its findings, confirming that the show cause process should commence.<sup>37</sup>

[41] The investigation report broadly records that the first allegation (relating to Client BN) was established as a reportable National Disability Insurance Scheme Commission (NDISC) Reportable Incident, as well as being contrary to LWB's Code of Conduct. Further, the investigation found Ms Krizay's conduct was serious misconduct within the meaning of the definition in Regulation 1.07 of the *Fair Work Regulations 2009*. In particular (with reference to sections in the Regulation);

“2. (a) It was wilful and deliberate inconsistent with the continuation of the contract of employment;

2. (b) It was conduct that caused serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business”.<sup>38</sup>

[42] With respect to the second allegation (relating to Client CL), the investigation established the same findings as with the first, but with the further finding that Ms Krizay's conduct contravened paragraph 3 of Regulation 1.07, in that she engaged in an assault.

[43] On 2 January 2024, Mr Phillips signed a "show cause" letter which was sent to Ms Krizay. The letter is dated 4 January 2024 and put Ms Krizay on notice that LWB proposed to terminate her employment, subject to receiving anything she wished to say about the matter. Ms Krizay did not attend the show cause meeting and instead provided a written response to the allegations.

[44] Ms Krizay's response refuted LWB's findings in respect of the first allegation, putting forward the matters referred to above as well as also putting forward that it took LWB over four months to notify her of the allegation, with management being aware of the incident during that time and failing to respond in a timely manner. Ms Krizay argues, in respect of the circumstance, that the delay undermines the validity of any proposed disciplinary action.

Ms Krizay's response in respect of the second allegation expressed disappointment that the investigator had not affirmed the mitigating circumstances she had put forward on 21 November 2023. Those circumstances are lengthy, dealing with a number of matters, including concerns about her supervision and an inconsistency of approach by LWB, both in respect of management matters as well as client care. Ms Krizay's written response on the second argument raised questions regarding questionable behaviour by other managers, she also put forward that the investigation was not procedurally fair owing to it being conducted internally. Ms Krizay also argued that there had been a failure on the part of Mr Subramaniam to act at the time he saw the incident on 5 September 2023, while taking a video of the events occurring.

[45] In respect of the last matter, a video taken by Mr Subramaniam, I required the production of that video which was provided. However as neither party relied upon it in the course of the proceedings before me, I have not taken its contents into account in making this decision.

[46] LWB was not persuaded by Ms Krizay's response to the "show cause" letter and terminated her employment on 12 January 2024. In its termination letter of the same date, LWB communicated the following to Ms Krizay as its reasons for termination;

"We have determined that your conduct constitutes serious misconduct and has breached the following:

NDIS Reportable Incident:

The allegations were determined to be a National Disability Insurance Scheme Commission (NDISC) Reportable Incident and were assessed as such as part of this investigation.

The available evidence for allegation 1 was weighed and considered against the definitions as defined by the NDISC. It has been determined on the basis of admission and on the balance of probability that there is sufficient evidence that the reportable incident occurred, in that respondent engaged in Psychological abuse of client Mr [Client BN] and engaged in unauthorised restrictive practice (environmental) of [Client BN].

The available evidence for allegation 2 was weighed and considered against the definitions as defined by the NDISC. It has been determined on the basis of admission and on the balance of probability that there is sufficient evidence that the reportable incident occurred, in that respondent engaged in physical and psychological abuse of [Client CL] and engaged in unauthorised restrictive practice (environmental) of [Client CL].

Fair Work Regulations 2009:

The conduct of Ms Krizay meets the threshold for a Serious Misconduct as defined by Fair Work Regulations 2009 – Reg 1.07 definition:

2. (a) It was wilful and deliberate inconsistent with the continuation of the contract of employment;
2. (b) It was conduct that caused serious and imminent risk to:
  - (i) the health or safety of a person; or
  - (ii) the reputation, viability or profitability of the employer's business.
3. (a) Ms Krizay in the course of her employment engaged in assault.

NDIS Code of Conduct:

1. Act with respect for individual rights to freedom of expression, self-determination, and decision-making in accordance with relevant laws and conventions
3. Provide supports and services in a safe and competent manner with care and skill
6. Take all reasonable steps to prevent and respond to all forms of violence, exploitation, neglect, and abuse of people with disability.

#### LWB Code of Conduct

1. We are all accountable for how we behave at work.
2. We treat the people we support with dignity and respect.
4. Being responsive means we are always aware of and comply with the laws, regulations or procedures related to our work.

LWB has also lost trust and confidence in you being able to undertake the inherent requirements of the role of a Disability Development and Support Officer because of your conduct.

We therefore conclude that your conduct is inconsistent with the continuation of your employment, and LWB has decided to terminate your employment as a Disability Development and Support Officer 1Q with immediate effect from close of business today, 12 January 2024. As this termination is due to serious misconduct, notice or payment in lieu of notice is not required.”<sup>39</sup>

[47] LWB submits there was a valid reason for dismissal. After the 5 September 2023 incident, LWB commenced an investigation into the conduct and Ms Krizay was provided the opportunity to respond to the allegations. Prior to dismissing the Applicant, LWB engaged in a show cause process, inviting the Applicant to provide any information she wanted LWB to consider, prior to making a final decision regarding her employment.

[48] LWB argues that it considered all the information the Applicant provided in the investigation, her response to the show cause process, including her employment record and matters in mitigation, prior to making a final decision to terminate the Applicant’s employment. Further, it submits that termination was the only available action available to it once it was determined the alleged conduct occurred “given the nature of the employment, and the vulnerability of the clients in the Applicant’s care”.<sup>40</sup>

#### *Serious misconduct*

[49] When considering whether a dismissal was an unfair dismissal under the Act, I must also consider whether the conduct alleged was serious misconduct. Serious misconduct is attributed a meaning under regulation 1.07 of the *Fair Work Regulations 2009* which provides:

“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 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:

(i) the health or 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;

(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.”<sup>41</sup>

**[50]** I am satisfied that the conduct complained of actually occurred;

- In relation to Client BN, Ms Krizay went to his room, pulled back his bedding and told him firmly to leave the room and go and watch television and that, in the course of doing so, she distressed the client.
- In relation to Client CL, the client was resisting being fed by Ms Krizay, who became frustrated about the situation. He started screaming and Ms Krizay began to force food into his mouth. He responded by screaming louder. Ms Krizay retaliated by slapping him across the back of the head and told him to take the food outside. She opened the door and pushed him outside and locked the door after him.

[51] The circumstances associated with the second allegation are plainly the more serious of the two allegations..

[52] The first allegation relating to Client BN would likely have been distressing and humiliating to the client concerned as well as to their family. Each would be entitled to very strongly complain to LWB that such conduct was not consistent with the level of care they expected or that Client BN was entitled to. In the circumstances, it is possible to establish that the incident was inconsistent with the LWB and NDIS codes of conduct, in the manner set out within the investigation report. That situation though does not automatically translate to a determination that the incident was, on its own, serious misconduct within either its ordinary meaning or that established by Regulation 1.07.

[53] Relevant to my findings in respect of the first allegation is that the matter was not even sufficiently serious for the two witnesses, Mr Subramanian or Mr Adegoke to report it to their superiors at the time it occurred. It only came to the attention of LWB after the second, more serious, event on 5 September 2023. That is not to say that LWB condones Ms Krizay's conduct, but rather that the two people working with the Applicant at the time, likely did not view the conduct as exceptional and certainly did not view it as *at that time* requiring a report to their managers.

[54] The circumstances of the second allegation are plainly very serious. The client was being forced to eat when he did not wish to; he was humiliated in front of others; he was slapped and then sent outside where he was prevented from returning, for a time at least. Those things in tandem are unquestionably serious misconduct and the matters to which Ms Krizay refers as mitigating factors do not meaningfully apply to this circumstance. I have no doubt that providing care to disabled people would be very challenging, especially when they exhibit behaviours which are aggressive, resisting or confronting. The client likely showed those and other behaviours which caused Ms Krizay to become highly frustrated. I accept that the degree of frustration she felt was likely unusual for her and that what occurred was most probably a momentary slip. While that observation can be made, it plainly does not excuse the conduct, and again I must take into account that the client concerned, as well as his family, would have every right to demand accountability from LWB and its employees for what occurred.

[55] As a result, I find there was serious misconduct on the part of Ms Krizay in respect of the second allegation. Because Ms Krizay's conduct was serious misconduct, and taking into account her misconduct in relation to the first allegation, I am satisfied that when LWB dismissed Ms Krizay, it had a valid reason for doing so, being a "sound, defensible or well founded" reason within the overall context of the employment relationship. LWB's

determination that this was a valid reason for termination of employment demonstrably took into account the circumstances involved in both allegation.

***(b) whether the person was notified of that reason***

[56] Ms Krizay was notified of her dismissal by letter dated 12 January 2024. The dismissal took immediate effect. The letter comprehensively set out the reasons for her termination.

***(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person***

[57] For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that there is a valid reason for dismissal.<sup>42</sup> While so, it is also accepted that “an opportunity to respond” amounts to an opportunity to provide reasoning to a decision maker that would, all things being equal, allow a reasoned explanation to cause the decision maker to accept what is proffered and to change from their foreshadowed path.<sup>43</sup>

[58] A provision in predecessor legislation requiring there not be dismissal until “the employee has been given an opportunity to defend himself or herself against the allegations made” has been held to be a requirement not needing any particular formality, being “intended to be applied in a practical, common sense way so as to ensure that the affected employee is treated fairly.”<sup>44</sup> 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 of the section”.<sup>45</sup>

[59] I am satisfied from the evidence that Ms Krizay was given an opportunity to explain her situation and to respond to the allegations made against her, as well as to put forward matters which should be considered in mitigation of her conduct.

***(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***

[60] There was no unreasonable refusal by LWB to allow Ms Krizay to have a support person present to assist at any discussions relating to her dismissal. Ms Krizay elected to not attend the show cause meeting and instead responded to the allegations in writing.

***(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal***

[61] Ms Krizay was not dismissed for reason of unsatisfactory work performance. Accordingly, consideration of this criterion is a neutral factor in my decision.

***(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***

[62] There is no direct evidence before me on the subject of whether LWB's size likely impacted on the procedures it followed in effecting the dismissal. Accordingly, this is a neutral consideration in my determination of whether Ms Krizay's dismissal was an unfair dismissal.

*(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*

[63] There is no evidence before the Commission that there may have been an absence of dedicated human resource management specialists or expertise in LWB. To the contrary, the Respondent appears to have been assisted in its decision-making through its internal human resource management specialists. Consideration of this criterion is a neutral factor in my decision.

*(h) any other matters that the FWC considers relevant*

[64] Ms Krizay's lengthy service with the Respondent and its predecessors requires being taken into account. Ms Krizay had worked in connection with the disability services provider from which she was dismissed since April 2001. Ms Krizay's evidence is that she commenced employment with the Victorian Department of Health and Human Services in or around April 2001 and that Life Without Barriers took over the Department's work in respect of disability homes in 2019. She had worked at the particular disability home since 2016.

[65] By any assessment, this is a long period of service. While service of this length is to be taken into account, I do not consider on this occasion that it causes a need for LWB to have turned away from dismissal as a potential sanction to be meted against Ms Krizay, or for me to criticise LWB for having dismissed Ms Krizay. The findings made in respect of the two allegations are serious, and in respect of second allegation, demonstrably serious misconduct of a significant scale.

[66] While I take into account Ms Krizay's lengthy service with LWB and its predecessor disability service operators, that service does not cause an otherwise fair dismissal to become an unfair one. In the circumstances, I consider that the seriousness of the facts, as established in relation to the second allegation in particular, are such as to mean that termination of Ms Krizay's employment was an option that was open to Life Without Barriers. Her conduct had some level of personal risk to the client concerned and had significant reputational and legal risk going directly to the Respondent's duties to its clients.

[67] I do not find there were any other matters of relevance requiring consideration.

## CONCLUSION

### *Conclusion on the s.387 criteria*

[68] After considering each of the criteria within s.387, I am satisfied that there was a valid reason for LWB's dismissal of Ms Krizay and that there were no substantial procedural defects or other matters which would cause me to find that, notwithstanding there being a valid reason for her dismissal, the dismissal was otherwise unfair.

[69] As a result, I am unable to find that Ms Krizay was unfairly dismissed.

[70] The application for unfair dismissal made by Ms Krizay is dismissed and an order to that effect is issued at the same time as this decision.<sup>46</sup>



COMMISSIONER

*Appearances:*

*Ms H. Krizay* for herself  
*Mr A. Frieberg* for the Respondent

*Hearing details:*

2024.  
Melbourne;  
12 April.

*Final written submissions:*

For the Applicant 28 April 2024  
For the Respondent 6 May 2024

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<sup>1</sup> *Titan Plant Hire Pty Ltd v Shaun Van Malsen* [2016] FWCFB 5520.

<sup>2</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

<sup>3</sup> *Edwards v Giudice* [1999] FCA 1836; (1999) 94 FCR 561 at [6] - [7].

<sup>4</sup> *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [32]; *Annetta v Ansett Australia* (2000) 98 IR 233 at [9] - [10].

<sup>5</sup> *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [32]; *He v Lewin* [2004] FCAFC 161; (2004) 137 FCR 266 at [15].

<sup>6</sup> *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [33]-[34]; *O'Connell v Wesfarmers Kleenheat Gas Pty Ltd* [2015] FWCFB 8205 at [22] - [23].

<sup>7</sup> *Edwards v Giudice and Others* [1999] FCA 1836, 94 FCR 561, [4].



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- <sup>8</sup> *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.
- <sup>9</sup> *Robe v Burwood Mitsubishi Print R4471* (AIRCFCB, Ross VP, Polites SDP, Foggo C, 11 May 1999).
- <sup>10</sup> *Miller v UNSW* [2003] FCAFC 180 (Gray J), [13].
- <sup>11</sup> *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.
- <sup>12</sup> [1938] HCA 34; (1938) 60 CLR 336.
- <sup>13</sup> *Wong v Taitung Australia Pty Ltd* [2017] FWCFCB 990 at [11].
- <sup>14</sup> [1938] HCA 34; (1938) 60 CLR 336 at 350, 363.
- <sup>15</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWCFCB 4185 at [46] citing *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
- <sup>16</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWCFCB 4185 at [46] citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410 at 413.
- <sup>17</sup> *Edwards v Giudice* [1999] FCA 1836 at [7].
- <sup>18</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23] - [24].
- <sup>19</sup> *Titan Plant Hire Pty Ltd v Malsen* [2016] FWCFCB 5520 at [28].
- <sup>20</sup> *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFCB 1033 at [36].
- <sup>21</sup> *Ibid.*, [32].
- <sup>22</sup> *Bista v Glad Group Pty Ltd* [2016] FWC 3009.
- <sup>23</sup> *AWU-FIME v QLD Alumina Limited* [1995] IRCA 346; (1995) 62 IR 385 at 391.
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *LWB Workplace Investigation Report*; Digital Hearing Book (DHB), p.215.
- <sup>26</sup> *Witness Statement of John Adegoke*; DHB p.256.
- <sup>27</sup> *Witness Statement of John Adegoke*, [10]; DHB p.256.
- <sup>28</sup> *Witness Statement of Muraliprabhu Subramaniam*, [9]; DHB p.259.
- <sup>29</sup> *Witness Statement of Muraliprabhu Subramaniam*, [44]; DHB, p.259.
- <sup>30</sup> *Witness Statement of John Adegoke*, Annexure 1; DHB, p.257.
- <sup>31</sup> DHB p.267.
- <sup>32</sup> *Show Cause Response*; DHB, p.451.
- <sup>33</sup> *LWB Workplace Investigation Report*; DHB, p.215.
- <sup>34</sup> *Witness Statement of Muraliprabhu Subramaniam*; DHB, p.619.
- <sup>35</sup> *Witness Statement of Muraliprabhu Subramaniam*, [17]; DHB p.260.
- <sup>36</sup> *Witness Statement of Nigel Phillips*, [10]; DHB p.276.
- <sup>37</sup> *Witness Statement of Nigel Phillips*, [13]; DHB p.276.
- <sup>38</sup> *Workplace Investigation Report*; DHB, p.438.
- <sup>39</sup> *LWB termination letter*; DHB, pp.467 – 469.
- <sup>40</sup> *Respondent's Outline of Submissions*, [29]; DHB p.254.
- <sup>41</sup> See *Fair Work Act 2009*, s.12 Dictionary “serious misconduct” has the meaning prescribed by the regulations.
- <sup>42</sup> *Chubb Security Australia Pty Ltd v Thomas* (unreported, AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) Print S2679 [41].
- <sup>43</sup> *Wadey v YMCA Canberra* [1996] IRCA 568 cited in *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544; (2010) 204 IR 399 at [85].
- <sup>44</sup> *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1; [2010] FWAFB 1200 at [26] citing *Gibson v Bosmac Pty Ltd* [1995] IRCA 222; (1995) 60 IR 1 at 7 (Wilcox CJ).
- <sup>45</sup> *Gibson v Bosmac Pty Ltd* [1995] IRCA 222 (5 May 1995); (1995) 60 IR 1 at 7 (Wilcox CJ).
- <sup>46</sup> [PR776619](#).