# DECISION

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

**Ms Mariah Maltby**

**v**

**The Trustee for Kingston Family Trust**
(U2024/7869)

DEPUTY PRESIDENT ROBERTS SYDNEY, 28 OCTOBER 2024

*Application for an unfair dismissal remedy – whether valid reason for dismissal – procedural fairness – appropriate remedy*

**[1]** On 8 July 2024 Ms. Mariah Maltby (Applicant) applied to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (Act) for a remedy having alleged that she had been unfairly dismissed from her employment with the Trustee for the Kingston Family Trust trading as the Yandina Hotel (Respondent). The Applicant sought orders for compensation pursuant to s.392 of the Act.

***When can the Commission order a remedy for unfair dismissal?***

**[2]** Section 390 of the Act provides that the Commission may order a person's reinstatement, or the payment of compensation to a person if satisfied that the person was protected from unfair dismissal at the time of being dismissed and the person has been unfairly dismissed. Section 382 provides that a person is protected from unfair dismissal if the person is an employee who has completed a period of employment of at least the minimum employment period and the person is covered by a modern award, an enterprise agreement applies to the person, or the person earns less than the high-income threshold.

**[3]** Section 385 relevantly provides that a person has been unfairly dismissed if the Commission is satisfied of four matters: the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy.

**[4]** It was not in issue that the Applicant was covered by a modern award.[1] The Respondent accepted that the Applicant was employed under the *Hospitality Industry (General) Award 2020*.

**[5]** As to the whether the Applicant was employed for at least the minimum employment period, the Applicant's evidence was that she was originally employed at the Yandina Hotel on a casual basis from December 2016 and then by the current owners at those premises as a casual employee from July 2017. She said she worked on a regular basis for approximately 30 hours

per week over six days each week. The Applicant gave evidence that she worked those regular hours on Monday, Wednesday and Thursday to Sunday each week. The Respondent said that the Applicant worked variable hours and did not consistently work 30 hours per week. They supplied copies of the Applicant's pay slips from 2017 until the date of the Applicant's dismissal. Those pay slips included details of the hours worked by the Applicant, including hours to which penalty rates applied, during each pay period.

**[6]** Section 383 provides that the minimum employment period for an employee of an employer who is not a small business is 6 months ending at the earlier of the time when the person is given notice of the dismissal or immediately before the dismissal. Section 384 sets out when an employee's period of employment counts towards the minimum employment period. It provides, relevantly:

**384 Period of employment**

> *(1) An employee's **period of employment** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.*
>
> *(2) However:*
>
> > *(a) a period of service as a casual employee does not count towards the employee's period of employment unless:*
> >
> > > *(i) the employment as a casual employee was as a regular casual employee; and*
> > >
> > > *(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis;*

**[7]** As can be seen from the above (and the definition of 'regular casual employee' in s.12), s.384(2) provides that a period of service as a casual employee does *not* count towards the employee's period of employment, unless two criteria are satisfied. First, the employment as a casual employee must have been on a '*regular and systematic basis*'. Second, during the period of casual service, the employee must have had a *'reasonable expectation of continuing employment by the employer on a regular and systematic basis'.* If the conditions of s.384(2)(a) are satisfied, then a period of service by a casual employee will count towards the period of continuous service.[2]

**[8]** For the purposes of s.384(2)(a)(i), it is the *employment* which must have been on a regular and systematic basis rather than the hours worked.[3] Even where there is no clear pattern or roster, evidence of regular and systematic employment can be established where the employer offered suitable work when it was available at times that the employee had generally made themselves available, and work was offered and accepted regularly enough that it could no longer be regarded as occasional or irregular.[4]

**[9]** I have considered the details in the pay slips which show that there was some variation in the total number of hours worked by the Applicant in each pay period. However, considered as a whole and having regard to the principles derived from the authorities referred to above, I am comfortably satisfied on the evidence that the Applicant was employed as a casual employee on a regular and systematic basis and that she had a reasonable expectation of continuing employment on a regular and systematic basis such that the Applicant's period of continuous service exceeded 6 months. This much is even evident having regard to the immediate 6-month period pre-dating the termination. The Applicant is therefore a person protected from unfair dismissal.

**[10]** The Respondent did not contend that they were a small business and that the dismissal was consistent with the Small Business Code, or that the dismissal was a case of genuine redundancy. I am satisfied that those factors are not relevant here.

**[11]** The Applicant was dismissed on 20 June 2024 and lodged her application for relief within the requisite time period.[5] No jurisdictional issues arise with the application. That being the case, the question of whether the Applicant has been unfairly dismissed will depend on whether the Commission is satisfied that the dismissal was harsh, unjust or unreasonable within the meaning of s.385.

**Background**

**[12]** The Applicant was originally engaged as a kitchen assistant and later a bottle shop retail assistant. At the time of the termination of her employment, she was a bottle shop manager who reported to Mr. Cross, the Respondent's General Manager. The Applicant worked with others in the bottle shop, including Ms. Oaks and Mr Hayes. On occasions she also worked with Ms. Taylor, although as Ms. Taylor worked primarily in the drive-through section of the hotel, this was less frequent than her work with the others.

**[13]** The Applicant supervised the work in the bottle shop, including the work of Ms. Oaks and Mr. Hayes. She would issue instructions to them verbally when they were working together, and via a staff Facebook page. Ms. Oaks and Mr. Hayes alleged that the Applicant had behaved in a threatening, intimidatory and abusive way towards them in the workplace. They ultimately complained to Mr. Cross. Mr. Cross spoke to the Applicant on 20 June 2024 and outlined the allegations that had been made against the Applicant. The Applicant denied the allegations, but her denials were not accepted and the Applicant's employment was terminated on that day for alleged misconduct.

***Was the dismissal harsh, unjust or unreasonable?***

**[14]** In considering whether the dismissal was harsh, unjust or unreasonable I am required to take into account the matters listed in s.387. I deal with those matters below.

*Section 387(a) - Valid reason relating to capacity or conduct*

**[15]** The Applicant denied that she had ever engaged in conduct of the kind of which she was accused by Mr. Cross. She said that she had not ever sworn at, bullied, intimidated or ridiculed Mr. Hayes. She said she had raised some minor performance issues with Mr. Hayes but these

were reasonable management directives and had been raised in a respectful way. Similarly, the Applicant said she had not sworn at Ms. Oaks or given her unreasonable directions. She said she had not made Ms. Oaks work harder than others or failed to help her carry out her tasks. The Applicant denied speaking in a derogatory way to Ms Oaks about other staff members. She also denied that she had engaged in the sexual harassment of Ms. Oaks or any other staff member. The Applicant said that Ms. Taylor was not under her supervision but that she regarded her as her friend and denied ever behaving in an aggressive or intimidatory way towards Ms. Taylor.

**[16]** Mr. Cross, Mr. Hayes, Ms Oaks and Ms. Taylor all gave evidence and were cross-examined by the Applicant's representative. Mr Hayes said that he was spoken to in a rude and derogatory way by Applicant in front of salespersons and customers. He said he found the behaviour demoralising and embarrassing. He said he was 'targeted' by the Applicant with criticism on the staff Facebook page which, although it did not identify him by name, it would have been clear to all other staff that the criticism was directed at him. Mr. Hayes instanced an occasion where the Applicant clenched her fists after he challenged one of her comments, which made him 'take a step back.' He said he felt intimidated by the Applicant. Mr. Hayes said he raised his concerns with Mr. Cross and the Facebook posts were removed but he still felt the Applicant was abusing the power she had over him, particularly because the Applicant was in charge of setting the roster. He said her poor behaviour continued after the posts were removed.

**[17]** Ms. Oaks described abusive language directed at her from the Applicant, including in front of other staff members. She described what she said was the Applicant's bullying behaviour towards Mr. Hayes. She said that the Applicant had touched her buttocks and made inappropriate remarks to others about Ms. Oaks' appearance which made her feel extremely uncomfortable. Ms. Oaks said she requested a meeting with management to discuss the issues on 19 June 2024.

**[18]** Ms. Taylor described the Facebook posts directed at Mr. Hayes. She said the Applicant had threatened to cut Mr. Hayes' hours. Ms. Taylor described an incident where a sales representative had come to her in a distressed state after allegedly being abused by the Applicant.

**[19]** Mr. Cross gave evidence that he had dealt with complaints about the Applicant prior to her termination and had had '5 or 6' discussions with her about her manner of speaking to people. He said the issues were not sufficiently serious to warrant a written warning and there were no records of the conversations with the Applicant. He said that after these discussions certain inappropriate Facebook posts by the Applicant had been removed by her and he disputed that the evidence of the Facebook posts provided by the Applicant was a complete record. He said he advised the Applicant that she needed to improve her communication and tone to all staff and not to single any one person out on a public forum in the future.

**[20]** Mr. Cross said he had been approached by Mr. Hayes in May 2024 and Mr. Hayes had complained about the Applicant's behaviour towards him. He said he also met with Ms. Oaks on 19 June 2024 and that she was distressed about the Applicants' behaviour. He said Ms. Oaks told him that the Applicant's poor behaviour towards her had been ongoing since the beginning of 2024 and that she no longer felt like she wanted to attend work. Mr Cross said after he received the complaint from Ms. Oaks he spoke with other staff members and suppliers about

the Applicant's conduct. He said he spoke with Ms. Taylor and others and that those persons confirmed the 'bullying and harassment tactics' of the Applicant. He also said he had received comments from customers about the Applicant's rude and aggressive behaviour.

**[21]** Despite the Applicant's blanket denials that she ever engaged in the type of inappropriate conduct referred to by the Respondent's witnesses, I am not satisfied that this is the case. Having heard each of the witnesses, but in particular Ms Oaks and Mr Hayes, I conclude that the Applicant had engaged in aggressive and intimidatory behaviour towards those other staff members. Mr. Hayes appeared to me to be a truthful witness who was careful about his account of events. He accepted that some of the Facebook records that he was taken to represented no more than reasonable management instructions from the Applicant. However, I accept Mr Hayes' evidence that there were other posts that 'targeted' him and I accept Mr. Cross' evidence that he spoke to the Applicant about these and that they were subsequently removed. I am also satisfied that the Applicant used derogatory and abusive language towards Mr Hayes in the workplace in the presence of others. I accept Mr Hayes' account of the 'clenched fists' gesture of the Applicant and that Mr. Hayes felt physically threatened by the gesture.

**[22]** Ms. Oaks presented as a witness who was upset by the Applicant's behaviour towards her. She was not as measured in her account of events as Mr. Hayes, but she gave a reasonably credible account of the Applicant's conduct. I do not regard her account as being simply that of a disgruntled employee who disliked her immediate supervisor or the work that she was being asked to do. I am satisfied from Ms. Oaks account that the Applicant used aggressive and abusive language directed at Ms. Oaks and that she witnessed similar language being directed at Mr Hayes. I accept her account that the Applicant's behaviour had been ongoing during the course of 2024. I also note that the complaints about the Applicant's conduct were made separately by Ms. Oaks and Mr. Hayes and were made some weeks apart.

**[23]** I conclude that the Applicant's behaviour towards Ms. Oakes and Mr. Hayes constituted misconduct on the part of the Applicant and that the misconduct constituted a valid reason for the termination of the Applicant's employment. This weighs against a conclusion that the termination was harsh, unjust or unreasonable.

**[24]** A further matter related to the Applicant's conduct was raised by the Respondent at the hearing. The Respondent provided documentary evidence to show that the Applicant had received a gift voucher in an amount of $250 from a sales representative for ordering a certain amount of wine supplies from the representative's business. Those supplies were paid for by the Respondent. The Applicant said she 'assumed' Mr Cross knew about the voucher because the sales representative told her the same offer had been made to Mr Cross, but he had declined to take up the offer. She accepted that she retained the voucher for her personal use and did not tell the Respondent that she had done so.

**[25]** The Respondent did not contend that the Applicant's acceptance of the voucher for her personal use was the reason for her termination. It appears to have been a matter which came to light after the termination of the Applicant's employment. The inquiry in s.387(a) is whether there was a valid reason, not whether the reason given was a valid reason.[6] Given the Applicant's evidence that she accepted the voucher for her personal use without telling the

Respondent, I am of the view that this meant there was a further valid reason for the dismissal which weighs against a conclusion that the termination was harsh, unjust or unreasonable.

*Section 387(b) and (c) - notice of reason for dismissal and opportunity to respond*

**[26]** The matter that is required to be taken into account under s.387(b) of the Act is whether the Appellant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[7]

**[27]** The evidence demonstrated that the Applicant was advised by Mr. Cross at the meeting on 20 June 2024 that a number of complaints had been made against the Applicant by other staff members. However, the Applicant said that the precise nature of the complaints was only made known to her when witness statements were provided as part of these proceedings. Mr Cross' evidence was vague in terms of the detail that was provided to the Applicant about the exact nature of the allegations. He said that he told the Applicant that he had received complaints from other staff about her aggressive and belittling behaviour towards them. He said he mentioned the Respondent's Code of Conduct which referred to these issues.

**[28]** Mr. Cross readily also conceded that he did not identify to the Applicant who had made the complaints against her. He said he did this to 'protect' the complainants. Given the complainants were not identified to the Applicant and the reasons given for the termination related to specific conduct directed towards particular fellow employees, the Applicant would not have had full notice of the reasons for the dismissal. The conduct was not identified with sufficient particularity so that the Applicant would have been aware of who her alleged conduct was directed towards or when the incidents occurred. At best, the Applicant had general allegations that she had engaged in unacceptable conduct in respect of unidentified accusers. This lack of full and proper notice as to reason for the dismissal inhibited the Applicant's capacity to provide a full account of the matters of which she was accused.

**[29]** Mr. Cross also accepted in cross-examination that he had conducted an 'investigation' into the allegations against the Applicant prior to meeting with her and that his mind was made up before the meeting with the Applicant that the Applicant would be dismissed. He said that nothing the Applicant could have said would have convinced him that there would be any other outcome.

**[30]** It is well established that an employee must be given an opportunity to respond to the reason *before* the decision to terminate is made.[8] An employer cannot provide procedural fairness by simply 'going through the motions' when in substance, a firm decision to terminate has already been made and is to be implemented regardless of what an employee might say in their own defence.[9] The evidence establishes that Mr. Cross' mind was closed to any outcome other than dismissal. The process adopted by the Respondent in withholding key information about the allegations and the reasons for dismissal and the failure to properly consider any response were serious deficiencies in the termination process that was undertaken. The Applicant was not accorded procedural fairness. This weighs in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

**[31]** To the extent that the Respondent now relies on the Applicant's acceptance of the sales voucher as a valid reason, it is clear that the Applicant was neither notified of that reason nor

given an opportunity to respond to it and must therefore 'contend with the consequences'[10] of those procedural failures. The consequence would be that the deficiencies under this heading as they relate to that reason would weigh in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

*Section 387(d) - any unreasonable refusal to allow a support person to assist in discussions relating to the dismissal*

**[32]** There is no evidence of any request for a support person to attend the meeting on 20 June 2024. Consequently, there was no refusal to allow a support person to participate in discussions relating to the dismissal. This is a neutral consideration in this case.

*Section 387(e) – unsatisfactory performance – warnings*

**[33]** The dismissal did not relate to unsatisfactory performance, but rather alleged misconduct on the part of the Applicant. This factor is not relevant to the present circumstances.

*Section 387(f) and (g) - size of the employer's business and absence of dedicated human resources management specialists or expertise*

**[34]** The Respondent is a not a small employer. It had 32 employees at the time of the termination. Mr. Cross was the General Manager responsible for employee matters. There was nothing to suggest that Mr. Cross had specialist expertise that could have had an impact on the way the termination was dealt with. The processes that were followed did not provide the Applicant with procedural fairness. A business of this size could reasonably be expected to have more formal processes in place to ensure that employees are accorded procedural fairness during discussions relating to termination. I am of the view that these factors weigh in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

*Section 387(h) - other relevant matters*

**[35]** The Applicant did not request a support person to attend the meeting with Mr. Cross. This is likely because she would have been unaware that her ongoing employment was at risk. Had she been put on notice of the allegations against her, the Applicant would have been in a better position to respond, including by seeking some support. As it was, she met with Mr. Cross and was forced to defend herself, by herself, 'on the spot'. She was summarily dismissed after a brief discussion. The Respondent was not required by s.387(d) to tell the Applicant to bring a support person but had they done so, and had the Applicant had the opportunity to avail herself of that option, this may have militated against some of the other shortcomings in the process. I regard this as a relevant consideration under s.387(h).[11]

**[36]** I also take into account the fact that the Applicant had almost 7 years' service with the Respondent. Mr. Cross for the Respondent described the Applicant's work performance as 'hot and cold'. The Respondent said, and I accept, that the Applicant was given some verbal warnings during her employment but nothing serious enough to warrant being reduced to writing. I conclude that the Applicant had a reasonable work record over the course of her employment and that this weighs in the Applicant's favour in determining whether the dismissal was harsh, unjust or unreasonable.

**[37]** Having regard to my conclusions above in relation to the matters listed in s.387, I am satisfied that the termination of the Applicant's employment was unjust.

**Remedy**

**[38]** The Applicant did not seek reinstatement. I do not regard reinstatement as appropriate in the circumstances. The Applicant sought compensation. The Applicant advised at the conclusion of the hearing that she had now obtained alternative employment and therefore only sought compensation for the period from the date of dismissal until 11 October 2024. I am satisfied that it is appropriate in the circumstances to make an order for compensation in lieu of reinstatement. In doing so, I am required by s.392 to take account of all of the circumstances of the case, including the matters listed in subsections (2)(a) to (g) of that section.

**[39]** I note that the Respondent is a medium sized enterprise. The Respondent did not provide any evidence as to the effect that an order for compensation would have on the viability of the Respondent's enterprise. I make no deduction on account of the effect on the viability of the enterprise.

**[40]** I also take into account the fact that the Applicant had almost 7 years' service with the company. I do not regard this period of service to provide any basis for reducing the amount of the proposed order.

**[41]** In determining the remuneration that the Applicant would have received or would have been likely to receive if she had not been dismissed, I take into account the fact that the Applicant was engaged on a casual basis and her earnings did vary, although there was regularity to her work over an extended period of time. I am also of the view that given the reasons for the Applicant's termination and my conclusions about the way the Applicant had interacted with fellow employees it is likely that even if the Respondent had accorded the Applicant procedural fairness, including allowing further time for the Applicant to respond, the process would have likely led to the same result. I also accept that the Applicant had been issued with previous, though informal verbal warnings and that these did not result in the cessation of the behaviour. I am of the view that even if the Applicant had been formally counselled and warned there was a real prospect that the behaviour would have been repeated and the Applicant's employment would not have endured for an extended period beyond the date of her termination. I think it is unlikely that the Applicant would have remained in the employment of the Respondent beyond a further eight weeks had her employment not been terminated when it was.

**[42]** There was nothing put by the Applicant in relation to attempts to mitigate her loss other than the submission that alternative employment had been obtained by the time of the hearing. I consider it appropriate to reduce the proposed amount of the order on account of any lack of mitigation efforts by a period of one and a half weeks.

**[43]** There was no evidence of any remuneration being earned by the Applicant from employment or other work during the period between the dismissal and the making of the order and I note that any income reasonably likely to be earned from employment or other work after the making of the order would not relate to the anticipated period of employment.[12]

**[44]** The well-established approach to the assessment of the quantum of compensation under s.392 of the Act is to apply the "Sprigg formula". That formula is derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*.[13]

**[45]** The approach in *Sprigg* is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her 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 that the employee receives the actual amount he or she would have received if they had continued in their employment.
>
> Step 5: Assess the figure against the compensation cap.

**[46]** Applying the above formula to this case, I calculate the order for compensation as follows:

(i) Remuneration the Applicant would have received or been likely to receive if she had not been dismissed in the period since her termination until 15 August 2024:

Average weekly earnings in the 12-month period preceding termination of employment:

$48,083.90 divided by 52 weeks = $924.69 per week
Multiplied by 8 weeks
Total - $7,397.52

(ii) Deduct remuneration earned since termination – nil
Less 1.5 weeks for lack of mitigation of loss - $1,387.04;
Sub-total $6,010.48

Less 25% for misconduct leading to termination of employment –

$4,507.86

Balance $4,507.86 (gross) (no discount for contingencies)

Amount of Order - $4,507.86 (gross)

**[47]** The amount proposed does not exceed the compensation cap. Having regard to the circumstances as a whole, I do not consider an order in this amount to be clearly inadequate or clearly excessive. The gross amount should be adjusted for taxation purposes in accordance with the principles described in *Shorten & Ors v. Australian Meat Holdings Pty Ltd*.[14]

**[48]** For the reasons outlined above, I consider that the Applicant was unfairly dismissed and a payment of $4,507.86 (gross) should be paid by the Respondent to the Applicant as compensation in lieu of reinstatement as an appropriate remedy.

**[49]** An order requiring payment of this amount will issue separately.


DEPUTY PRESIDENT

*Appearances*:

Mr. Leighton, Solicitor for the Applicant.
Mr. Cross for the Respondent.

*Hearing details:*

By Video using Microsoft Teams at 10:00am AEDT on Friday, 11 October 2024.

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[1] Section 382(b)(i).

[2] *Shortland v Smiths Snackfood Co Ltd* [2010] FWAFB 5709 at [12].

[3] See *Yaraka Holdings Pty Limited v Giljevic* [2006] ACTCA 6 (30 March 2006) at para. 65, [(2006) 149 IR 399]; cited in *Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078 at [70].

[4] *Ponce* op cit at [76].

[5] Section 394(2).

[6] *MM Cables (A Division of Metal Manufacturers Limited) v Zammit* Print S8106 at [42].

[7] See *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Reseigh v. Stegbar Pty Ltd* [2020] FWCFB 533 at [55].

[8] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 at para. 75, [(2000) 98 IR 137].

[9] *Wadey v YMCA Canberra* [1996] IRCA 568.

[10] *APS Group (Placements) Pty Ltd v O'Loughlin* (2011) 209 IR 351.

[11] See *Jurisic v. ABB Australia Pty Ltd* [2024] FWCFB 5835 at [84].

[12] *Ellawala v. Australian Postal Corporation* Print S5109 at [34] and following.

[13] (1998) 88 IR 21.

[14] (1996) 70 IR 360.