



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jagdeep Singh

v

Imagine Hotels and Resorts Pty Ltd

(U2024/3072)

COMMISSIONER PERICA

MELBOURNE, 8 NOVEMBER 2024

Application for an unfair dismissal remedy

[1] On 18 March 2024, Mr. Jagdeep Singh made an application to the Commission under s 394 of the *Fair Work Act 2009* alleging he had been unfairly dismissed from his employment with Imagine Hotels and Resorts Pty Ltd (Imagine) and seeking reinstatement or compensation as a remedy.

[2] The matter was heard on 5 July 2024 and 23 July 2024. Mr. Singh represented himself and gave evidence. Imagine was represented by Mr. Brett Pointon, the Chief Executive Officer of Imagine. Several witnesses gave evidence for Imagine: Ms. Rebecca Matthews the Chief Operating Officer, Mr. Rene Stern the hotel manager of Imagine Southbank, Mr. Yannick Dardenne, the General Manager of Product and Quality Control, Mr. Adrian Cheuiyot, a room attendant and Ms. Maggie Lee who, at the time of giving evidence, was the hotel manager – Operations at Imagine Southbank.

[3] For the reasons expressed below I am satisfied Mr. Singh was unfairly dismissed and that he is entitled to a remedy of compensation in the gross sum of \$4,156.00

When can the Commission order a remedy for unfair dismissal?

[4] Section 390(1) of the Act provides that the Commission may order a remedy if:

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

[5] Both limbs of this section must be satisfied. I am therefore required to consider whether Mr. Singh was protected from unfair dismissal at the time of being dismissed. If I am satisfied, he was protected, then I must also decide whether Mr. Singh has been unfairly dismissed.

When is a person protected from unfair dismissal?

[6] Section 382 of the Act provides that a person is protected from unfair dismissal at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[7] Mr. Singh was employed by Imagine for one year and seven months which exceeds the minimum employment period. There was no dispute that Mr. Singh's annual earnings was less than the high-income threshold. It was not in issue that Mr. Singh was protected from unfair dismissal at the time of being dismissed.

When has a person been unfairly dismissed?

[8] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

[9] The Applicant was dismissed on 26 February 2024 and lodged his application for relief on 18 March 2024 within the requisite time period.

[10] The matters referred to at points (a), (c) and (d) above were not in issue. No jurisdictional issues arise with the application. Accordingly, the question of whether Mr. Singh has been unfairly dismissed will depend on whether the Commission is satisfied the dismissal was harsh, unjust or unreasonable within the meaning of s 385. Before turning to consider whether the Applicant has been unfairly dismissed, it is convenient to set out some of the factual background.

BACKGROUND

[11] On 25 July 2022 Mr. Singh commenced employment with Imagine at the Imagine Hotel Marco at 42 Balston Street Southbank (Imagine Southbank). He was initially employed as a

full time Housekeeping Manager. This role included allocating rooms to room attendants for cleaning, supervising cleaning and administrative tasks.

[12] From July 2023 the nature of his employment as a Housekeeping Manager changed from full-time to a permanent part-time role working Sundays and other hours when they were offered. From November 2023 he also worked as a casual guest services agent which involved checking guests in and out and other related administrative tasks.

[13] Mr. Singh was born in Hong Kong of Indian parents. He had an Indian passport which he used to obtain a student visa in Australia. Due to the imminent expiry of his Indian passport, Mr. Singh was required to fly to Hong Kong to surrender his Indian passport. He was then required to obtain a certificate of naturalisation as a Chinese National and Hong Kong Special Administrative Region of China (HKSAR) passport. Once he obtained a HKSAR passport the details on his visa needed to be changed to remove the reference to his surrendered Indian passport to include details of the new HKSAR passport. The new passport was necessary for him to remain in Australia under the Student Visa.

[14] On 3 January 2024, Mr. Singh's father informed Mr. Singh that he had received a letter from the Immigration Department of the HKSAR informing him that the application Mr. Singh had made on 13 May 2022 for naturalisation as a Chinese National will be successful subject to two conditions¹. The conditions were: (1) Mr. Singh must renounce his Indian nationality and; (2) Mr. Singh must pay the balance of the application fee. Mr. Singh explained (in a document he produced after he had been cross examined) that the study he was undertaking in Australia would be completed in May 2024, "it therefore was urgent and very important for [Mr. Singh] to be in Hong Kong" The events that precipitated his dismissal arose out of the circumstances which surrounded the urgent need of Mr. Singh to fly to Hong Kong to obtain a new passport.

LATE DECEMBER EARLY JANUARY DISCUSSION WITH REBECCA MATTHEWS CONCERNING PASSPORT TRIP

[15] In late December 2023 and early January 2024 Mr. Singh had a discussion with Ms. Matthews, the Chief Operating Officer of Imagine, concerning his need to go to Hong Kong and deal with his passport issues. There is a contest in the evidence between Mr. Singh and Ms. Matthews on the estimate Mr. Singh gave Ms. Matthews as to the time required to complete the steps to obtain the passport and visa amendment.

Evidence of Mr. Singh

[16] Mr. Singh's recollection of these conversations is contained in his witness statement dated 23 May 2024 which, was admitted into evidence².

"At a time just shortly before 31 December 2023, Rebecca Matthews, ...offered me an opportunity to do night caretaking at Imagine Southbank. After a few conversations, I agreed to give it a trial but gave no firm commitment beyond the trial as I then I may had to go back to Hong Kong at some stage to obtain my new Hong Kong passport.

On 5 January 2024 I told the Respondent I had to leave to go to Hong Kong to surrender my passport. I mentioned the whole process can take me from 3 weeks to 5 weeks to get my new HK passport issued and be able to fly back on it.

On 9 January I advised Rebecca I had secured flight to Hong Kong.”

[17] The time estimate Mr. Singh gave was the subject of oral evidence. In his examination in chief Mr. Singh said:

“**COMMISSIONER:** You are sure you said three to five weeks? -

MR SINGH: Correct, yes. I mentioned about my brother as well. It took my brother three weeks. It was faster for him. So I mentioned minimum it can be three weeks, but it can go over five weeks. Because this is a passport issue, it is out of my control, and the - - -”

“...So I said three to five weeks because first I have to surrender my nationality, get my passport, and then go to the embassy, get my visa updated with my new passport number. So I said three to five weeks and she said, okay, she’ll go back to the head office and get it approved, and my work knew about this for one year. Yannick, Tom, my supervisor, everyone knew this, how important this is to me. Being an international student, I have to get my new passport before I hop on the next visa. So Yannick knew about this for already a year.”³

[18] Under cross examination Mr. Singh said the following⁴:

MR. POINTON: You keep mentioning to us that you said three to five weeks?

MR. SINGH: Yes.

MR. POINTON: I wasn’t there, Rebecca was there, and I trust her impeccably. Her statement says three weeks. You mentioned your brother? -

MR. SINGH: Yes.

MR. POINTON: That took three weeks? -

MR. SINGH: Yes.

MR. POINTON: and her statement said you thought you’d do it quicker than three weeks?—

MR. SINGH: -I never mentioned it would be quicker than three weeks.

MR. POINTON: But you say you did mention five weeks?-

MR. SINGH: Three to five weeks.

[19] In his examination in chief Mr. Singh adduced new evidence, which was not in his witness statement, or any other document filed previously, that “in mid-June 2023” he had stated to Mr. Yannick Dardenne, the General Manager of Product and Quality Control at Imagine, that he would have to fly to Hong Kong to change his passport.⁵

Evidence of Matthews

[20] Ms Matthews evidence of these conversation is contained in her witness statement which was admitted into evidence⁶:

“[Mr. Singh] contacted me, and we spoke about his need to quite urgently fly to Hong Kong, as he told me his Indian passport was about to expire and he needed to surrender it and sort a new passport before it expired. [Mr Singh told her] there was an urgent need to travel to Hong Kong and he would require time off. My recollection is very clear that [Mr Singh] said to me the context of him needing to leave the Country was because of this expiring passport issue. [Mr. Singh said] he would then need to enter into or arrange a new Visa for re-entry to Australia given this change of passport.

At about the same time, an opportunity arose for potentially [Mr. Singh] to take on some additional duties with the Respondent in a night caretaker role. This would involve accommodation at Imagine Southbank being available to be the contact for any night care taker contact. – so being able to be awoken (if asleep) for urgent access or similar or emergencies or late check in or check out.

I spoke with [Mr. Singh] about whether he was interested in this caretaker role. He did express interest in it, but at the same time he had this urgent passport issue. We left our discussion on the basis that the caretaker role as available to him as long as he could commence in that role quite soon....

My next contact with [Mr. Singh] was him advising me that he had arranged a flight to leave Melbourne for Hong Kong on 13 January 2024. He advised me of this about 5 January 2024.

I recollect conversations between 5th and 9th January 2024 about his period of absence, as he advised me that he would be absent for a period of three weeks, and he was quite definitive about this. He specifically referred to his brother having the same issue with his passport, and that his brother had completed the task over a three-week period and he expected that he could do it sooner than that. On this basis I approved his absence following making necessary representations on his behalf at Head Office

... I really had no issues with [Mr. Singh] being absent, given he advised of his urgent passport issue and I understand that he was in Australia on a student visa and would require a passport ... in order to remain in Australia. I also considered he had been open and honest with me about the need for travel and his passport issue and that he would be returning within three weeks”.

[21] Her evidence was that Mr. Singh had “advised [her] that his flight arrangements would be from Melbourne to Hong Kong and that he would attend to the passport matter and deal with his Visa and then return. He specifically said to [her] he would keep [her] advised of the progress of the changeover of passport to the Chinese passport and his return”.⁷

[22] During her examination in chief Ms. Matthews gave the following evidence about these conversations⁸.

“...So he said to me that there was an urgency to get back to Hong Kong because he had to surrender his passport. So he – to my knowledge and what he said to me, he had an Indian passport but he had to change that over to a Chinese passport, and there was a level of urgency in doing that. So it was – he used the word ‘surrender’, so to me that implied that there’s an urgency to this situation.

So I was, like, ‘Okay. Yes. That’s totally fine. What do we need to do?’ He said he’s looking for flights to go back to Hong Kong. Yes. No worries.

And I think that was, like, the 9th, somewhere around there.”

“ So he said to me, ‘A maximum of three weeks but my brother got his done in two weeks.’ So I made an assumption anywhere between two and three weeks, and he said three weeks⁹.”

[23] On the issue of whether there was a discussion of an absence of more than three weeks Ms. Matthews said the following:¹⁰

MR POINTON: Were there any talk of anything more than three weeks? -

MS MATTHEWS: No.

MR. POINTON: No talk? No discussion about that? No discussions it could have taken longer? Reference to the brother taking three; might have been quicker? -

MATTHEWS: Yes, that was it, yes

[24] On 9 January 2024, Mr. Singh sent Ms. Matthews a text message that said:

“Hey Rebecca, I have locked in the ticket I will be flying this Saturday on 13/01/24. I have explained to Zain regarding nightcare duty for this Saturday, he should be expecting your message”¹¹.

MR. SINGH’S OVERSEAS TRAVEL ITINERARY

[25] Having sought and obtained approval from Ms. Matthews to be absent while he dealt with the passport issue, Mr. Singh left Australia on 13 January 2024. His travel itinerary was as follows:

- On Saturday 13 January Mr. Singh left Australia flew from Melbourne to Denpasar in Indonesia, and then From Denpasar to Kuala Lumpur in Malaysia where he remained until the Tuesday 16 January 2024¹².
- On 16 January 2024 he flew from Kuala Lumpur to Hong Kong where he remained from until 16 February 2024¹³.
- On 16 February 2024 he flew from Hong Kong to Denpasar in Indonesia where he remained until 23 February 2024¹⁴.
- On 23 February 2024 he flew from Denpasar to Melbourne where he arrived at 11.30AM¹⁵.

[26] Mr. Singh was out of Australia for 43 days or 5 weeks and five days. His evidence was that he used indirect flights with stop overs in Malaysia (from Saturday 13 January to Tuesday

16 January) on the way to Hong Kong and Indonesia (from 16 February to 23 February) and on the way back to Melbourne because indirect flights are cheaper¹⁶.

TEXT EXCHANGE BETWEEN MR. SINGH AND MS. MATTHEWS WHILE HE WAS OVERSEAS

[27] While he was overseas Mr. Singh and Ms. Matthews engaged in a text exchange which is central to a determination of this matter. It is reproduced below¹⁷.

Text exchange from 1 February to 12 February

Thursday 1 February 2024

MS. MATTHEWS: Hi jag – any news on your return we are very short staffed

MR. SINGH: Hi Rebecca, I am expecting about two more weeks. I have surrendered my Indian passport already. I should get my certificate of surrender by next week and then I can proceed to the HK immigration department to apply for my ID and my new passport. I will keep you informed as I get updates also.

MS MATTHEWS: OK please keep me posted. Take care

Monday 12 February 2024

MS MATTHEWS: Any News?

Mr. Singh's explanation of the eleven-day gap

[28] In cross examination Mr. Singh explained why he had not contacted Ms. Matthews for eleven days after she had texted "Keep me posted"¹⁸.

"MR. POINTON: My question was: do you think it was important and you might have told your employer? You've told me in all this that you kept the employer up to speed with it, all that, every day, it was always up to speed, we knew exactly what was going on, your correspondence to us wasn't delayed, wasn't slow, you kept us up to speed. Twelve days - 11 days - is that keeping us up to speed? -

MR SINGH: I'm still on the leave and there's no updates.¹⁹

[29] The text exchange between Mr. Singh and Ms. Matthews continued as follows:

Text messages from 14 February

Wednesday 14 February 2024

MR. SINGH: Hey Rebecca, Happy Chinese New Year. I got my passport today the offices were closed due to CNY. I have been informed by migration agent now about my new passport details. They will now need to link my new passport to my visa. I am awaiting on their reply now. I will update with you once I hear from them.

MS. MATTHEWS: I need a definitive date. The person doing the caretaking you that you were supposed to do needs to finish up soon. I need to either have you back here or replace the caretaking with someone else.

Thursday 15 February 2024

MR. SINGH: 23/02 My agent has told me it will take up to 7 business days to link my passport. I should be there next week

Monday 19 February 2024

MS. MATTHEWS: Please advise what day you will be back at work...

MR. SINGH: Hi Rebecca. I can get back to work on 25/02

Tuesday 20 February 2024

MS. MATTHEWS: We will let you know when you can return.

Wednesday 21 February 2024

MR. SINGH: Hi Rebecca, I am flying the day after tomorrow. Just wanted to check if I can move in on Friday.

Thursday 22 February 2024

MR. SINGH: We need to talk on Monday. Send me a time that you can come to Marco to see me.

MR. SINGH: Just an update, my passport has still not been updated on immigration portal yet. My agent has sent an e-mail directly to immigration so we are waiting on their response. I will still try and fly tomorrow and see if they allow me. I have some documents with me which might help. I will keep you posted tomorrow morning if they let me board my flight.

Friday 23 February 2024

MR. SINGH: Hi Rebecca, some good news I am able to board the flight. Australian immigration has given me approval to depart. I'll see you on Monday.

MS MATTHEWS: you will not have access to the Southbank apartment as I have a caretaker in there. Because you have been unable to give me a definitive return date, the current caretaker will remain. I will meet you at 9am Monday as arranged.

EVIDENCE ON THE PROCESS OF GETTING HIS NEW PASSPORT AND VISA UPDATE

Surrendering Indian Passport and obtaining Chinese Nationalisation Certificate

[30] The process of surrendering his Indian passport took some time. His written statement says little about the process involved in surrendering but he, did give oral evidence on this, as follows:

MR. SINGH...So I got to Hong Kong on 16th. Once I got to Hong Kong, I had my - in two days I had my surrender of nationality of Indian nationality. I was holding an Indian passport.

I surrendered my nationality. That took the longest time. I took about two weeks to just get the certificate. So we have to get the certificate of nationality. Once I got the certificate, I have to go to the Hong Kong - - -

COMMISSIONER: So how long did getting the certificate take? Two weeks? -

MR. SINGH: Two to three weeks.²⁰

[31] Mr. Singh later filed the Certificate of Naturalisation as Chinese National in the Commission. It was issued on 31 January 2024 which was fifteen days after he arrived in Hong Kong²¹. This could only have been obtained once Mr. Singh surrendered his Indian Passport at the Indian Embassy in Hong Kong

Obtaining the HKSAR passport

[32] Pages of the HKSAR passport that Mr Singh obtained are in evidence. It notes the passport was issued on 2 February 2024.²²

[33] In evidence Mr. Singh confirmed he received his HKSAR passport on 12 February, which was the date of Chinese New Year.²³ There was a delay between the issue of the passport and Mr. Singh picking it up. This was dealt with in his cross examination.

MR. POINTON: Yes. Why didn't you pick it up on the 2nd when it was issued? -

MR. SINGH: It was not ready yet - - -

MR. POINTON: No, it was issued on the 2nd. It's got it on your passport? -

MR. SINGH: No, but it was not ready for collection. It comes with the ID as well, the Hong Kong ID I mentioned earlier.

MR. POINTON: So you rang them on the 2nd or the 3rd and they said, 'It's not ready yet'?—

MR. SINGH: No, I didn't ring them. It was just - I did not - it was not ready to collect it until the 9th.

THE COMMISSIONER: Why was that? -

MR. SINGH: I have no idea. To me, it was Chinese New Year holidays. It's Chinese New Year holiday period going on.²⁴

...

MR. POINTON: You told us that it took you right through to the end of January to get rid of your Indian passport, and then you went back and, on the 2nd, they issued a new Hong Kong passport, but you never rang them at any particular point in time to see whether they've issued it, or you did ring them? Did you follow them up at any particular point and say, 'Is my passport ready today'?—

MR SINGH: You can't - the only I could do is go to the office, that's it, but - - -

MR POINTON: It's pretty important, like your job's on the line for it? -

MR. SINGH: Yes.

MR. POINTON: So did you go there? -

MR. SINGH: No, I was still in the off period. I still had time.

MR. POINTON: I've got a question for you. You just said you - it wasn't ready, and then you told me you never talked to anybody. So how do you know it wasn't ready? -

MR SINGH: So they never called me, they never informed me, I never got notified.

MR. POINTON: So you just assumed it wasn't ready then? You didn't know whether it was ready then. I would imagine that if it was issued on the 2nd, it was ready, your passport was ready? -

MR. SINGH: But if I'm not notified, how will I know it's ready?

...

MR. SINGH: So my dad works in Wan Chai, next to the immigration tower. He was doing that. It was not me doing this.²⁵

Change of passport details on the Australian Student Visa

[34] After he obtained his HKSAR passport and before he returned to Australia it was necessary for Mr. Singh to ensure his student visa was updated to include the details of his HKSAR passport because his Indian passport had been surrendered. Mr Singh's evidence was that there was a delay in the processing of this change to his visa.

[35] Mr. Singh's migration agent, Ms. Kaur gave evidence of her engagement with Mr. Singh concerning his visa which relevantly included²⁶:

- On 16 February Mr. Singh requests an update on whether his student visa had been varied to include his HKSAR passport details. Ms. Kaur made an enquiry. confirming the change had not been made.

- On 22 February Mr. Singh informed Ms. Kaur that he had taken matters into his own hands and had attempted to update the passport details himself²⁷. Ms. Kaur then checked and established the details had not been updated.
- On 22 February, by a Whats App call, Mr. Singh instructed Ms. Kaur to e-mail the Immigration Department to make the amendment to the visa and he agreed to pay the relevant service charge to his migration agent. The e-mail by Ms. Kaur was sent that day.
- On 23 February, an e-mail was received by the migration agent confirming that the passport details had been updated and it would take 24 to 48 hours to be reflected on the immigration department system.

Bali stopover

[36] It is not disputed that Mr. Singh had not informed Imagine that he would return to Australia with a stopover in Indonesia. The itinerary for his flight confirms that he booked the flight to Indonesia from Hong Kong on 14 February 2024²⁸. Mr. Singh had booked the 23 February 2024 return flight from Indonesia to Melbourne earlier on 9 February 2024²⁹. This was before he had received his HKSAR passport and before his visa had been updated.

[37] In his witness statement Mr. Singh explained he was, “returning through Bali because the flights were cheaper and [he] was waiting on [his] new passport to be applied on [his] student visa. [He] could travel to Indonesia, but could not enter Australia until the visa was approved and applied to [his] new passport³⁰”.

[38] While he was still in Indonesia, Mr. Singh had posted a picture from Bali to social media. A staff member of Imagine alerted Ms. Matthews to the post.³¹

[39] Mr. Singh returned to Melbourne at 8:30pm on Friday, 23 February 2024. In the text exchange he had agreed to meet Ms. Matthews for a meeting at 9:00am on the morning of 26 February 2024.

26 FEBRUARY MEETING WITH MANAGEMENT

[40] Present at the meeting were Mr. Singh and several management participants from Imagine including, Ms. Matthews, Ms. Maggie Lee who is the Hotel Manager – Operations at Imagine Southbank and Mr. Yannick Dardenne, the General Manager of Product and Quality Control. According to Ms. Matthews the meeting took between 10 and 15 minutes.³² Mr. Singh gave evidence of what transpired at that meeting in his oral evidence³³.

“**MR. SINGH:** ...on the 26th. It was a Monday. So I got to the office at 9, and when I was there, Maggie, the front desk manager, brought me up to the level 7 meeting room. In that meeting room, everyone was already there - Yannick, Rebecca and Maggie. So three of my executives were sitting there already. So obviously, with the text before, I knew something was wrong. I went there and apologised first thing.

... So from there, they let me speak. First thing, I said, ‘I’m sorry, it took me more than - longer than expected, there were delays. Sorry if there was miscommunication.’ I apologised first thing and I mentioned this should not happen again if I was - if in the future there’s a similar situation, this would not repeat. Yes, I was showing I’m ready

to work and this won't happen. So Rebecca started speaking. Yannick and Maggie were quiet the whole time. They did not say anything.

So Rebecca said, 'We found out you were in Bali, you were enjoying partying, sipping Pina Colada and you were out there.' I mentioned, you know, 'That was not my intention. It was just on the last week. I could not come back, so I was there. My migration agent, I tried to get help. Also I could not come back.' She mentioned, 'We do not believe you' and she - she said, 'We heard rumours about you and we are looking for someone long term.' I said, 'Look, I'm really sorry' again, you know, 'I know I went over time, but I've been here for two years, I've been working with you for a long time, and I have no intention to mislead you in any way.' I said my point. They said - they closed - they were writing notes, Rebecca was writing notes already. She closed her book, she like, 'Sorry, we can't do this.' ..."

[41] Ms. Matthews gives an account of the meeting in her witness statement which was received into evidence:

"I proceeded to raise the issues of non-contact and delayed contact and what we considered to be his travel. He again apologised. I do say that the Applicant denied travel outside of travelling to Hong Kong and to Bali and to Bali as he said it was a cheaper flight to get home. ...

The Applicant was given an opportunity to respond but again apologised for the lack of communication and misunderstanding. He insisted the connection home via Bali was due to the cheap cost of flights. My internal thought process was this is very, very odd and why did he not inform me prior to now of this. We had been in communication literally when he would have been in Bali, but I was led to believe he was in Hong Kong all that time.

The Applicant was advised that we would consider our position and he would be advised on the outcome of our concerns and whether his employment would continue.

Following the Applicant leaving the meeting, further consideration was given to our knowledge and his responses. At that point we decided that the Applicant's employment could not continue. The view was formed that his explanations on travel and length of absence and lack of contact amounted to a repudiation of the employment relationship³⁴."

[42] Her oral evidence broadly conforms to this statement. She also gave evidence on her reaction to the explanation Mr. Singh gave in that meeting³⁵:

MS MATTHEWS: And all he could really say was, 'I am sorry', and, 'It was cheaper.' And, yes, that was sort of the crux of that part. And then he didn't actually give me a substantial reason as to why he was away. I just felt like the conversation was not going anywhere. It was just I was saying, 'Bali', he was saying, 'Cheap flights.' I was saying, 'Why?' He was saying, 'Cheap flights.' He was apologising. I was reiterating why I felt overwhelmed by the situation. Not once - yes, not once - yes, anyway, that's sort of how it sort of - it was going around in circles.

Yes? -There was not any substantial explanation other than the cheap flights, as to why. And I found that quite - I was annoyed. I found it quite rude and so because the

conversation wasn't really going anywhere, I said to him, you know, 'Let's just leave it now and we'll come back to you with sort of like an outcome of the situation.'

26 February Termination letter

[43] Following that meeting Imagine issued a termination letter to Mr. Singh on that same day³⁶. It read:

"We are writing to you in relation to your employment with Imagine Hotels and Resorts Services Pty Ltd and refer to your failure to attend since Sunday 14th January, 2024.

As you agreed in our meeting today, you had not communicated with us adequately or provided sufficient evidence as to your claims of being stuck in Hong Kong and unable to travel back to attend shifts at your place of employment during your unplanned absence. We had been left with no option other than to replace your role on the front desk and also find a permanent replacement for your Sunday Housekeeping shift and Hotel caretaking obligations. Despite being supportive & willing for you to travel back to Hong Kong, your lack of timely communication and ambiguity of a definitive return date resulted in us having to employ an additional staff member for your Housekeeping shift, engage the service of a new caretaker and employ a new staff member to cover casual shifts that you were not here to undertake for the Front desk.

As discussed today in our meeting, we considered this abandonment of employment stemming from insufficient communication regarding your travel plans and timeframe away from the business, along with failure to adhere to the organisation's leave approval processes. Despite attempts to contact and gather evidence pertaining to your absence, you, as the employee, failed to provide adequate information. We consider this a breach of communication and failure to adhere to established protocols regarding leave and absence notification.

Your additional side trip to Bali, whilst we were holding your position, is believed to be not inline with our goodwill gesture of holding your various positions whilst you travelled back to Hong Kong (for the specified time) to apply for your new passport. You acknowledged our predicament, and although apologetic now, our actions were a result of business continuity and staffing requirements."

[44] In his final pay Mr. Singh was paid his annual leave accruals in the gross sum of \$1,420.77 but, was not paid anything in lieu of notice.

CONDUCT DISCOVERED AFTER THE TERMINATION

[45] Imagine relies on conduct of Mr. Singh discovered after his termination.

[46] The conduct concerns an absence from work during a period which Mr. Singh was on holidays in Japan and Korea in September and October 2023 and conduct related to a bag of marijuana left behind by a guest.

September and October 2023 absence and overseas trip

[47] During this proceeding Imagine relied on some social media posts which were posted while Mr. Singh was away in 2024. One post was from Seoul in Korea, the other two are from

Tokyo in Japan³⁷. It transpired these posts related to an earlier trip he had taken in September and October 2023.

[48] It was put to Mr. Singh that his Indian Passport noted a visa issued for Japan on 11 September which was for travel between 2 October 2023 to 17 October 2023 and one for travel to Korea between 23 September to 23 October 2023³⁸. Mr Singh in response said, he did not deny those entries³⁹.

[49] Imagine argue that he travelled “without authorisation, advice, knowledge or consent to be absent from roster for any travel” and that Imagine ‘was completely misled and deceived’ by Mr. Singh about travel during that time⁴⁰.

[50] In his evidence Mr. Singh indicated that he travelled from Melbourne on 25 September 2023 and returned on 5 October 2023, an absence of 11 days. ⁴¹ He explained this period as follows:⁴²

COMMISSIONER: What did you tell your employer about that Korea and Japan trip? -

MR. SINGH: So Korea and Japan was not mentioned to them because I work only on Friday, Saturday, Sunday. At that time, I was a part-time contract, so I only work three days, and they guarantee me two shifts only on Saturday and Sunday, so - - -

So I was on a transition to part-time contract at that period and I was only guaranteed two days of work, Saturday and Sundays, so about 14 hours, and Friday was, if they need me, I will be there.

...

COMMISSIONER: So you didn't miss any shifts? -

MR. SINGH: I just missed Saturday and Sunday.

...

MR. SINGH: Yes, I missed the first week, Saturday/Sunday, but that was communicated already.

COMMISSIONER: What was communicated? -

MR. SINGH: So that was communicated to Yannick.

COMMISSIONER: What was communicated?

MR. SINGH: That I need off on those days. It wasn't specified I was travelling, but I mentioned I needed off on those days, and they arranged themselves to work on those days. My other manager, Anu, as well worked on that day. ...

[51] Mr. Dardenne had a written statement tendered into evidence which dealt with the absences as follows⁴³:

“... I had absolutely no idea that the Applicant had travelled overseas (or anywhere else for that matter) including to Japan and Korea in late October 2023 or any stage the latter part of 2023.

..., I have checked the Respondent’s records for leave applications by the Applicant in September and October 2023. I have also reviewed my own exchanges with the Applicant, which were mostly text messages about duties and availability and related matters. In none of those exchanges, is there mention of leave or being absent overseas.

I can say that there are two periods, across September 2023 and October 2023, where the Applicant might have travelled, without our knowledge and I must say, if he did so, he had misled me as to his availability and where he was and his reasons for unavailability.

In this period I now raise, the Applicant did advise that in particular across the period of 29 September to 1 October 2023, he was unavailable, due to an event of his sister in Melbourne and for which he and other family members were attending. There were a number of exchanges in that period, and I have as part of my statement provided copies of all text message exchanges during this period

What can be seen from those messages, and my clear recollection is as I have stated, that is, the Applicant was absent on that particular weekend due to his sister’s event in Melbourne and then we tried to organise other availability for which the Applicant advised he was unavailable. This was in the dates leading up to 7 October 2023.

It is the case that the Applicant then advised he was unavailable for the weekend of 7 and 8 October 2023, stating that his sister’s event was that particular weekend, rather than the weekend that he had previously advised me of. I have a clear recollection of the first advice, and it was the weekend of 30 September and 1 October 2023. Because of this, our records were corrected for that unavailability as being unapproved leave for those dates.

After further communications with the Applicant he conceded to work the weekend of 7 and 8 October 2023 on the basis he would fit in the other arrangements with his sister’s event.”

[52] The text messages to which Mr. Dardenne refers are as follows⁴⁴:

Wednesday 4 October 2024

MR. SINGH: I wanted to say that I really cannot make it on Saturday. It is a very special occasion for my sister here in Australia and I will be attending it along with my family. I am able to come back to work on Sunday.

MR. DARDENNE: From my understanding, you informed me and Any that your family (sisters event) was last long weekend that just past. I am confused as to how the event is not suddenly coming on Saturday 7 October....

MR. SINGH: I believe there has been some confusion. Last weekend was when they arrive in Australia., the event will actually be held on 7th October

[53] In his oral evidence Mr. Dardenne gave hearsay evidence that on 29 September 2023, Mr. Singh had called in sick to the housekeeping manager and said he couldn't come in on the weekend of Saturday 30 September and Sunday 1 October⁴⁵. Mr. Dardenne stated he "covered the shift on Sunday, 1 October⁴⁶". Mr. Singh could not recall what he said in the conversation with the housekeeping manager on 29 September 2023.⁴⁷

[54] Mr. Dardenne in his oral evidence clarified Mr. Singh's roster for the period of 25 September to 5 October overseas⁴⁸:

COMMISSIONER : So, can I just be clear, so 25th, the allegation that he took a sickie on the 29th, okay, which you covered. Other than the 1st, was there any other shifts rostered for him, during that period he was absent? So from 25 September to 5 October? -

MR. DARDENNE: I believe he showed up for the shift on 7 October.

COMMISSIONER: Okay. So between the 30th and the 5th he wasn't rostered? -

MR. DARDENNE: He was. He was rostered for Saturday the 30th and Sunday, 1 October.

COMMISSIONER: This is what I'm saying, the 30th and the 1st. He wasn't rostered from the 25th until the 30th, or the 2nd until the 5th?

MR DARDENNE: Correct. Yes.

BAG OF MARIJUANA ALLEGATION

[55] Imagine argue it discovered that Mr. Singh took possession of a bag of marijuana left by a guest at the hotel. This came to the attention of Ms. Matthews after Mr. Singh's employment ended.⁴⁹

Mr. Singh

[56] In his written statement received into evidence Mr. Singh denies he took marijuana from the hotel room⁵⁰. He went on:

"I took the bag out of the room without looking at it, and gave it to his manager as per proper process. She stapled and tagged the bag and I heard nothing further about it. Everyone knew there was marijuana in the bag because it smelled strongly, but the suggestion that I took it or that I sought to sell marijuana to my colleagues is entirely without basis."

[57] His oral evidence elaborated on his written statement⁵¹:

"I was working at the front desk that day. Maggie [Maggie Lee] was there...Maggie is my front desk manager. There was a guest coming back - calling back. She spoke with - he spoke with Maggie. He said he missed - he left his lost property in the room. He checked out on that day, so Maggie asked me, as that's my role, to go up and get the lost property and bring it back. So I noticed in the - sorry, I'll mention this later, but -

so I went up to the floor. I don't remember which room it is. Adrian, he was cleaning the room. So he was already making the bed, so I went up to him, I asked him if he found any lost property, and he just had a brown bag, which he was using to put rubbish inside. So we searched that brown bag and we found in the bottom of that bag there was some marijuana, and it was - the whole room was smelling really bad from the drug.

I got the bag from him, I mentioned him it's a lost property. That was already mentioned in the beginning there was a lost property, I came here for that. So I got the bag from him, I went down back to Maggie, handed her the bag. She stapled the bag. She named the room number and she even mentioned the comment, 'This smells like stink.' She made this comment because it was a strong smell, and she kept the bag away for the guest to come back and collect, and before my shift ended, the bag was collected on the same day.

Mr. Adrian Cheruiyot

[58] Mr. Adrian Kipnegno Cheruiyot, a room attendant at Imagine, gave evidence. His written statement included an e-mail which contains an account of the incident he sent to Ms. Matthews on 17 April 2024 which he "confirms is correct"⁵²

"I was on duty and on this day the guest of this particular room in interest checked out late, this was around 12:30pm. Upon entering this room for cleaning, I immediately noticed a strong odour of marijuana, so I thought to myself that the guest smoked just before he left. I did not have time to dawdle since I was in a time constraint, so I went and made the bed.

Afterward, I proceeded to clean the kitchen and found a brown paper bag containing some trash. I then used that bag to gather the rest of the trash from the room. While doing this, Jagdeep appeared and mentioned that the guest of this room has forgotten a brown paper bag informed him that the only brown paper bag I've encountered contained trash. Nevertheless, skimmed through the trash where I discovered a ziplock bag containing a moderate amount of marijuana.

Recognising the seriousness of the situation, I followed protocol and handed the bag over to Jagdeep, who took it to the reception. This is to the best of my knowledge."

Ms. Maggie Lee

[59] Ms. Maggie Lee also gave evidence. She prepared a witness statement dated 15 July 2024⁵³ which was tendered into evidence. In that statement Ms. Lee notes she was one of Mr. Singh's managers during his period of employment. In relation to the bag of marijuana she states: "at no time was a bag handed to me by Jagdeep and particularly not a bag containing a quantity of marijuana⁵⁴." Her oral evidence was consistent with this statement.⁵⁵

Mr. Rene Stern

[60] Mr. Rene Stern, the hotel manager of Imagine South Bank, gave evidence that Mr. Singh had not given him a bag of marijuana "stating that a guest had left it in his room and had made an inquiry about it⁵⁶".

Mr. Yannick Dardenne

[61] Mr Dardenne’s evidence was that at no time did Mr. Singh provide him with a bag of marijuana stating that a guest had left it in the room⁵⁷.

WAS THERE A VALID REASON FOR THE DISMISSAL RELATED TO MR. SINGH’S CONDUCT?

[62] Imagine relies on three reasons to justify their decision to summarily dismiss Mr. Singh.

1. Absence from employment and misleading statements about passport travel

[63] In his letter of termination, this reason is couched in these terms: “we considered this abandonment of employment stemming from insufficient communication regarding your travel plans and timeframe away from the business, along with failure to adhere to the organisation’s leave approval processes”⁵⁸.

[64] In its outline Imagine argues Mr. Singh had misled it on the length of his absence, his intended travel and the lack of contact, responsiveness and urgency to return to the workplace to recommence duties. Imagine further argued that Mr. Singh had been “so misleading of [Imagine] that termination of employment with immediate effect was also a justified outcome”⁵⁹.

2. Mr Singh’s overseas holiday in September 25 to 5 October 2023

[65] Imagine argues that Mr. Singh had “not sought leave of absence in any way and has made himself unavailable by wilfully and untruthfully stating his position and reason for being unavailable to his manager and to [Imagine]....”⁶⁰

3. Marijuana allegation

[66] The position of Imagine on this issue is not straightforward. In its outline it states that “...the Applicant is not to be believed about the handing of the the bag or marijuana to his manager and it goes against his credit and further substantiates his wilfully deceptive conduct.”⁶¹

[67] I will now consider each of these reasons in turn.

Reason related to the delay in his return and “dishonesty” about his travel plans

[68] There is a contest on the evidence on what Mr. Singh had told Ms. Matthews about the length of time he estimated it would take to complete the tasks necessary to obtain the HKSAR passport and to update his visa.

[69] Ms. Matthews has a clear recollection that Mr. Singh had told her a “A maximum of three weeks”. In her written statement she said, “He specifically referred to his brother having the same issue with his passport, and that his brother had completed the task over a three week period”⁶². Mr. Singh’s evidence was that he had said “I mentioned about my brother as well. It took my brother three weeks. It was faster for him. So I mentioned minimum it can be three weeks, but it can go over five weeks. Because this is a passport issue, it is out of my control...”⁶³

[70] It is noteworthy that Ms. Matthews contacted Mr. Singh by text on 1 February which stated, “Hi Jag - any news on your return dates. We are very short staffed”⁶⁴. This is twenty days after he left Australia. This evidence is equivocal in so far as it could either represent contact initiated on the maximum time he had estimated (three weeks) or the minimum time he estimated.

[71] Mr. Singh responded to this text on 1 February estimating another “two more weeks” to which Ms. Matthews responded, “OK please keep me posted”.⁶⁵

[72] Mr. Singh did not keep Ms. Matthew’s posted. The next exchange between them was on Monday 12 February 2024, eleven days later. Ms. Matthews texted “any news?”⁶⁶. Mr. Singh responded on 14 February, two weeks after his last contact with her, informing her, “[he] got [his] passport today”⁶⁷. This is not consistent with his oral evidence that he received his passport two days earlier on 12 February which was Chinese New Year. He also informed her about steps he had taken to link his visa to his new passport.

[73] On 15 February Ms. Matthews sent a text “I need a definitive date. The person doing the care taking that you are supposed to do needs to finish up soon.”⁶⁸ Mr. Singh responded by text on 15 February giving the date of “23/02” and added “My agent told me it will take up to 7 business days to link my new passport I should be there next week”.⁶⁹

[74] The reality was he had booked his return flight on 9 February and could have informed Ms. Matthews on that date that he had done so. He waited a further six days. The issue of the delays on the amendment of his visa in the evidence of Ms. Kaur *could* have affected his return day but in reality, did not. He knew on 9 February that he had booked a flight to return to Australia on 23 February.

[75] A further five days transpired, and Ms. Matthews sent a further text on Monday, 19 February 2024 saying, “Please advise what day you will be back at work” to which he responded “Hi Rebecca I can be back to work on 25 February 2024”⁷⁰.

[76] From that point forward Mr. Singh sent text messages to Ms. Matthews on 20, 21, 22 and 23 February.

[77] At no point had Mr. Singh informed Ms. Matthews that his flights would include stop overs in Malaysia from 13 January to 16 January 2024 on the way to Hong Kong, or Indonesia from 16 February to 23 February 2024⁷¹ on the way back to Melbourne.

[78] Mr. Singh had not kept her informed of the delays he had experienced in the process of surrendering his Indian passport and obtaining his naturalisation certificate which took from 16 January until 31 January 2024, or the delay in receiving his Hong Kong passport, which was issued on 2 February 2024, but he did not receive it until 12 February 2024. Nor did he inform her of his return flight until days after he had booked it.

[79] Mr. Singh explained the delays and gaps in keeping Ms. Matthews informed. He said in his evidence in chief:

“...I was on a leave, I was like I will be making it back anyways. You know, I have the intention to come back. This is important to me. I’ve invested a lot here. I was - I had no intention to go round, take any delays, it was just out of my control”

...

“I was communicating with them⁷²”

[80] Mr. Singh was asked a question in cross examination about the eleven-day gap in his text messages with Ms. Matthews⁷³:

MR. POINTON: My question was: do you think it was important and you might have told your employer? You’ve told me in all this that you kept the employer up to speed with it, all that, every day, it was always up to speed, we knew exactly what was going on, your correspondence to us wasn’t delayed, wasn’t slow, you kept us up to speed. Twelve days - 11 days - is that keeping us up to speed? -

MR. SINGH: I’m still on the leave and there’s no updates.

[81] This failure to keep his employer informed of these matters and his absence occurred during a busy time for the Southbank Imagine. It was over the course of the Australian Open which ran from Sunday 14 January 2024 until 28 January 2024 which was “the busiest time of the year” for the Southbank Imagine⁷⁴ Ms. Matthews had informed him by text that they were “short staffed” and had asked him to keep her posted.

[82] The delay in his return had consequences for Imagine described by Ms. Matthews in her witness statement received into evidence.⁷⁵ She gave evidence that Imagine had to:

- employ an additional casual staff member to cover the front desk role.
- “Increase another staff member’s hours in his House Keeping role” and had “to pay this person extra to take the additional hours to get him across the line for the additional hours
- secure another staff member to cover for the trial period of caretaking the Southbank Imagine with some uncertainty as to when Mr. Singh would return.

[83] Ms. Matthews approved Mr. Singh’s absence from work because of the importance of the passport and visa change for Mr. Singh’s residency. Mr. Singh knew, or ought to have known, that his absence was at a time of peak occupancy for the hotel. It was incumbent on him to keep Ms. Matthews informed of progress. His expressed attitude for his failures to respond and limited provision of information was: “I was still on leave and there were no updates”.

[84] In his closing submissions Mr. Pointon made the important point that Mr. Singh as a manager in the housekeeping department was in a position of trust.⁷⁶ Given his position of responsibility a higher expectation was required of Mr. Singh to keep management informed of his progress and any delays he experienced while he was overseas.

[85] Given the circumstances when his leave of absence was approved, he was required to periodically explain what was happening, particularly where there were significant delays. There were significant gaps in his contact with Ms. Matthews (one of which was eleven days) and the text messages show on many occasions Ms. Matthews had to initiate contact to elicit a

response from Mr. Singh. On my assessment he did not provide sufficient or regular enough information on his progress or the delays he was experiencing.

[86] I am satisfied he was derelict in his duty to keep his employer informed. I am not however, satisfied that Mr. Singh was consciously dishonest. At best he could be seen to have dissembled by omission. To my mind “I was on leave and there were no updates” does not “cut it”. I agree with Imagine that he did not give sufficient information at sufficient regularity in circumstances where Imagine had shown largesse in granting him time off to pursue something that was important to him during a peak occupancy period for Imagine.

Was Mr Singh’s conduct in not keeping his manager adequately informed serious misconduct justifying summary dismissal?

[87] I am not satisfied that Mr. Singh was wilfully dishonest. The question then is whether a failure to provide sufficient information at sufficient regularity is serious misconduct justifying summary dismissal. Mr. Singh was dismissed without notice.

[88] Serious misconduct is defined in *Fair Work Regulation 1.07* as “conduct that is wilful and is inconsistent with the continuation of his conduct of employment”. Serious misconduct includes “theft, fraud, assault, sexual harassment and the refusal to carry out lawful and reasonable instructions consistent with the employment contract.”

[89] I do not think his dereliction in his duty to inform his employer reaches the level of a repudiatory breach of his employment contract sufficient to justify a summary dismissal.

Reason related to unauthorised travel in 2023

[90] Imagine relies on conduct disclosed by documents in this proceeding that Mr. Singh had taken a holiday in Korea and Japan from 25 September to 5 October 2024. He only missed one rostered shift during that period on the weekend of 30 September 2023 to 1 October 2023.

[91] Imagine relies on the evidence of Mr. Dardenne that Mr. Singh “wilfully and untruthfully stated his position and reason he was unavailable to his manager and to Imagine.” Mr Dardenne claims Mr. Singh had told him he was unavailable due to an event of his sister in Melbourne on 29 September to 1 October. Mr Dardenne claims “There were a number of exchanges in that period, and I have as part of my statement provided copies of all text message exchanges during this period...”⁷⁷

[92] The texts he attaches to his statement in relation to this issue are equivocal. They are as follows:

MR. SINGH: I wanted to say that I really cannot make it on Saturday. It is a very special occasion for my sister here in Australia, and I will be attending it along with my family. I am able to come back to work on Sunday.

MR. DARDENNE: From my understanding, you informed me and Anu that your family (sisters event) was last long weekend (the weekend that just past). I’m confused as to how the event is now suddenly coming on Saturday the 7th October?

MR. SINGH: I believe there has been some confusion. Last weekend was when they arrive in Australia., the event will actually be held on 7th October.

[93] The earlier exchange which gave rise to the “confusion” has not been produced. At best the text messages establish a contest as to the effect of Mr. Singh’s earlier communication with Mr. Dardenne. This is an insufficient basis for establishing dishonesty as a reason for the dismissal.

[94] There is also an allegation that Mr. Singh was dishonest in that he claimed sick leave for the weekend of 30 September 2023 to 1 October 2023 while he was overseas.

[95] Once again Imagine relies on the evidence of Mr. Dardenne. In his oral evidence Mr. Dardenne stated that on 29 September 2023, Mr. Singh had “called in sick to the housekeeping manager” and said he couldn’t come in on the weekend of Saturday 30 September and 1 October⁷⁸. Mr Dardenne stated he “covered the shift on Sunday, 1 October⁷⁹” Mr. Singh could not recall what he said in the conversation with the housekeeping manager on 29 September 2023.⁸⁰

[96] Imagine relies on hearsay evidence of Mr. Dardenne that the housekeeping manager had been informed by Mr. Singh that he was “sick” on the weekend. This is the evidence on which Imagine relies to make its case of wilful dishonesty on the basis that Mr. Singh is alleged to have lied and took a “sickie” to cover the fact he was overseas. Mr. Singh could not recall the conversation with the housekeeping manager. This evidence is not sufficient to make a finding of wilful dishonesty on the part of Mr. Singh and cannot be relied on as a basis to find there was a valid reason for the termination.

Reason related to the Marijuana allegation

[97] There is no contest on the evidence that Mr. Singh took possession of a bag of marijuana left by a guest. He was working on reception at the time when a call came in from a guest who had checked out of the hotel and informed a manager that he had left behind some lost property. Mr. Singh went up to the room and retrieve it.

[98] Mr. Cheryot, a room attendant who gave evidence in this proceeding, stated in his witness statement that “Recognising the seriousness of the situation, I followed protocol and handed the bag over to Jagdeep, who took it to the reception.”⁸¹

[99] There is a contest as to what happened next. Mr. Singh’s evidence was he went back down to reception and gave the bag to Ms. Maggie Lee. Ms. Lee gave evidence that at “no time was a bag handed to [her] by the Applicant and particularly a bag that contained a quantity of marijuana”.⁸²

[100] The evidence establishes that Mr. Singh took possession of the marijuana but there is a contest as to what happened to it. In so far as possession of marijuana may be (depending on the quantity) a criminal offence the quality of proof required to meet the balance of probabilities is higher.

[101] The approach to be taken for allegations of criminal conduct in a civil proceeding was expressed in *Briginshaw*⁸³:

“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.”⁸⁴

[102] The contest on the evidence on what Mr. Singh did with the bag of marijuana is the subject of a direct conflict between his evidence and the evidence of Ms. Lee. This is precisely the form of inexact proof of which the High Court warned in *Briginshaw*. Applying the *Briginshaw* test on a balance of probabilities I cannot find that this allegation supports a finding that there was a valid reason for the dismissal.

[103] Given the nature of the allegation and the evidence I cannot be satisfied that the allegation “goes against Mr. Singh’s credit and further substantiated wilful and deliberate conduct” as argued by Imagine.

Was there a valid reason for the termination of Mr. Singh under s387(a)

[104] A reason for dismissal:

- “Must be sound, defensible and well founded⁸⁵”
- Must not be “capricious, fanciful, spiteful and prejudiced⁸⁶”
- Must be defensible or justifiable on an objective analysis of the relevant facts⁸⁷

[105] I cannot find Mr. Singh “wilfully and untruthfully stated the r reason he was unavailable to his manager” in relation to his trip to Korea and Tokyo in 2023. He missed one shift and the evidence about what Mr. Singh said to management about his absence is inadequate. It therefore cannot be a sound and defensible reason for his termination.

[106] Similarly, the marijuana allegation goes nowhere. There is a conflict of evidence as to what he did with the lost property marijuana bag which I cannot resolve. Therefore, that conduct cannot be defensible or justifiable on an objective analysis of the facts, particularly through the lens of the *Briginshaw* test.

[107] Given the consequences of the delay for Imagine, the largesse shown by his employer to give him a leave of absence at a time of peak occupancy, together with his failure to respond quickly when he was told by text that Imagine was “short staffed” and to keep Ms. Matthews “posted” justifies the decision to dismiss him.

[108] The decision to dismiss Mr. Singh based on the dereliction of his duty to keep his employer sufficiently informed with sufficient regularity was sound, defensible and justifiable on an objective analysis of the facts. I therefore find there was a valid reason for his dismissal.

[109] The failure to provide adequate information was a valid reason. The conduct for which he was terminated however did not reach the level of serious misconduct. It follows the decision to dismiss Mr. Singh without notice was a disproportionate response and was therefore harsh.

Was Singh notified of that reason under s387(b)

[110] Mr. Singh was called into a meeting on Monday morning with three managers. He was not informed before the meeting that his employment was in jeopardy. He was asked to explain the delay. He was then later that afternoon sent a letter terminate his employment.

[111] The process does not require any formality and is to be applied in a common-sense way to ensure the employee is treated fairly⁸⁸. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and had a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section.⁸⁹

[112] The process used to bring about this dismissal was perfunctory. Mr. Singh entered the meeting without being told that his employment was in jeopardy. He was asked a series of questions. The meeting took between ten and fifteen minutes. After the meeting he was sent a termination letter. On my analysis this falls short of a full opportunity to respond to the concerns over the delay on his return.

Any unreasonable refusal to allow Mr. Singh to have a support person present to assist in discussions under section 387(d)

[113] Mr. Singh was told by text to come to a meeting. At no time was he informed his employment was in jeopardy. He was never offered an opportunity to have a support person present at that meeting.

If the dismissal was for unsatisfactory performance whether Singh had been warned

[114] The dismissal was related to his failure to communicate while he was on a leave of absence and was not related to his performance of his duties at the hotel. This factor is therefore neutral on the question of harshness.

The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal under s387(f)

[115] No evidence was before me as to the size of the workforce employed at Imagine Hotels. I was not directed to any procedure manuals in relation to disciplinary procedures or warning processes.

[116] In a hospitality business which includes several hotels it is expected that there would be some written procedures to deal with disciplinary processes particularly involving dismissals. The process used in this case does not meet the standards one would expect of a business of this size.

The degree to which the absence of dedicated human resource management specialists would likely impact on the procedures under 387(g)

[117] Ms. Matthews, the person who effected this dismissal holds a dual role as the Chief Operating Officer and General Manager - People⁹⁰ a position she held for fifteen months.⁹¹ Although she holds a dual role, her position as the General Manager – People can be described as a dedicated human resource management role. Imagine cannot expect a dispensation in this case because of the absence of a dedicated human resource specialist. The business has a manager responsible for human resource matters.

FINDING ON HARSH, UNJUST AND UNREASONABLE

[118] There was a valid reason for the dismissal in this case but the decision to dismiss Mr. Singh without notice for serious misconduct was disproportionate and therefore harsh.

[119] The process used for the dismissal was not fair or reasonable. Mr. Singh was not given notice that his employment was in jeopardy before the 26 February meeting. He was not given an opportunity to have a support person at that meeting. Following that meeting a decision was made to terminate him and a letter issued terminating his employment without any further input from him. He was then sacked without notice which I have found to be disproportional and therefore, not fair. I find the dismissal in this case was harsh, unjust and unreasonable under s 385(b).

ASSESSMENT OF COMPENSATION

[120] In his application Mr. Singh sought reinstatement or compensation as a remedy but reinstatement was not pressed in the hearing of the matter. Imagine has stated it has lost trust and confidence in him as an employee. I am satisfied reinstatement is not an appropriate remedy. Therefore, an assessment must be made of the appropriate compensation.

Method of assessment

[121] Section 392(2) requires all the circumstances of the case be considered when determining an amount to be paid as compensation in lieu of reinstatement. That subsection includes a list of circumstances I am required to take into account. What follows is my assessment of the amount of compensation against each of the factors prescribed in s 932.

[122] In the process of the analysis below I have sought to apply the Sprigg formula as it is expressed in *Bowden v. Ottrey Homes Cobram and District Retirement Villages*⁹². The steps in the Sprigg formula (which I apply in my analysis below) are:

- **Step One:** Estimate the remuneration Mr. Singh would have received or have been likely to have received had the employer not terminated him.
- **Step Two:** Deduct monies earned since termination. The failure to mitigate loss may lead to a deduction in the amount of compensation ordered.
- **Step Three:** Discount for Contingencies.
- **Step Four:** 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 employment.

Matters Under S392

Viability of the employer's business [s392(2)(a)]

[123] Imagine did not provide any evidence or submissions that an order of compensation to Mr. Singh would impact on its business. I do not take this factor into account.

The length of Mr. Singh's service with Imagine [392(2)(b)]

[124] Mr. Singh's employment with Imagine was from 25 July 2022 until 26 February 2024, just over one year and seven months. The relatively short length of employment justifies a discount on the compensation that is awarded in this case. I will discount two months from the assessment of remuneration I make below.

The remuneration Mr. Singh would have received or would likely have received if he was not dismissed [392(2)(c)]

[125] Based on the material before me I estimate that Mr. Singh would have remained employed for six months. I am therefore required to assess the remuneration he would have received had he remained in the employed that period.

[126] There is a dispute between the parties as to the relevant remuneration for this assessment. From November 2023 Mr. Singh moved to a part-time employment with an ability to pick up additional casual shifts on the front desk.

[127] Imagine argue I should calculate remuneration based on the 8 hours per week he was required to work under his permanent part-time arrangement which was at a wage of \$26,682.00 per annum. Imagine argue it had no obligation to provide casual work and therefore remuneration received in casual shifts should not be part of my assessment.

[128] Mr. Singh argues that "I was getting a good amount of hours at the front desk as well as his part-time work". He argues "based on my payslips from November 2023 the total average hours I worked was 56 hours per fortnight". He estimated he was earning an average of "\$2,296.00 per fortnight⁹³" or \$1,148.00 per week.

[129] From my examination of his payslips Mr. Singh was regularly performing casual shifts as well as the permanent part time work. I accept the estimate Mr. Singh provided on his fortnightly pay considering both his casual shifts as well as his permanent part-time shifts.

[130] The total remuneration Mr. Singh would have received over twenty-six weeks would have been \$29,848. With the discount for his short length of service of two months, that amount is reduced to 16 weeks total remuneration. I therefore calculate the amount to be \$18,368.00 gross (that is \$1,148.00 x 16 weeks).

The efforts of Mr. Singh mitigate his loss [s392(2)(d)]

[131] Mr. Singh made efforts to mitigate his loss. He was unemployed for three weeks from 26 February 2024 until 12 March.

[132] From 12 March 2024 until 1 July 2024, he was employed by Quest apartments as a guest service agent at a fortnightly salary of \$1,346.00 gross per fortnight or \$673.00 per week (which was \$950.00 less than \$2,296.00 per fortnight he was receiving at Imagine).

[133] From 1 July 2024 Mr. Singh was employed by an enterprise called Hamilton first as a casual and then as permanent part-time. In the hearing Mr. Singh estimated he was receiving a gross payment of \$960.00 dollars a week in that job.

Remuneration earned and income reasonably likely to have been earned [s392(2)(e) and (f)]

[134] As can be seen from my analysis of Mr Singh's efforts to mitigate his loss he was employed by Quest from 12 March 2024 until 1 July 2024 (sixteen weeks) during which he earned an average fortnightly salary of \$1346 or \$673 per week. I calculate the total gross remuneration he received in that employment was \$10,768 (673 x 16)

[135] Accordingly, the calculation of compensation is adjusted as follows:

- a) \$18,368.00 (gross earnings in the six months period after Mr. Singh's dismissal minus two months for his short service. That is, sixteen weeks gross earnings.
- b) Less \$10, 768.00 (earnings by the Mr. Singh for the 16 weeks between 12 March 2024 to 1 July 2024)
- c) Subtotal: \$7,600.00

[136] This calculation is intended to put Mr. Singh in the position he would have been but for his unfair dismissal (with a discount for his short service).

Any other matter the Commission considers relevant [392(2)(g)]

[137] I have found there was a valid reason for the dismissal of Mr. Singh. He knew or ought to have known the steps Imagine had to take to cover his absence in circumstances where the occupancy of the hotel was in peak demand.

[138] The management of the hotel had done him a favour by allowing him time off to get his passport and visa in order. That favour was not repaid by him. Mr. Singh did not feel it necessary to regularly inform management of delays in the process, or his full travel itinerary. On many occasions Ms. Matthews had to prompt a response from him. Mr. Singh was culpable in the circumstances which lead to his dismissal.

[139] Given his culpability it is appropriate to discount the compensation payable by a further three weeks. On Mr. Singh's assessment he earned on average \$2,296.00 a fortnight which is \$1,148.00 a week. I deduct a further three weeks from the compensation payable which leaves a gross amount of \$4,156.00 (that is \$7,600.00 minus \$3,444.00).

Misconduct [392(3)]

[140] There was insufficient evidence to support a finding of misconduct for either Mr. Singh's failure to inform Imagine of his 2023 Korea/Japan holiday or the marijuana allegation. In a strict sense his failure to provide information can be characterised as misconduct in that he did not adequately inform his employer when he would return to work. As I have made a deduction for this conduct under "other matters" I make no deduction for this factor.

Shock and distress to be disregarded [392(4)]

[141] The amount of compensation does not include a component for shock, humiliation and distress.

Compensation Cap [392(5) and (6)]

[142] The gross amount of \$4,156.00 is less than the compensation cap of 26 weeks' pays. No further adjustment is necessary.

Application of Step 4 of *Sprigg* with respect to tax

[143] I have considered the impact of taxation but have elected to settle upon a gross amount of \$4,156.00. I leave taxation for determination in accordance with applicable taxation legislation.

Assessment of the compensation amount in all the circumstances

[144] I am required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case". On the basis of my reasons for the assessment of compensation I have provided I am satisfied the amount of compensation that considers all the circumstances as required by s 392(2).

CONCLUSION

[145] I have found the dismissal of Mr. Singh on 26 February was harsh, unjust and unreasonable and that compensation is an appropriate remedy. I am satisfied that the compensation figure arrived at in this case does not yield an amount that is clearly excessive or inadequate.

[146] I am also satisfied that a remedy of compensation in the sum of \$4,156.00 gross in favour of Mr. Singh, along with the payment of superannuation on that amount is appropriate in all the circumstances of this case. An Order to that effect will issue with this decision.



COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR781060>

¹ A screen shot of this letter was included in material Mr. Singh had filed as closing submissions.

² Digital Court Book (DCB) at page 10.

³ PN103 to 105.

⁴ PN346 to 350.

⁵ PN106 to 109.

⁶ DCB at 104 to 105.

⁷ DCB at 106.

- ⁸ PN1040 to 1042.
- ⁹ PN1068.
- ¹⁰ PN 1072 to 1073.
- ¹¹ DCB at 13.
- ¹² DCB at 27.
- ¹³ DCB at 28.
- ¹⁴ DCB at 32.
- ¹⁵ DCB at 45.
- ¹⁶ PN184.
- ¹⁷ DCB at 119 – 121.
- ¹⁸ DCB at 121.
- ¹⁹ PN431.
- ²⁰ PN126 to 129.
- ²¹ This was filed with the closing submissions of Mr. Singh.
- ²² DCB at 38.
- ²³ PN446.
- ²⁴ PN459 – 462.
- ²⁵ PN464 - 470
- ²⁶ DCB 51 – written statement of Ms Kaur
- ²⁷ Mr Singh confirmed this in his oral evidence at PN 167
- ²⁸ DCB at 32.
- ²⁹ DCB at 45.
- ³⁰ DCB at 12.
- ³¹ DCB at 134.
- ³² PN1358.
- ³³ PN216 to 224.
- ³⁴ DCB at 114 and 115.
- ³⁵ PN 1194-5.
- ³⁶ PN137.
- ³⁷ DCB at 130-132.
- ³⁸ PN284 and 287.
- ³⁹ PN287.
- ⁴⁰ DCB at 117 Statement of Matthews at paragraph 53.
- ⁴¹ PN289 to 291.
- ⁴² PN298 to 307.
- ⁴³ DCB at 143 to 146.
- ⁴⁴ PN148 – 149.
- ⁴⁵ PN1870-1874.
- ⁴⁶ PN1894.
- ⁴⁷ PN1917.
- ⁴⁸ PN1899-1901.
- ⁴⁹ DCB at 117 Statement of Matthews.
- ⁵⁰ DCB at 12.
- ⁵¹ PN312-314.
- ⁵² DCB at 170-1.
- ⁵³ DCB at 238.

⁵⁴ Ibid.

⁵⁵ PN1591 - 1603.

⁵⁶ DCB at 172.

⁵⁷ DCB at 145-6.

⁵⁸ DCB at 137.

⁵⁹ DCB at 88-89.

⁶⁰ DCB at 98.

⁶¹ Ibid.

⁶² DCB at 105.

⁶³ PN103.

⁶⁴ DCB at 13.

⁶⁵ DCB at 14.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ DCB at 15.

⁶⁹ Ibid.

⁷⁰ DCB at 16.

⁷¹ He asserted without evidence that the indirect flights were cheaper.

⁷² PN190 - 191.

⁷³ PN431.

⁷⁴ PN339.

⁷⁵ PN106-107.

⁷⁶ PN2313.

⁷⁷ DCB at 144.

⁷⁸ PN1870 - 1874.

⁷⁹ PN1894.

⁸⁰ PN1917.

⁸¹ DCB at 171.

⁸² DCB at 146.

⁸³ [1938] 60 CLR 34.

⁸⁴ Ibid at pp. 362-3.

⁸⁵ *Selvachandran* (1995) 62 IR 371 at 373.

⁸⁶ *Rode v. Burwood Mitsubishi* Print R4471 at paragraph 19.

⁸⁷ *Miller v. University of NSW* [2003] FCAFC 180 at paragraph 13.

⁸⁸ *RMIT v. Asher* [2010] FWAFB 1200 at paragraph 26.

⁸⁹ Ibid at paragraphs 14 and 15.

⁹⁰ DCB at 103.

⁹¹ PN988.

⁹² [2013] FWCFB 431.

⁹³ Closing submissions of Mr Singh dated 9 July 2024 – third unnumbered page under the heading “Compensation”