DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Ana Maria Gracioso Martins
v
Wallace Medical Systems Pty Ltd
(U2024/10019)

COMMISSIONER WILSON MELBOURNE, 3 JANUARY 2025

Application for an unfair dismissal remedy

[1] This decision concerns an application for an unfair dismissal remedy made to the Fair Work Commission (the Commission) by Ms Ana Maria Gracioso Martins, in relation to the ending of her employment with Wallace Medical Systems Pty Ltd, trading as Biolink. In her application, Ms Martins claims that she was dismissed, with the meaning of that term being defined by s 386 of the *Fair Work Act 2009* (FW Act), as well as putting forward that her dismissal was unfair.

[2] The respondent argues against Ms Martins' application putting forward that there has been no dismissal and that her departure from employment was consistent with the Small Business Fair Dismissal Code. The submissions made by the respondent did not materially address the question of whether her dismissal was unfair in the event that the Commission found Ms Martins' termination of employment was a dismissal.

[3] Section 396 of the FW Act requires the determination of four initial matters before consideration of the merits of the application. Those matters are, whether the application was made within the period required in s 394(2) of the FW Act, whether the person was protected from unfair dismissal, whether the dismissal was consistent with the Small Business Fair Dismissal Code, and whether the dismissal was a case of genuine redundancy. In relation to the elements within s 396, I find that Ms Martins' application was lodged with the Commission within the 21-day period for making such applications and that, at the relevant time she was dismissed, she was a person protected from unfair dismissal and that the dismissal was not a genuine redundancy.

[4] It is necessary though to consider whether because of the respondent's size whether, if Ms Martins was dismissed, such dismissal was consistent with the Small Business Fair Dismissal Code.

[5] Having had regard to ss 397, 398, and 399 of the FW Act and having consulted with the parties, I conducted a determinative conference about these matters on 15 November 2024, at

which Ms Martins appeared and gave evidence for herself. Ms Alina Ytong Tang, a director of the respondent appeared and gave evidence for Biolink.

[6] After consideration of the various contentions of the parties as well as material in evidence before me I find that Ms Martins was dismissed; that the Small Business Fair Dismissal Code has no application to her circumstances; that she was unfairly dismissed; and that an award of compensation should be made to Ms Martins.

BACKGROUND

[7] Ms Martins commenced employment with Biolink on 3 October 2022 in the capacity of Medical Product Engineering Scientist and she was promoted to the position of Senior Medical Product Engineering Scientist in March 2023. Ms Martins is qualified with a PhD and at the time she finished working for Biolink she was remunerated on a salary of $160,000 per year plus superannuation at the statutory rate of 11.5% after 1 July 2025.

[8] Since the sum of Ms Martins' salary and superannuation is above the high income threshold it is necessary to consider whether she is nonetheless a person protected from unfair dismissal.

[9] Ms Martins' original contract of employment specified her employment was covered by the *Professional Employees Award* 2010.[1] Whereas the position description for the position of Senior Medical Product Engineering Scientist makes no reference to award coverage the respondent does not argue the position was not award covered. Perusal of the two position descriptions does not suggest her final duties had moved so significantly as to mean she did not continue to be award covered. Accordingly, a finding is available to the Commission that Ms Martins was at the time her employment ended, a person protected from unfair dismissal.

[10] Both parties acknowledge that during the period of Ms Martins employment the respondent was small, with it having few employees both directly employed or employed in two other companies which are part of the same ownership group. Whether or not the other companies are associated entities within the meaning of s 12 of the FW Act and their employees require being counted for the purposes of ascertaining whether the respondent was a small business employer within the meaning of s 23 of the FW Act is not necessary to determine. This is since the evidence demonstrates that Wallace Medical Systems, the entity which runs Biolink, only employed one or two people at the time Ms Martin's employment ended,[2] and Wallace Building Systems only had 1 employee, and a further entity, DOJO 1 had 2 employees.[3]

[11] Ms Martins disputes that she was the only employee of the respondent in October 2024 when her employment ended arguing that a person known as either James or Andrew Sackl was also an employee of the business. She says that she reported directly to Mr Sackl since the downsizing of Biolink in late May 2023.[4] Several items of correspondence from Ms Martins to the respondent were sent by her to an email address with the prefix 'james.s'. She also says that Mr Sackl featured throughout an extended Slack chat under the pseudonym of 'NextGen'.

[12] Ms Tang says that she is married to Mr Sackl and that his involvement in the respondent's business is as a volunteer.[5] However Ms Tang, she does not directly dispute that Ms Martins reported to Mr Sackl. Further the documentary evidence before the Commission

would suggest that Mr Sackl had anactive involvement in the business, communicating with Ms Martins and others on behalf of the business on numerous occasions.

[13] Starting in June 2024, Biolink stopped paying Ms Martins for the work she performed. Ms Martins' evidence is that she was not paid at all for work in June, July and August 2024. Further, she says that "payments of wages had been continuously delayed in the months prior".[6] When she checked her superannuation account at the end of July2024 she found no superannuation had been paid to her account by Biolink since April 2023.[7]

[14] On Ms Tang's evidence the viability of the business has been impacted by a dispute Biolink has with the Australian Taxation Office (ATO) about payments due to the company. The respondent's Employer Response Form, the Form F3 outlines the dispute thus;

> "Ms. Martins was employed by Biolink from October 1, 2022, and contributed significantly to key projects, including an important submission to the Australian Taxation Office (ATO) and Ausindustry relating to a $5.7 million R&D tax refund the group is due. Due to cash flow constraints caused by a significant delay in the processing of this refund—now exceeding 12 months—we experienced financial difficulties, which regrettably led to Ms Martin's final two months' wages being delayed."[8]

[15] On 9 August 2024, Ms Martin spoke with Ms Tang and Mr Sackl about her employment concerns. In that conversation she told them that she was thinking of resigning because of the pressing financial difficulties caused by not being paid;

> "MS MARTINS: Yes, I said that, given that I hadn't been paid for June, the whole of June, the whole of July, and it was already August, and I was struggling to pay my rent and I had already almost maxed my credit card, that I had to - I had to leave, I just had to leave, and because I did my job well and I thought if I could work for them as a contractor and still keep a link with them, a friendly, agreeable link, that that would make it more likely for me to be in good terms with them and be paid for what they owed me. So that's what we talked about, and then I sent the letter on that same day.
>
> THE COMMISSIONER: You said in that meeting that you were thinking of leaving and that was because you hadn't been paid?
>
> MS MARTINS: That's right.
>
> THE COMMISSIONER: Did they have any response to that proposition?
>
> MS MARTINS: They said they understood my position and that if I could become a contractor, we'd for sure continue working together and that would be - that would be fine."[9]

[16] Ms Martins also gave evidence that Ms Tang and Mr Sackl were positive about the prospect of her working for Biolink as an independent contractor, stating they "were positive and supportive of the idea because they're very entrepreneurial and they were encouraging of me becoming a business owner."[10]

[17] After her conversation with Ms Tang and also on 9 August 2024, Ms Martins resigned from her employment with Biolink when she provided to Ms Tang and the email address 'james.s' a letter with the following content;

> "Dear Alina,
>
> I am formally resigning from my position as Senior Medical Product Engineering Scientist (Biolink) at Wallace Medical Systems, effective immediately. This decision is due to the non-payment of my superannuation contributions from May 2023 to present, as well as the non-payment of my wages for June and July 2024 to date.
>
> I appreciate the opportunities and experiences gained during my employment at Wallace Medical Systems and am committed to ensuring a smooth transition. I will work on a handover plan to facilitate this process.
>
> Thank you for the opportunity, and I wish Wallace Medical Systems continued success.
>
> Best regards,
> Ana Maria Gracioso Martins"[11]

[18] I take from this letter and the evidence generally that the date of effect of the end of Ms Martins was Friday, 9 August 2024.

[19] Several events after Ms Martins' employment ended required noting as well.

Proposal to work as an independent contractor

On 19 August 2024, Ms Martins proposed to Ms Tang that Biolink retain her services as an independent contractor through a service company run by her brother. She provided for Biolinks' consideration a proposed general service agreement. The proposal suggested an engagement broadly for the provision of 'Regulatory Support, Product Development Support, and Scientific Consulting'[12] however the proposal was made contingent upon Ms Martins being paid "all my wages, annual leave, and superannuation contributions."[13] Ms Tang's evidence on the subject includes that "Ana voluntarily pursued a contractor status post-resignation to claim Centrelink benefits immediately."[14]

Letter of Demand

[20] On 23 August 2024, Ms Martin sent a letter of demand to the respondent requesting the immediate payment of her outstanding wages, superannuation leave entitlements. The letter claimed payment of a total of $69,298.91, to be paid within 7 days;

> **"Re: Letter of Demand for Payment of Outstanding Wages, Superannuation, and Leave Entitlements**
>
> Dear Alina,

I am writing to formally request the immediate payment of all outstanding amounts owed to me in connection with my employment with Wallace Medical Systems from 03 October 2022 to 09 August 2024.

Despite numerous attempts to resolve these issues informally, the following payments remain outstanding: Senior Product Development Engineering Scientist | Reference salary $160,000.00 P.A., plus Super.

a. Wages:

i. Month of June, remaining amount (Gross): **$12,333.33**
ii. Month of July, remaining amount (Gross): **$13,333.33**
iii. 1st – 9th August, remaining amount (Gross): **$3,870.97**

b. Annual leave:

i. Last payslip issued May 2024: 185.5954 hours accrued since 03 October 2022 ii. June 2024: 12.67 hours
iii. July 2024: 12.67 hours
iv. 1st - 9th August 2024: 3.74 hours
v. Total accrued annual leave hours: 214.6754 hours
vi. Total amount of annual leave owed (Gross): **$17,382.27**

c. Superannuation contributions:

i. Last contribution was in April 2023
ii. Months owed: May 2023-August 2024
iii. Superannuation rate from July 2022 – June 2023: 10.5%
iv. Superannuation rate from July 2023 – June 2024: 11.0%
v. Superannuation rate from July 2024 – June 2025: 11.5%
- Total Superannuation from May 2023 to June 2023: $2,800.00
- Total Superannuation from July 2023 to June 2024: $17,600.00
- Total Superannuation for July 2024: $1,533.33
- Total Superannuation for August 1st - 9th, 2024: $445.68
- Total Superannuation Owed (Gross): **$22,379.01 + interest**

Total amount owed as of 23rd of August 2024: **$69,298.91 (Gross) + interest**

Please be advised that if the full payment of the amounts due is not received within seven days of the date of this letter, I will commence legal proceedings to recover the money without further notice.

I trust that this matter can be resolved promptly without the need for further action. Thank you for your attention to this matter.

Sincerely,"

[21] Ms Tang responded to the correspondence the same day, explaining an inability to make immediate payment;

> "Hey Ana
>
> Thank you for your email
>
> understand company 's situation affecting your life , I'm grateful you had been sticked around since big team left . It isn't an easy year , and our finance situation is getting worse and worse while R&D refund been holding for a year now
>
> We never intended to owe anyone any money . We sold everything belong to our personal, and withdrew our children 's education funds from their acc to put to the company and last $ from our acc we put into business keep the business run after the big team left . Now , I'm not afraid to let you know how bad it is .we have been struggled to put food on the table for our kids recently. The latest time the $ you got that's all we had put together to make sure you at least have some food on the table . Whenever customers paid , we paid your salary first , as Jin always say , he can wait , pay you first, although you were not paid on time , but we tried our best
>
> This really not the situation anyone planned to be in , I certainly not enjoy it
>
> Anyway , only chance you can get paid in 7 days is R&D refund processed in 7 days or department of health can pay us in 7 days
>
> I'm so sorry I can not offer you anything at this moment , I hope I can send government demand letter let them to pay us immediately
>
> However , like I mentioned to you before
>
> If any clients pay us , we would pay you something when funds in , it will be paid off before R&D refund processed. Given some pharmacies started receiving goods, we will get paid soon
>
> Re your super etc , when tax return processed , ATO would deduct funds before they refund us , so will 100% be paid when R&D processed
>
> Re the interests, regardless you are entitled to charge us interests or not . When the date you resigned , james and myself all agreed even though you left , we will still pay you bonus for thank you supported while we were at hardest time, as some people would step us down , left us straight away .but you would never do that to us . Hence we appreciated your trust and supports
>
> You have my number you are always welcome to call if you want to know why update
>
> Regards
>
> Alina"[15]

Job advertising by Biolink

[22] On 11 September 2024, Ms Martin's noticed advertising by Biolink on LinkedIn recruiting for a position which she believed was "a similar but lower-paying position to replace my role."[16] The advertisement she saw was for the position of 'Biomedical Researcher,' with this description;

> "Biolink is seeking a highly motivated and experienced Biomedical Researcher to support the development of a new product line through the creation of a comprehensive correlation matrix. The ideal candidate will have a deep understanding of biology, experience in biomedical research, and a strong ability to leverage advanced technologies to establish meaningful correlations for our users.
>
> This will be a fixed-term contract with opportunity for long-term engagement upon the candidates' successful completion of the fixed period.
>
> Key Responsibilities:
>
> - Collaborate with project stakeholders, including software engineers, to define and plan the unique aspects, feature milestones, and scope of capabilities for our biomarker testing technologies.
> - Design and execute research initiatives to verify and expand the testing capabilities of Biolink's wellness products.
> - Partner with software engineers to integrate research findings and identified correlations into a companion mobile application for Biolink's test products.
> - Identify potential issues, risks, and gaps in current research and testing technologies, and develop actionable strategies to address these challenges.
> - Produce clear, educational, and engaging writing based on research findings and product features for presentation within the Biolink mobile app.
>
> Qualifications:
>
> - Proven access to and familiarity with scientific research papers and databases.
> - A strong background, experience, or a relevant degree in biomedical research, biology, or a related field.
> - Proficiency in utilizing cutting-edge technologies to support and accelerate research and development activities.
> - Excellent communication skills, with the ability to translate complex biomedical concepts into accessible, informative content for a diverse audience.
>
> What We Offer:
>
> - An opportunity to work on innovative projects at the intersection of biology and technology.
> - Collaboration with a dynamic, interdisciplinary team dedicated to improving wellness through advanced research and product development.

- A chance to shape the future of Biolink's products and directly impact the user experience with our testing technologies.

Join us at Biolink and help bridge the gap between cutting-edge research and realworld wellness solutions.

Please email your application to james.s@biolink.net.au"

[23] The respondent's Employer Response Form, the Form F3, contends the advertised position is not comparable to the role left by Ms Martins; it is lower paid; has substantial differences in job roles and responsibilities; and is a fixed term contract position. [17]

WAS THE APPLICANT DISMISSED?

[24] The term 'dismissed' is defined in s 12 of the FW Act by reference to s 386, which provides this definition:

"**386 Meaning of dismissed**

(1) A person has been ***dismissed*** if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been ***dismissed*** if:

(a) The person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement; and the employment has terminated at the end of the training arrangement; or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

Section 386(1) considerations – whether dismissed at the initiative of the employer or Applicant forced to resign

[25] Section 386(1) is in the terms set out above, providing the primary definition of the term 'dismissed.' That primary definition allows for two alternatives; situations in which an employee's employment has been terminated on the employer's initiative (s 386(1)(a)) and circumstances in which an employee has resigned but was forced to do so because of conduct, or a course of conduct, engaged in by their employer (s 386(1)(b)).

[26] After an extensive analysis of the law surrounding s 386(1), the Full Bench in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*,[18] (Bupa) held that the Commission needed to distinguish whether it was argued the dismissal was not legally effective, such as for reason of a "heat of the moment" communication or incapacity of some kind or whether it had been "forced" through conduct or a course of conduct by the employer with an intentional purpose of procuring a resignation. There is no submission to me in these proceedings that Ms Martins left Biolink's employment through "heat of the moment" actions.

[27] The actions of an employer in relation to a termination of employment are not the only points of consideration. It is also necessary to consider the circumstances giving rise to the termination; the seriousness of the issues involved; and the respective conduct of the employer and employee.[19]

[28] Assessment of Ms Martins' contention is assisted by the summary of the general principles laid out by Deputy President Hampton in *Tao Yang v SAL HR Services Pty Ltd* (Tao Yang)[20], noting that not all of the summarised principles are relevant to whether there was a forced resignation:

"• The question as to whether there was a dismissal within the meaning of the FW Act is a jurisdictional fact that must be established by the Applicant;

- A termination at the initiative of the employer involves the conduct (or course of conduct) engaged in by the employer as the principal constituting factor leading to the termination. There must be a sufficient causal connection between the conduct and the resignation such that it "forced" the resignation;

- The employer must have engaged in some conduct that intended to bring the employment relationship to an end or had that probable result;

- Conduct includes an omission;

- Resignations that are clear and unambiguous may be treated on face value unless special circumstances are present which warrant the employer confirming the intention of the employee;

- Considerable caution should be exercised in treating a resignation as other than voluntary (forced) where the conduct of the employer is ambiguous and it is necessary to determine whether the employer's conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign; and

- In determining the question of whether the termination was at the initiative of the employer, an objective analysis of the parties' conduct is required."[21]

[29] By 9 August 2024, the date on which Ms Martins' employment ended, she had not been paid for two months and had not been paid superannuation contributions for more than a year, yet she had kept working during that period, and importantly for the two months in which she was aware she had not been paid.

[30] A fundamental aspect of any contract of employment is that in return for an employee's labour, the employer pays wages in accordance with other parts of the contract, an award or an enterprise agreement. Ms Martins' original contract of employment for the position of Medical Product Engineering Scientist provided that she was to be paid monthly in arrears through a credit to her bank account on the 30th day of each month. A written contract referable to the position she held at the end of her employment, that of Senior Medical Product Engineering Scientist, is not before me. The original contract acknowledges the *Professional Employees Award 2020* as the "relevant award" but does not prescribe the regularity with which payments must be made. The Award also does not prescribe the regularity of payments of wages, however the FW Act does. Section 323(1)(c) prescribes that an employer must pay amounts payable to an employee in relation to the performance of work at least monthly. It may be taken from this situation that Biolink was obliged to pay Ms Martins at least monthly while engaged as Senior Medical Product Engineering Scientist.

[31] The respondents' advertising for new staff after Ms Martins left her employment could suggest that it had no intention of ending her employment; however an inference of that type does not overcome the fact that Ms Martins had not been paid for some time. From Ms Martins' perspective Biolink had benefited from her work without payment for two months and she was entitled to make decisions about her employment in the light of that knowledge. No inference should be drawn from the job advertisements placed after she had left Biolink's employment that she should have continued to work without the prospect of payment for future work, let alone remediation of the respondent's past failures to pay her.

[32] The respondent's evidence on the subject of the payment of wages is that it acknowledges payments were due to Ms Martins but were not paid (and are still owing), instead putting forward that it could not afford to pay her. In this regard, Biolink points to its financial position being well known to Ms Martins, given the staff reductions that had occurred since 2023. However, there was no discussion with Ms Martins about the situation or how or when it would be resolved. The failure to pay wages is very plainly conduct which has the probable result of bringing the employment relationship to an end. If nothing else it evinces an intention

on the part of the employer not to be bound by the contractual term to make monthly payment for time worked by the employee. The letter Ms Martins sent to Biolink on 9 August 2024 is clear; that she resigned because of the Respondent's failure to pay her and for no other reason.

[33] Accordingly, I am satisfied from the evidence that Ms Martins was 'dismissed' within the meaning of s 386(1)(b).

SMALL BUSINESS FAIR DISMISSAL CODE

[34] The material received by the Commission from the Respondent asserts that it objects to the continuation of Ms Martins' application, based on the ground that the employer is a small business employer and that it complied with the Small Business Fair Dismissal Code.

[35] It is unnecessary to consider to any degree whether the dismissal was consistent with the Small Business Fair Dismissal Code as the code does not deal with the circumstance of redundancy, instead dealing only with the two categories of 'Summary Dismissal' and 'Other Dismissal', neither of which have application to the circumstances of this matter.

WAS MS MARTINS UNFAIRLY DISMISSED?

[36] Having found that Ms Martins was dismissed and that a question of consistency with the Small Business Fair Dismissal Code does not arise, my consideration turns to whether her dismissal was unfair. The legislative provisions relevant to this matter are set out in s 387 of the FW Act, which is as follows:

> "**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

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

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

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

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

Valid reason – general principles

[38] To be a valid reason, the reason must be "… sound, defensible or well-founded." A reason which is "… capricious, fanciful, spiteful or prejudiced …" cannot be a valid reason.[22] The reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.[23] The valid reason for termination is not to be judged by legal entitlement to terminate an employee, "… but [by] the existence of a reason for the exercise of that right" related to the facts of the matter.[24] Ascertainment of a valid reason involves a consideration of the overall context of the "practical sphere" of the employment relationship.[25]

[39] Ms Martins' forced resignation came about because Biolink failed to pay her for two months. Rather than Biolink itself terminate Ms Martins' employment because it could not pay her salary when it was due, Biolink allowed Ms Martins to keep working until she realised that the company was either unable or unwilling to pay her salary and that a better choice on her part would be to resign and find an another employer.

[40] An employer's inability to pay wages because of temporary or long-term cash-flow difficulties could be a valid reason for an employee's termination of employment. Plainly reducing structural costs such as by removing one or more employees so as to in turn relieve the employer of the ongoing need to pay wages could improve a company's cashflow and thereby avoid catastrophic consequences for the employing entity, including insolvency.

[41] However, in this case the decision to stop paying was unilateral on the part of Biolink and not coupled with any restructuring of its arrangement with Ms Martins, whether by reducing her weekly hours of work or her salary.

[42] Biolink's argument about its cashflow difficulties surround what it says is a large sum of money owed to it by the Australian Taxation Office as a result of research and development investments the company made. Neither the basis of the claim, the quantum, or the timing of the amounts in dispute, have been cogently dealt with in the respondent's submissions and evidence. All that may be drawn from the situation is that Biolink thinks the ATO owes it a large amount of money which caused it to make past financial allocation decisions, including with the employment of Ms Martins, but that the ATO has not agreed to pay any or all of the

amounts claimed by Biolink. If or when the ATO decides in Biolink's favour, it will be able to afford to pay Ms Martins her past salary and superannuation.

While that situation is obviously distressing for all involved, it is not an unusual situation and does not absolve the respondent from making timely and proper decisions about its costs structure, including the continuation of Ms Martins' employment. It did not do so and left the decision making to Ms Martins. When Ms Martins faced the inevitable – that she was not likely to be paid past wages in a timely manner and further would most likely not be paid for her future labours – her resignation came about because of conduct of the respondent.

[43] On this basis, I am not satisfied that the Respondent held at the time of Ms Martins forced resignation a valid reason for her dismissal.

(b) whether the person was notified of that reason

[44] It is well established that consideration of s 387(b) is directed to whether or not the dismissed person was notified of the valid reason for their termination, before the decision to dismiss them was made, with it being expected that the notification of the valid reason is in explicit terms.

[45] As I have not found there was a valid reason further consideration of this criterion is unnecessary.

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

[46] For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that there is a valid reason for dismissal.[26] While so, it is also accepted that "an opportunity to respond" amounts to an opportunity to provide reasoning to a decision maker that would, all things being equal, allow a reasoned explanation to cause the decision maker to accept what is proffered and to change from their foreshadowed path.[27]

[47] A provision in predecessor legislation, requiring there not be dismissal until "the employee has been given an opportunity to defend himself or herself against the allegations made", has been held to be a requirement not needing any particular formality, being "intended to be applied in a practical, common sense way so as to ensure that the affected employee is treated fairly.[28] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section".[29]

[48] Again, in the circumstances of this matter further consideration of this criterion is unnecessary.

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

[49] Consideration of this criterion is also a neutral matter in my determination as to whether Ms Martins was unfairly dismissed.

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

[50] No allegations of unsatisfactory performance have been directed to Ms Martin and so consideration of this criterion is also a neutral matter in my determination as to whether Ms Martins was unfairly dismissed.

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

[51] Further, there is no direct evidence before the Commission about whether the size of the enterprise likely impacted on the procedures followed by the respondent in effecting Ms Martins's dismissal.

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

[52] The respondent is a small business employer, however there is no direct evidence before the Commission about whether there was either an absence of dedicated human resource management specialists or expertise in the enterprise or whether such an absence of expertise impacted on the Biolink's procedures in relation to Ms Martins.

(h) any other matters that the FWC considers relevant

[53] Despite my finding that Ms Martins was forced to resign as that term in the FW Act is understood to operate, 10 days after, on 19 August 2024, she expressed an interest to Biolink in being engaged to perform work for the company through an independent contractor arrangement. This follows the conversation she had with Ms Tang and Mr Sackl on 9 August 2024, in which the prospect of Ms Martins working as a contractor was discussed. Biolink did not actively engage with Ms Martins' more detailed approach on 19 August 2024. Ms Martins' actions in this regard are to be understood only as an effort to mitigate her loss; she had no difficulty with the respondent and saw contractual work as potentially beneficial.

Conclusion on the s.387 criteria

[54] After considering each of the criteria within s 387, I am not satisfied there was a valid reason for Biolink's dismissal of Ms Martins. I am not satisfied there are factors associated with the dismissal that would cause me to find the termination was not otherwise unfair.

[55] The FW Act requires the Commission to consider whether a dismissal was harsh, unjust or unreasonable by taking into account the matters at ss 387 (a) to (h). The meaning of the term 'harsh, unjust or unreasonable' was considered by the High Court of Australia in the matter of *Byrne and Frew v Australian Airlines Limited*:

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."[30]

[56] It has been further held that a dismissal may be ***unjust***, because the employee was not guilty of the misconduct on which the employer acted; ***unreasonable***, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or ***harsh***, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct.[31]

[57] I find that Ms Martins' dismissal was unreasonable. It was unreasonable since the cashflow problems that led to her forced resignation should have been identified by Biolink much earlier than August 2024 and dealt with in such time as to allow Ms Martins to find alternative employment.

[58] Accordingly, I find that Ms Martins' dismissal was an unfair dismissal.

REMEDY

[59] The sections of the Act dealing with remedy once a finding of unfair dismissal has been made are set out in ss 390 to 393.

[60] Pursuant to s 390(3), an order for the payment of compensation to a person must not be made unless the Commission "is satisfied that reinstatement of a person is inappropriate" and the Commission "considers an order for payment of compensation is appropriate in all the circumstances of the case."

[61] Neither party argues that reinstatement should be considered by the Commission in the event of a finding of unfair dismissal.

[62] After reviewing the evidence and other material before the Commission and taking into account the size of the enterprise and the fact that the respondent maintains it is unable to pay past wages due, let alone future wages, I concur that in this case, reinstatement would be inappropriate.

Compensation – what must be taken into account in determining an amount?

[63] Having determined that reinstatement is ***inappropriate***, compensation may only be ordered if the Commission considers an order for payment of compensation is ***appropriate*** in the circumstances of the case (s 390(3)(b)). That is, an order for compensation is not automatic if reinstatement is found to be inappropriate, and is instead a discretion to be exercised, subject to certain further consideration. In this regard, s 392(2) of the FW Act requires all of the

circumstances of the case to be taken into account when determining an amount to be paid as compensation to the applicant in lieu of reinstatement, including:

> "(a) the effect of the order on the viability of the Respondent's enterprise;
>
> (b) the length of the Applicant's service;
>
> (c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;
>
> (d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
>
> (e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
>
> (f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
>
> (g) any other matter that the Commission considers relevant."

[64] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent's enterprise

[65] There is some, but no cogent evidence before me about the effect of an order for compensation on the viability of Biolink's enterprise. Ms Tang states Biolink is trading and has some income, around $10,000 per month, but has "huge debts".[32] Ms Tang's evidence is also that if its dispute with the ATO is resolved in its favour then it will be in a position to pay everybody.[33]

[66] The lack of cogent evidence about Biolink's actual financial situation means I am unable to resolve whether an order for compensation will itself affect its viability.

Length of the Applicant's service

[67] Ms Martins worked for Biolink for slightly more than 22 months having started employment on 3 October 2022 and ended it on 9 August 2024. Her length of service does not require an adjustment to be made to the amount of compensation to be ordered.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[68] Assessment of the remuneration an applicant would have received, had it not been for their dismissal is both an essential and difficult task.

[69] As stated by a majority of the Full Court of the Federal Court of Australia, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[34]

[70] At the time her employment ended Biolink owed 2 month's salary and more than 15 months superannuation payments. While Biolink's failure to pay the salary due to Ms Martins would have been obvious to her it was only at the end of July 2024 that Ms Martins learned of the respondent's failure to pay superannuation to her account. When she challenged Ms Tang and Mr Sackl about the situation on 9 August, they told her only that Biolink could not afford to pay her wages. ATO

[71] Ms Tang's evidence about her company's financial situation is troubling; it is not insolvent, but it is unable to pay its bills. The fact that the business is still trading – albeit that it may be struggling – suggests that the decision not to pay Ms Martin's salary and superannuation was at least as much a discretionary decision as it was one demanded by the respondent's business circumstances.

[72] Handled better by an employer than it was in Ms Martins' case the employment relationship would likely have limped forward for a time, however likely not for very much longer. Ms Martins estimates she has been underpaid $69,298.91, comprising $29,537.63 in salary not paid to her; $17,382.27 for accrued but unpaid annual leave, and $22,379.01 for unpaid superannuation. The respondent's capacity to pay these amounts is unclear. In correspondence to the Commission on 14 November 2024, which was not admitted to the overall evidence as it was filed after the expiry of filing directions, Ms Tang proposed the payment to Ms Martins of $10,000 "by next Friday" (the following day, being the hearing day).

[73] These matters are significant in determination of the future anticipated period of employment as they demonstrate an important constraint on the viability of an ongoing employment relationship. While the amounts owing to Ms Martin illustrate both past and future capacity to pay issues for Biolink and no doubt would fuel tensions between the parties, the amounts owing to Ms Martin are not factors to be taken into account in assessing compensation itself.

[74] If the respondent's contentions about its financial position are accurate then, even if it had entered into a payment plan with Ms Martins, it is unlikely the payments would have continued for very long or it would have been forced to dismiss her (other than by means of a forced resignation). Despite this, Ms Martins obviously liked working for Biolink and had considerable trust for her employer. Even if a payment plan was in place, it may well have taken more than a single breach for her to then finally resign for lack of payment. For Biolink's part if it thought Ms Martins would continue to work without paymentit had no incentive to dismiss her since she seemed willing enough to continue working for the company.

[75] At some point though, and relatively soon, the relationship would permanently break. In the overall circumstances, I set the anticipated period of employment at six weeks, from the date of termination, 9 August 2024. Ms Martins' next monthly payment was due on 30 August and it would likely have taken some time beyond that date for a further missed payment to precipitate a final break in the employment relationship.

Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[76] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[35] What is reasonable depends on the circumstances of the case.[36]

[77] Ms Martins refers to several efforts to obtain further work. In particular she approached Biolink 10 days after finishing employment to explore the opportunity to work as an independent contractor, but never heard back from the respondent about the possibility.

[78] Given the overall circumstances, I am satisfied that Ms Martins has taken reasonable steps to mitigate the loss she incurred because of her dismissal.

Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[79] At the time of the hearing Ms Martins had not obtained further paid work. As a result, I do not consider that any deduction is required to be made from the order for compensation proposed by me for reason of post-employment earnings.

Amount of income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation

[80] While there is no evidence before me on the subject, I also take account of the fact that the anticipated period of employment identified by me is considerably shorter than the period between the time of Ms Martins' dismissal and the issuing of this decision. Accordingly, no deduction needs to be made from the order for compensation for this criterion.

Other relevant matters

[81] I do not consider there are other relevant matters to be taken into account in setting an appropriate order for compensation.

Compensation – how is the amount to be calculated?

[82] The well-established approach to the assessment of compensation in unfair dismissal matters is to apply the 'Sprigg formula' derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*).[37] The approach and *Sprigg* reasoning has been confirmed several times in Full Bench decisions, including in *ERGT Australia Pty Ltd v Kevin Govender*.[38]

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

> Step 1: Estimate the remuneration the Applicant 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.
>
> 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 1

[84] At the time of her dismissal Ms Martins was in receipt of a salary of $160,000 per year with superannuation paid in addition.

[85] It follows that my estimation of the remuneration Ms Martins' would have received or have been likely to have received if her employment had not been terminated is $18,462. Added to that amount is $2,123, being the amount of statutory superannuation contributions Ms Martins would have received for the anticipated period of employment on the basis that the applicable rate is 11.5% from 1 July 2024.

Step 2

[86] The second step in *Sprigg* requires the deduction of monies earned since termination, with the only exclusions being monies received from other sources and unrelated to work done. As set out above Ms Martins has not been engaged in paid work since leaving Biolink.

Step 3

[87] It is necessary to consider the impact of both favourable and unfavourable contingencies on the amounts likely to be earned by the applicant for the remainder of the anticipated period of employment,[39] noting that it may not be appropriate to deduct contingencies if all of the projected period of continued employment has passed.[40] In Ms Martins' case, I find there are none that ought to be taken into account in this matter, since the whole of the anticipated period of employment has passed.

Step 4

[88] I have considered the impact of taxation but have elected to settle a gross amount as set out in the table below and the compensation to be ordered will be subject to taxation according to law.

[89] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[41]

[90] I am satisfied that the compensation to be ordered by me is proportionate to the circumstances of the case. In this regard, I consider the total quantum to be appropriate, with no deductions either for efforts to obtain further employment, or post-termination earnings.

Compensation – is the amount to be reduced on account of misconduct?

[91] If I am satisfied that misconduct of the applicant contributed to the employer's decision to dismiss, I am obliged by s 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[92] In determining the amount by which it is appropriate to reduce an order for compensation on account of misconduct, the Commission must consider, amongst other things, whether the applicant engaged in misconduct and, if so, whether that misconduct contributed to the respondent's decision to dismiss the person. I have not identified misconduct on the part of Ms Martins therefore no deduction is made for that purpose.

[93] My calculation of the amount payable to Ms Martins is set out in the following table:

1. ESTIMATE THE AMOUNT THE EMPLOYEE WOULD HAVE RECEIVED OR WOULD HAVE BEEN LIKELY TO RECEIVE IF THE EMPLOYMENT HAD NOT BEEN TERMINATED,	6 weeks projected lost income at the rate of $3077 per week/$160,000 per year.	$18,462
	Employer superannuation contribution – 11.5% (as applicable after 1 July 2024)	+ $2,123
Subtotal		***$20,585***
	Deduction attributable to mitigation efforts	$0
	Deduction for misconduct	$0
2. Deduct monies earned since termination,		$0
3. Deductions for contingencies,		$0
TOTAL		**$20,585**
4. Calculate any impact of taxation,		*To be taxed according to law*
5. Apply the legislative cap.		*Does not exceed the compensation cap.*

[94] An order for compensation consistent with the above table will be issued by me at the same time as this decision. The order will require a payment of wages in the amount of $18,462, to be taxed according to law, and of superannuation in the amount of $2,123, to be paid into Ms Martins' nominated superannuation fund, each to be paid within 14 days of the date of this decision.

[95] Ms Martins' application is determined accordingly.

COMMISSIONER

Appearances:

Ms A Martins, Applicant

Ms Y Tang, for the Respondent

Hearing details:

13 November.
2024.

Printed by authority of the Commonwealth Government Printer

<PR782968>

---

[1] Digital Hearing Book (DHB), p.45.
[2] Transcript, PN 70
[3] Transcript, PN 249.
[4] DHB, p.126
[5] Transcript, PN 179.
[6] DHB, p.4.
[7] DHB, p.5.
[8] *Employer Response Form*, Form F3; DHB, p.141.
[9] Transcript, PN 88 – 92.
[10] Transcript, PN 98,
[11] DHB, pp.149 – 150.
[12] DHB, p.152.
[13] DHB, p.151.
[14] DHB, p.147.
[15] DHB, pp.80 – 81.
[16] DHB, p.124.
[17] DHB, p.143.
[18] [2017] FWCFB 3941, [47] – [54].

[19] *Pawel v Advanced Precast Pty Ltd* (Print S5904, AIRCFB, Polites SDP, Watson SDP and Gay C, 12 May 2000), at [13].

[20] [2023] FWC 1325.

[21] [2023] FWC 1325, [53].

[22] *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.

[23] *Robe v Burwood Mitsubishi* Print R4471 (AIRCFB, Ross VP, Polites SDP, Foggo C, 11 May 1999).

[24] *Miller v UNSW* [2003] FCAFC 180 (Gray J), [13].

[25] *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.

[26] *Chubb Security Australia Pty Ltd v Thomas* (unreported, AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) Print S2679 [41].

[27] *Wadey v YMCA Canberra* [1996] IRCA 568 cited in *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544; (2010) 204 IR 399 at [85].

[28] *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1; [2010] FWAFB 1200 at [26] citing *Gibson v Bosmac Pty Ltd* [1995] IRCA 222; (1995) 60 IR 1 at 7 (Wilcox CJ).

[29] *Gibson v Bosmac Pty Ltd* [1995] IRCA 222 (5 May 1995); (1995) 60 IR 1 at 7 (Wilcox CJ).

[30] [1995] HCA 24 (McHugh and Gummow JJ), [128].

[31] *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1,10 citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (McHugh and Gummow JJ), [128].

[32] Transcript, PN 256 – 261.

[33] Transcript, PN 263.

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

[35] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[36] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[37] (1998) 88 IR 21.

[38] [2021] FWCFB 5389, [35].

[39] *Enhance Systems Pty Ltd v Cox* [2001] AIRC 1138, [39]

[40] *Bowden v Ottrey Homes* [2013] FWCFB 431, [54].

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