



DECISION

Fair Work Act 2009
s 394—Unfair dismissal

Marites Dimayuga

v

The Adventure Group Hotels Pty Ltd

(U2024/9215)

COMMISSIONER LIM

PERTH, 7 FEBRUARY 2025

Application for an unfair dismissal remedy – valid reason – dismissal not unfair – application dismissed

1. What is this decision about?

[1] On Monday 29 July 2024, the Adventure Group Hotels Pty Ltd dismissed Ms Dimayuga from her employment as a Room Attendant/Housekeeper following an incident where a motel guest’s room was robbed.

[2] AGH is a group of accommodation venues that includes the Bentley Motel in Perth Western Australia. Ms Dimayuga was employed as a Room Attendant/Housekeeper at the Bentley Motel.

[3] I held a hearing on Friday 22 November 2024, to hear the matter. I granted permission for Ms Dimayuga to be represented by Mr A Wright from WK Lawyers. Ms Karen Bendik, General Manager, represented AGH.

[4] Having considered the relevant evidence and submissions of the parties, I find that there was a valid reason for Ms Dimayuga’s dismissal. I find that her dismissal was not unfair in the circumstances.

[5] My detailed reasons follow.

2. Evidence

[6] Ms Dimayuga gave evidence in support of her case. AGH called Ms Bendik, Mr Prashant Paudel (WA Operations Manager) and Ms Paula Duffin (Housekeeping Supervisor) to give evidence.

[7] Ms Bendik, Mr Paudel and Ms Duffin were all conscientious and credible witnesses. I particularly found Ms Bendik to be an impressive witness in terms of her candour and the coherency of her evidence.

[8] Ms Dimayuga does not speak English as a first language. I have factored this in when weighing her evidence. I found that Ms Dimayuga generally gave her evidence honestly, but did downplay her culpability in the robbery incident.

2.2 The robbery incident

[9] The details of the robbery incident were provided by Ms Dimayuga as she was the only witness other than the perpetrator. AGH did not dispute her account. Where the parties diverge is the significance of the facts rather than what occurred.

[10] To preserve the privacy of the individuals involved, I do not cover every detail of the incident. It is sufficient to say that on Thursday 18 July 2024, Ms Dimayuga was at work and cleaning her assigned rooms.

[11] There was an interaction with a woman who was not a guest at the motel. I will refer to this woman as 'Doe'. Doe asked Ms Dimayuga if an unspecified "he" was "home" in relation to one of the rooms Ms Dimayuga was assigned. Ms Dimayuga informed Doe that she did not know, as she had not serviced that room yet. Doe then sat outside the room door.

[12] As Ms Dimayuga was completing her duties, she checked her housekeeping board for the room Doe was interested in and saw that it was registered to a male guest with a second adult registered.

[13] Ms Dimayuga mistakenly assumed that Doe was a hotel guest and that her partner had the room key.¹ Ms Dimayuga's evidence is that she did not direct Doe to the hotel front desk as Doe did not ask her to open the room.

[14] There were further interactions between Doe and Ms Dimayuga, where Doe displayed erratic behaviour, such as insisting on giving Ms Dimayuga a brand-new bag with the tag still attached.² Doe convinced Ms Dimayuga to open the door for one of the rooms under the guise of checking on "him" as Doe "could not hear anything from the room."³ When Ms Dimayuga opened the room door, the room was empty. Doe made the comment, "Yes, he is not here, and he will not be seeing me drunk; I will just have to sleep." Doe asked Ms Dimayuga if she looked drunk before closing the door on Ms Dimayuga.⁴

[15] Ms Dimayuga resumed her cleaning duties on one of the other rooms but felt uneasy about what had occurred. Approximately two minutes after the interaction, Ms Dimayuga called Ms Duffin on her two-way radio to report the interaction. Ms Duffin checked the room records and called the relevant guest before meeting with Ms Dimayuga at the room after a short period of time. By this time, Doe had left the room.

[16] The guests in the relevant room later reported that Doe had stolen their possessions from the room.

2.3 Disciplinary process

[17] On Monday 22 July 2024, Ms Bendik notified Ms Dimayuga that AGH were investigating whether she had engaged in misconduct. Ms Dimayuga was invited to attend a disciplinary meeting on Thursday 25 July so that she could respond to the allegation of misconduct.⁵

[18] On Thursday 25 July 2024, Ms Dimayuga met with Ms Bendik, Mr Prashant and the WA Rooms Manager. Ms Bendik checked with Ms Dimayuga if she wanted a support person present, which Ms Dimayuga declined.⁶ Ms Dimayuga read from a four-page pre-prepared **Response Statement**.⁷

[19] Both Ms Dimayuga and Ms Bendik agree that Ms Bendik engaged with Ms Dimayuga's statement and asked questions along the way. At the end of the meeting, Ms Bendik informed Ms Dimayuga that no decision had been made and that the investigation was ongoing. Ms Bendik did not take a hard copy of Ms Dimayuga's Response Statement.

[20] Ms Bendik's evidence is that after this meeting she conferred with Mr Prashant and the WA Rooms Manager who attended the disciplinary meeting. The WA Rooms Manager's opinion was that Ms Dimayuga should be let go as she "didn't really accept her huge mistake."⁸ Mr Prashant was of the same opinion – his evidence is that Ms Dimayuga had not apologised or shown remorse and given her experience in the industry it was unacceptable that she could not recognise her wrongdoing.⁹ Mr Prashant recommended to Ms Bendik that she terminate Ms Dimayuga's employment.

[21] Ms Bendik informed Ms Dimayuga of her decision to end her employment on Monday 29 July 2024, by way of a termination letter. The termination letter was detailed and considered. I note the following comments from the letter that set out the reasons why Ms Bendik reached the decision to terminate Ms Dimayuga:¹⁰

"Further, during the meeting, as the statement was lengthy, so as to understand it better, I would from time to time, stop you to ask about a particular statement to gain a better understanding and I provide the following further commentary below:

- You claimed that the guest was well-presented. You stated that *if* she had looked dishevelled or was behaving unruly, you're certain you would have acted differently. This was paraphrased back to you to ensure that we had this statement correct. You again, confirmed that due to this person looking well-presented, you gave her access to the room. This indicated that you thought you had the authority to pick and choose who you would relax the rules with and who you wouldn't, essentially, acknowledging and understanding the rules, but *choosing* not to follow them as the person appeared 'well-presented.' Without your supervisor seeing the perpetrator in question, she reported the incident to the front desk after speaking with you, stating that 'Tess has made a mistake and has allowed a [woman]¹¹ into [a Room].' We must assume that this is the description you gave to your supervisor when describing the woman and this is contradictory to the account you gave us in your meeting. We have located the perpetrator on CCTV, and whilst we cannot ascertain if she was drunk, we can see that she was indeed a [woman], struggling to carry a large backpack and appeared to be unsteady on her feet. We feel that how the perpetrator looked or behaved is immaterial regarding being allowed access to a room, but we note the inaccuracies in your version of events having spoken to the person you reported to and having CCTV footage of the perpetrator.

- There were several times where you referred to reviewing your housekeeping board during the interaction with the guest, stating that you could see that there were two guests checked into this room, suggesting that by the perpetrator referring to ‘her husband’ that this provided some justification on how easy it was for you to be ‘hood-winked.’ You mentioned twice that the room was booked under a ‘man’s name.’ We are perplexed that at no stage did you even think to ask the ‘imposter’ of the name the booking was under before opening the door.
- You mentioned in your statement that prior to your letting the perpetrator access to [the Room], that she had gifted you a handbag. You stated that as a housekeeper you conveyed to her that you couldn’t accept gifts and that she decided to place it on the bottom of your trolley. To us, this is odd behaviour that should have presented a red flag to you, but you continued to engage with her and ultimately let her in.
- You stated that you had an ‘uneasy feeling’ after the fact, which caused you to call your supervisor on the two-way explaining what had happened, which again, goes to prove that you felt your actions were wrong, yet you continued to name yourself on more than one occasion as the victim in this melee without appearing to accept any responsibility.
- In our opinion, at no stage during the disciplinary meeting did you show remorse for your actions or acknowledge the severity of the events even after it was explained that the company had to reimburse the guest. The guest reported an inventory list to the police itemising what was missing totally to [redacted]. The company made a commercial decision to reimburse the guest [redacted] to further protect itself from ongoing reputational damage. Several hours has been spent by upper management in damage control and you failed to respond to this, but rather doubled down in taking the position of the victim seemingly having no regard to the real victim, which was the guest who felt violated having their personal belongings stolen.”

[22] And:

“Due to the events of misconduct, and your unacceptable subsequent response to the allegations that have proven to be true, we have terminated your employment effective July 29, 2024.”

3. Preliminary matters

[23] There is no contest, and I find that:

- a) Ms Dimayuga had completed the minimum employment period and was covered by the *Hospitality Industry (General) Award 2020*. Ms Dimayuga was thus protected from unfair dismissal pursuant to s 382 of the *Fair Work Act 2009 (Act)*;
- b) Ms Dimayuga’s application was made within the time prescribed in s 394(2) of the Act;
- c) AGH was not a small-business employer within the meaning of the Act; and
- d) The dismissal was not a case of genuine redundancy.

4. Relevant legislation

[24] Section 385 of the Act provides that:

“385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC 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.”

[25] Section 387 of the Act requires me to take into account the below matters in determining whether Ms Dimayuga’s dismissal was harsh, unjust or unreasonable:

“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.”

[26] Consideration of the above criteria is mandatory.¹² I set out my consideration below.

4. Submissions and consideration

4.1 Section 387(a) – was there a valid reason for the dismissal related to Ms Dimayuga’s capacity or conduct?

[27] A valid reason is one that is “sound, defensible or well-founded,”¹³ and should not be “capricious, fanciful, spiteful or prejudiced.”¹⁴

[28] Where the reason for dismissal relates to conduct, the Commission must find that the conduct occurred and that the conduct justified dismissal. Whether the conduct relied upon as a reason for dismissal actually occurred is to be determined based on the evidence,¹⁵ and it is to be assessed on the balance of probabilities,¹⁶ taking into account the gravity of the allegations.¹⁷

[29] Ms Dimayuga submits that there was no valid reason for dismissal. She submits that:

- (a) there was no clearly understood policy or procedure which prohibited her from opening rooms to people she believed were guests;¹⁸ and
- (b) she did not receive any specific training on this issue.

[30] The parties agree that there is no explicit written policy that sets out how to deal with the scenario that Ms Dimayuga faced. There was some contest between the parties over what documentation was given to Ms Dimayuga when she started her employment with AGH. The significance of this contest is that Ms Dimayuga says that she was never given a copy of the AGH Employee Handbook.¹⁹ AGH disagreed with this.

[31] It is not necessary for me to resolve this dispute between the parties. Whether or not Ms Dimayuga received the AGH Employee Handbook or not, Ms Dimayuga clearly understood that motel rooms should only be accessed by guests and staff. This is evident from her Response Statement, where she states that she did not direct Doe to the front desk as she did not insist on Ms Dimayuga opening a room for her, and there was no sense of urgency from Doe.²⁰ Further, the Response Statement asserts that if Doe had claimed that she had forgotten her room key, Ms Dimayuga would have directed her to the Front Desk. The Response Statement asserted, “*The scenario or the “drama” was totally different, she looks OK, calm, composed which made me believe that she is one of the guests or the partner of the one registered in the board.*”²¹ This shows that Ms Dimayuga understood that rooms should only be opened to the relevant guest.

[32] With regards to Ms Dimayuga’s belief that Doe was a guest, this belief was not a reasonable one based on Ms Dimayuga’s evidence of their conversation and how Doe acted. Ms Dimayuga ignored the red flags of Doe insisting that she give Ms Dimayuga a new bag with tags on and Doe asking Ms Dimayuga if she looked drunk.

[33] The belief was also not a reasonable one given the simple actions that Ms Dimayuga could have taken to verify whether Doe was a guest. As stated in the termination letter, Ms Dimayuga could have asked for Doe’s name or the name of her alleged partner to cross check with her housekeeping board. Ms Dimayuga could have contacted Ms Duffin on her two-way radio, as she did after she had let Doe into the room. She could have contacted the front desk or directed Doe to the front desk, or as she believed that Doe was the partner of a motel guest, she could have asked Doe to contact her partner.

[34] I also found Ms Dimayuga's evidence to be contradictory as to why she opened the door for Doe. Her evidence is that Doe's comments led her to believe that she was the partner of a registered guest. Ms Dimayuga's Response Statement also stated that part of this was because there was no sense of urgency and that Doe looked, "OK, calm, composed."²² It does not make sense that Ms Dimayuga did not take any of the actions outlined in [33] if there was no sense of urgency.

[35] During Ms Dimayuga's re-examination she also confirmed that if Doe had asked her to open the door, she would have asked her where her room key was and referred her to the front desk. It is hard to reconcile this when Doe effectively asked Ms Dimayuga to open the door by asking her to check on "him."

[36] I am similarly not persuaded that any lack of specific training is a reasonable justification for Ms Dimayuga not understanding how to deal with the situation.

[37] As outlined in the termination letter, AGH dismissed Ms Dimayuga not just because of the robbery incident, but because of how she responded to it. AGH's position is that Ms Dimayuga showed a lack of remorse and reflection. Having listened to Ms Dimayuga's evidence and considering the Response Statement she read out at the disciplinary meeting, I find that Ms Dimayuga was sorry that the incident occurred, but did not accept that her actions were wrong.

[38] Ms Dimayuga's pre-prepared statement expressly stated:

- Good afternoon. First, I would like to take this opportunity to thank you for giving me this opportunity to respond to the allegation and clarify my side. Second, I would like to extend my apology that the said allegation and untoward incident put us into this kind of uncomfortable and stressful situation.
- I am definitely rejecting, disagreeing, and that the misconduct allegation is unacceptable. I did not commit theft, fraud, etc. I am not an [a]ccomplice but one of the victims of a "professional imposter".
- I understand from the memo on Protocols it says that it's common sense not to allow anyone access to a room, however, I might say based on the incident and the reality that she was not supposed to be in that room, is that she is a "professional scammer." She negatively attacked my senses; I was blindsided by her as she created an artificial situation and played on my emotions which clouded my judgement.
- I did not intentionally put the hotel's property in jeopardy and our guest's belongings at risk but the imposter maligned me.
- It is really hard for me to accept the misconduct allegation and totally opposing the said allegation as I was a victim of a professional imposter. I was not an accomplice, and I was in good faith when I helped her to check "him" by opening the door for her because she made me believe that she's the partner of the one registered in the board and started to look worried when no one answered when she knocked.

- I am acknowledging the bad result or the negative effect of the said incident at [Room] and I am truly hurt, traumatised being a victim of an imposter and being into the other 3 stressful instances/incidents.
- Should you give me a chance, I am still willing to be part of the Bentley Motel and believe that whatever lessons I have gained from the said incidents will serve as my guiding light so that I will not be a victim but rather become more vigilant.

[39] I appreciate that Ms Dimayuga is not a native English speaker and that she was emotional about the situation she was in. However, it is clear from her Response Statement that whilst she was sorry that the robbery incident had occurred, she sought to distance herself from it and rejected any allegation that she had done anything wrong. Much of Ms Dimayuga's framing in the Response Statement paints her as the victim of a scam, without acknowledging what she should have done differently.

[40] I also note from the termination letter that Ms Bendik sought to clarify points Ms Dimayuga raised, so Ms Dimayuga had the opportunity to communicate verbally. Even in Ms Dimayuga's witness statement prepared for the hearing, and the materials filed in support of her Form F2 application,²³ she continues to refer to herself as a victim without properly acknowledging that she made an error of judgment or the actions she could have taken instead. I agree with AGH that Ms Dimayuga showed a lack of reflection on her part in the incident.

[41] During the hearing, Ms Bendik's evidence was that if Ms Dimayuga had acknowledged her part in the incident and shown genuine reflection, she would have decided on disciplinary action other than termination. I accept Ms Bendik's evidence on this.

[42] I find that even without an explicit AGH policy on not opening rooms to people who may not be guests, it is common sense that housekeepers should not open the doors of motel rooms to people unless there is good cause to believe that they are the relevant guest for that room. This is a key part for any business that provides accommodation. Given the evidence on the interactions between Ms Dimayuga and Doe, and the options that Ms Dimayuga had available to her to verify if Doe was a motel guest, I find that Ms Dimayuga's actions did constitute misconduct. Combined with her unwillingness to accept that she had done anything wrong, I find that this was a valid reason for dismissal.

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

[43] An employee protected from unfair dismissal should be notified of the reason to terminate their employment before the decision to dismiss is made.²⁴ Failure to do so impacts on their ability to respond to that reason before the decision to terminate is made.²⁵

[44] On Monday 22 July 2024, Ms Dimayuga was given written notice of the misconduct allegation; that she was entitled to bring a support person to the disciplinary meeting and that if the misconduct was proven it could result in a written warning, a final written warning or termination of her employment.²⁶ I am satisfied that she was notified of the valid reason.

[45] Ms Dimayuga submits that at the disciplinary meeting on Thursday 25 July 2024, Ms Bendik had already made the decision to dismiss her and that her response was not properly considered. I do not accept this submission.

[46] As noted earlier in this decision, I found Ms Bendik to be a highly credible witness. I accept Ms Bendik's evidence that she did not reach the decision to terminate Ms Dimayuga's employment until after the disciplinary meeting and after she had conferred with other supervisory staff. This is supported by the detailed termination letter where Ms Bendik went through the issues with Ms Dimayuga's response.

[47] I am satisfied on the evidence from the parties that Ms Dimayuga was given a full and genuine opportunity to address the valid reason for dismissal.

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

[48] Ms Dimayuga was given the opportunity to bring a support person to the disciplinary meeting but declined to do so. This is a neutral consideration.

4.4 Section 387(e) – warnings concerning performance

[49] The parties agree that Ms Dimayuga was a good employee with no performance issues until the robbery incident.

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

[50] I accept Ms Bendik's evidence that AGH does not have dedicated HR staff.²⁷ I find that this is a neutral consideration.

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

[51] Ms Dimayuga submits that the dismissal was harsh for the following reasons:

- (a) the dismissal was disproportionate to her conduct;
- (b) she had not received any specific training on the issue she was terminated for, nor was there a specific policy;
- (c) her three years' service with AGH; and
- (d) the absence of prior warnings or disciplinary action against her.

[52] I accept Ms Dimayuga's evidence that she did not receive training on the specific situation she found herself in on 18 July 2024. However, as already outlined, I do not find that this is particularly persuasive.

[53] The parties agree, and I accept, that Ms Dimayuga had an unblemished record prior to the robbery incident and was a good worker. I have factored this into my assessment.

[54] I accept that Ms Dimayuga had three years' service with AGH, and as per her evidence, prior to AGH had worked as a housekeeper and housekeeper supervisor for eight years with another accommodation venue.

[55] I do consider that Ms Dimayuga's fast action after Doe closed the door weighs in favour of a finding that the dismissal was disproportionate. Unfortunately, Ms Dimayuga's extensive experience as a housekeeper weighs against a finding that the dismissal was disproportionate to her misconduct. If Ms Dimayuga had been a new housekeeper with a short amount of experience, it would have been understandable for her to not know the best way to respond to someone attempting to gain entry to a room.

[56] Ms Dimayuga had at least 11 years of housekeeping experience at the time of her dismissal. Combined with the seriousness of what occurred, I find that the dismissal was proportionate.

5. Conclusion

[57] I have made findings in relation to each matter in s 387 as relevant to this case. The considerations in s 387(a) and parts of s 387(h) weigh in favour of a finding that the dismissal was fair, whilst some of the considerations in s 387(h) weigh against such a finding. The other considerations in s 387 are neutral.

[58] I have given significant weight to the valid reason for dismissal. Ms Dimayuga made a serious error of judgment given her role and the service AGH provides. It is human to make mistakes, and I understand how it can feel unfair to lose your job from one error of judgment. Unfortunately, Ms Dimayuga did not take ownership of her mistake.

[59] Having considered the criteria in s 387, I am not satisfied that Ms Dimayuga's dismissal was harsh, unjust or unreasonable. Ms Dimayuga's application is dismissed.



COMMISSIONER

Appearances:

A Wright for the Applicant.
K Bendik for the Respondent.

Hearing details:

2024.
Perth by Video using Microsoft Teams:
22 November.

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¹ Digital Court Book p 29 at [26] – [27].

² Ibid p 29 at [31] – [33].

³ Ibid p 29 at [35].

⁴ Ibid p 29 at [37] – [40].

⁵ Ibid p 63.

⁶ Ibid p 30 at [57] – [58].

⁷ Ibid pp 20-23.

⁸ Ibid p 249.

⁹ Ibid p 304.

¹⁰ Ibid pp 9-10.

¹¹ Redacted to remove identifying information.

¹² *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14].

¹³ *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333, (1995) 62 IR 371, [373].

¹⁴ Ibid.

¹⁵ *King v Freshmore (Vic) Pty Ltd* (Unreported, 17 March 2000) Print S4213, [24].

¹⁶ *Edwards v Justice Giudice* [1999] FCA 1836, [6] – [7].

¹⁷ *Briginshaw v Briginshaw* [1938] 60 CLR 336.

¹⁸ DCB p 25 at [19].

¹⁹ Ibid p 28 at [8].

²⁰ Ibid p 21.

²¹ Ibid.

²² Ibid.

²³ Ibid pp 11-19.

²⁴ *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (Unreported, 13 January 2000) Print S5897, [70] – [73], [(2000) 98 IR 137].

²⁵ Ibid, [75].

²⁶ DCB p 8.

²⁷ Ibid p 307 at [29]-[30].