[2025] FWCFB 4

The attached document replaces the document previously issued with the code [2024] FWCFB 4 on 13 January 2025.

The MNC in the top right hand corner has been corrected.

Indigo Crosweller
Associate to Vice President Gibian

Dated 31 January 2025

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Gonva Group Pty Ltd
v
Lina Ramirez
(C2024/4469)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT WRIGHT

SYDNEY, 13 JANUARY 2025

Appeal against decision [2024] FWC 1522 of Commissioner Thornton at Adelaide on 13 June 2024 in matter number U2023/10993 – Whether Commissioner considered the effect of an order for compensation on the viability of the appellant's enterprise – Whether Commissioner was obliged to request further information from the appellant – Whether general duty on the Commission to make further inquiries – Whether error in finding the dismissal was in breach of the Small Business Fair Dismissal Code – Whether managing director of the appellant discriminated against – No arguable case of appealable error demonstrated – Not in the public interest to grant permission to appeal – Permission to appeal refused.

Introduction

[1] Gonva Group Pty Ltd (**Gonva** or the **appellant**) has applied for permission to appeal and, if permission is granted, to appeal a decision of Commissioner Thornton of the Fair Work Commission (the **Commission**) dated 13 June 2024.[1] The decision arose from an application for an unfair dismissal remedy made by Ms Lina Ramirez (**Ms Ramirez** or the **respondent**) under s 394 of the *Fair Work Act* 2009 (Cth) (the **Act**).

[2] In the decision, the Commissioner found that Gonva had not complied with the Small Business Fair Dismissal Code and that Ms Ramirez had been unfairly dismissed. The Commissioner was satisfied that the relationship between the parties had irretrievably broken down and reinstatement would be inappropriate. The Commissioner ordered the payment of compensation pursuant to s 392 of the Act in the gross amount of $13,158.97 plus $1,447.49 in superannuation. This was required to be paid within 28 days of the decision. Subsequently and after Gonva had provided further material in relation to the financial circumstances of the business, the Commissioner made a further decision which varied the compensation order to provide for instalment payments.[2]

[3] Gonva filed a notice of appeal on 3 July 2024. The notice of appeal sought a stay of the decision and orders of the Commissioner, which then required that the sum of compensation be paid by 11 July 2024. Vice President Gibian heard the stay application on 10 July 2024. The application for a stay was refused.[3] The appeal was heard on 18 September 2024. Mr Gonzalez,

Managing Director, appeared for Gonva and Ms Ramirez represented herself. Ms Ramirez submitted at the hearing that, as of that date, she had not received any compensation payments.

[4] For the reasons that follow, permission to appeal should be refused.

Matter history and decision under appeal

[5] Gonva is a small food and beverage business that trades as the Cafetal Coffee Company. It operates a cafe serving food and beverages with a focus on South American food and Columbian coffee, and also undertakes importation, roasting and wholesaling of Colombian coffee. It was not disputed that Gonva is a small business in that it employed fewer than 15 employees at the time of Ms Ramirez's dismissal.

[6] Ms Ramirez commenced employment with Gonva on 10 October 2022 as a food and beverage attendant. She was employed on a permanent part-time basis and worked a regular roster of 32 hours per week, initially undertaking shifts on two weekdays and a Saturday and later also working on Sundays. For the last five months of her employment, Ms Ramirez continued to work four days per week and regularly worked Monday, Wednesday, Friday and Saturday.

[7] In around September 2023, Mr Gonzalez became the sole owner and director of Gonva. Prior to September 2023, Gonva was owned and managed by Mr Valencia and Mr Gonzalez before Mr Valencia ceased his involvement in the business. Prior to his departure, Ms Ramirez raised concerns with Mr Valencia about permanent employees not being paid for public holidays when the cafe was closed. Ms Ramirez raised the issue regarding public holiday pay with Mr Gonzalez in a staff meeting on 27 September 2023. Mr Gonzalez submitted that he found Ms Ramirez to be disrespectful in a series of meetings including on 27 September 2023 and on another occasion when Ms Ramirez suggested that he should work on a Saturday to assist with peak service times.

[8] Ms Ramirez said that she subsequently called the Fair Work Ombudsman to seek advice about her entitlement to public holiday pay and recorded this call which she says she provided to the kitchen manager who was the first point of contact. Mr Gonzalez then advised Ms Ramirez that he would take her off the shift she regularly worked on Monday because he would have to pay her for public holidays that fell on that day.

[9] In October 2023, Ms Ramirez requested two weeks' leave to undergo surgery. Mr Gonzalez said at first instance that he had hired a new staff member to replace her for the period she was on leave. Ms Ramirez's surgery was subsequently delayed on a number of occasions. Ms Ramirez advised the manager who told her that Mr Gonzalez was very upset, and that Ms Ramirez would not be on the roster for her regular shifts. Ms Ramirez then offered to take annual leave for the remainder of the week. The following week Ms Ramirez and Mr Gonzalez had another dispute in circumstances where Ms Ramirez insisted on returning to work and said she did not wish to take a second week of annual leave.

[10] On 28 October 2023, Mr Gonzalez dismissed Ms Ramirez by email based on his understanding that he had complied with the Small Business Fair Dismissal Code. The

assertions and reasons for dismissal set out in the email were helpfully summarised in the Commissioner's decision as follows:[4]

> (a) She was not currently on the roster because she requested time off for personal matters;
> (b) Her request for time off caused "many inconveniences in the operation of the business";
> (c) The business had had "many problems with you due to your aggressive verbal behaviour, where I myself have spoken with you … But there has been no change and on the contrary you have reached completely unacceptable levels like the one I've had to deal with it myself this week";
> (d) The issue of aggressive verbal behaviour was not a new issue and had been happening for a long time, including when the Applicant had worked with Mr Gonzalez's former business partner;
> (e) Mr Gonzalez had defended the Applicant on many occasions to other staff following complaints about aggressive verbal behaviour;
> (f) the Applicant had been given enough time to improve her behaviour;
> (g) that despite "meeting all your requirements" the aggressive verbal behaviour continued to be a serious problem;
> (h) the alleged aggressive verbal behaviour "is unacceptable and should not be accepted in any healthy work environment"; and
> (i) that he had an obligation to protect his personal well-being and that of the business.

[11] Section 396 of the Act provides four matters which the Commission must decide in relation to an application for an unfair dismissal remedy before considering the merits of the application:

> **Initial matters to be considered before merits**
>
> The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
>
> (a) whether the application was made within the period required in subsection 394(2);
> (b) whether the person was protected from unfair dismissal;
> (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
> (d) whether the dismissal was a case of genuine redundancy."

[12] The Commissioner extracted the relevant provisions of the Small Business Fair Dismissal Code in the decision at first instance. Those provisions relate to summary dismissal and procedural matters in relation to the provision of evidence of compliance with the Code in the event an employee makes a claim for unfair dismissal:

> **Small Business Fair Dismissal Code**
> …
> **Summary Dismissal**
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a

> dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
> …
> **Procedural Matters**
> …
> A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements

[13] The Commissioner found that Ms Ramirez had been unfairly dismissed in that the dismissal was inconsistent with the Small Business Fair Dismissal Code and that it was harsh, unjust and unreasonable. The Commissioner found that "the Applicant asked legitimate questions and raised reasonable issues with the Respondent about her conditions of employment" and that "the Applicant did not communicate with Mr Gonzalez in an aggressive or inappropriate manner as he has claimed."[5] The Commissioner went on to find that the substance and manner of the complaints did not amount to misconduct and that there were no reasonable grounds for Mr Gonzalez to have believed that Ms Ramirez's conduct was sufficiently serious as to justify summary dismissal in accordance with the Small Business Fair Dismissal Code.

[14] The Commissioner then turned to consider whether the dismissal was harsh, unjust or unreasonable. The Commissioner found that the conduct relied upon by Gonva to dismiss Ms Ramirez was not supported by the evidence and that the conduct relied upon by Gonva did not occur in the manner described by Mr Gonzalez. Although the Commissioner accepted that Mr Gonzalez was offended by what he perceived to be actions by Ms Ramirez that were disrespectful to him, the Commissioner did not accept that Ms Ramirez was in fact disrespectful or otherwise inappropriate in her communications with Gonva. The Commissioner found that it had not been demonstrated that Ms Ramirez had engaged in misconduct and that there was no valid reason for dismissal for the purposes of s 387(a).

[15] The Commissioner considered the remainder of the factors set out in s 387 of the Act to the extent relevant. The Commissioner found that Ms Ramirez had been notified of the reason for dismissal but had not been given an opportunity to respond to the misconduct relied on to terminate her employment for the purposes of s 387(b) and (c). For the purposes of s 387(f), the Commissioner took into account that the nature of Gonva's small business and the absence of human resources expertise contributed to the procedures adopted in the lead up to the dismissal. In relation to s 387(h), the Commission recorded aspects of Ms Ramirez's evidence which asserted that cultural issues were influential in the events leading up to her dismissal. The Commissioner observed:[6]

> **[108]** Ms Ramirez's submission in this regard gives important context to the response that I observed of Mr Gonzalez's personal offence taken to the Applicant raising queries about her conditions of employment.
>
> **[109]** Ultimately, this cultural consideration, while relevant to the events that occurred in this matter, does not override applicable industrial laws that protect employees from dismissal if

> they ask questions or raise queries with respect to their conditions of employment in an appropriate and lawful manner.

[16] Following consideration of each of these matters, the Commissioner concluded that Ms Ramirez's dismissal was harsh, unjust and unreasonable.[7]

[17] The Commissioner then awarded compensation in the amount of $13,158.97 gross plus 11% superannuation of $1,447.49 in circumstances in which reinstatement was not appropriate. In determining the amount of compensation to be awarded to Ms Ramirez, the Commissioner summarised the approach of the full bench in *Sprigg v Paul Licensed Festival Supermarket* (1998) 88 IR 21 as follows:[8]

> "1. Estimate the renumeration the employee would have received, or would have been likely to receive, if the employer had not terminated the employment;
> 2. Deduct monies earned since the termination. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered;
> 3. Discount the remaining amount for contingencies;
> 4. Calculate the impact of taxation to ensure the employee receives the actual amount he or she would have received if they had continued in their employment;
> 5. Apply the legislative cap on compensation."

[18] The Commissioner then considered the criteria in s 392 of the Act:

> **392 – Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
> (b) the length of the person's service with the employer; and
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
> (g) any other matter that the FWC considers relevant.

> *Misconduct reduces amount*
>
> (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.
>
> *Shock, distress etc. disregarded*
>
> (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.
>
> *Compensation cap*
>
> (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
>
> (a) the amount worked out under subsection (6); and
>
> (b) half the amount of the high income threshold immediately before the dismissal.
>
> (6) The amount is the total of the following amounts:
>
> (a) the total amount of remuneration:
>
> (i) received by the person; or
>
> (ii) to which the person was entitled;
>
> (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
>
> (b) if the employee was on leave without pay or without full pay while so employed during any part of that period--the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

[19] Having regard to the submissions advanced on the appeal, it is relevant to note that the Commissioner considered the factor in s 392(2)(a) (namely, the effect of the order on the viability of the employer's enterprise) as follows:[9]

> *Viability: section 392(2)(a)*
>
> **[128]** The Respondent did not offer any evidence with respect to the viability of its business, should compensation be awarded. Mr Gonzalez did say at the end of the hearing that he could not afford any compensation but there was no detail to that submission.
>
> **[129]** I appreciate that Mr Gonzalez operates a small business. I have also taken into account the evidence of Ms Ramirez that the Respondent was considering removing her from the roster on a Monday so as to avoid paying her wages on a public holiday when the business was closed, as being indicative of a concern about revenue and profitability.

> **[130]** However, in the absence of evidence from the Respondent regarding viability, I am unable to discount any compensation awarded on this basis.

[20] The Commissioner found that, if the dismissal had not occurred, Ms Ramirez's employment was likely to have continued for a period of approximately a further 18 weeks.[10] The Commissioner calculated the remuneration lost by Ms Ramirez in the 18-week period would have been $14,101.56 gross less unpaid sick leave in the period of $942.59, reaching a total of $13,158.97. In addition, the Commissioner found that Ms Ramirez's loss of income included 11% superannuation that would otherwise have been paid to her in the amount of $1,447.49.

Grounds of appeal

[21] The grounds of appeal in the notice of appeal are lengthy. However, they can be summarised in three grounds.

[22] Ground 1 alleges that the Commissioner failed to take into account a mandatory consideration under s 392(2)(a) of the Act, being the effect of the order for compensation on the viability of the employer's enterprise. Gonva's written submissions assert that Gonva is a small business experiencing severe financial hardship and "does not have sufficient funds to pay any compensation". Mr Gonzalez asserts that that the Commissioner never asked him to provide evidence about the financial position of the business and claims that Gonva did not adduce evidence of its' financial circumstances because the hearing was "not about the business's financial situation". Mr Gonzalez pointed out that, whilst the decision was reserved, the Commissioner requested that Gonva provide the pay slips for Ms Ramirez but did not ask him to provide information or evidence about Gonva's financial situation.

[23] Ground 2 concerns to the Commissioner's finding that the dismissal was in breach of the Small Business Fair Dismissal Code. Mr Gonzalez submits that Ms Ramirez's engaged in "serious misconduct" by intimidating him by recording phone calls, using her mobile phone while working and treating Mr Gonzalez "with a lack of respect and a tendency towards anger or verbal confrontation." Gonva's submissions were that these three issues amounted to serious misconduct justifying summary dismissal and that the Commissioner therefore erred in finding that the dismissal was not in accordance with the Small Business Fair Dismissal Code.

[24] Ground 3 alleges that Mr Gonzalez felt discriminated against because of his gender, lack of communication skills in English and because of his cultural background. Gonva's written submissions assert that the Commissioner accepted Ms Ramirez's version of events, that the Commissioner did not accept that he had been verbally abused by Ms Ramirez because it is difficult to think that a woman perpetrated verbal abuse against a man and that the hearing was an intimidating experience for Mr Gonzalez. Gonva claims that this was because "the interaction between the Commissioner and Ms Lina Ramirez was more fluid than my interaction because of my lack of communication skills in English and gender." Mr Gonzalez also submits that he felt discriminated against because of his cultural background as a result of the observations made by the Commissioner in relation to the "cultural issues" referred to by

Ms Ramirez in her evidence and asserted the Commissioner erred by not considering a witness statement filed by Ms Ramirez which was not relied upon by her in the hearing.

[25] Gonva filed further evidence on appeal which was not before the Commissioner in the form of a series of pay slips for Mr Gonzalez and various financial records and bank statements of Gonva. As we understand it, the additional evidence was sought to be relied upon for the purposes of demonstrating that, in fact, an order for compensation in favour of Ms Ramirez would have a significant effect on the viability of Gonva's business. The Full Bench received, and has considered, the evidence for the purposes of considering the application for permission to appeal. However, in the circumstances of this matter, the additional evidence is not capable of demonstrating an arguable case of appealable error in the Commissioner's decision.

Permission to appeal

[26] There is generally no right to appeal from a decision of the Commission and an appeal may only be made with permission of the Commission in accordance with s 604(1) of the Act. Section 604(2) requires that the Commission must grant permission if the Full Bench is satisfied that it is in the public interest to do so. In most matters, the Commission otherwise has a broad discretion as to whether to grant permission to appeal.[11]

[27] In cases which involve an application for permission to appeal from a decision made under Part 3-2 of the Act, section 400 confines the discretion of the Full Bench as follows:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[28] Section 400(1) imposes a higher threshold for permission to appeal in respect of decisions in unfair dismissal proceedings.[12] Permission to appeal is confined to circumstances in which the Full Bench is satisfied it is in the public interest to do so and the residual broad discretion under s 604 does not apply. The public interest may arise where a matter raises issues of importance and general application, or if a diversity of decisions at first instance requires guidance from an appellate review, or where the decision manifests an injustice, or is counterintuitive, or the relevant legal principles appear disharmonious with other similar matters.[13]

[29] Gonva submits that permission to appeal should be granted on the basis that the decision is not "fair and just" and was made without considering the business' financial material. It is asserted that the business, staff members, and Mr Gonzalez's family will suffer from the obligation to pay compensation. Additionally, Gonva suggests that there is public interest in considering the difficulties faced by small business owners and the reality that "men are also abused verbally by women" and raises issues in relation to the relevance of a person's cultural background to a decision of the Commission.

[30] The Full Bench does not consider that it is in the public interest to grant permission to appeal and, as a result of the operation of s 400(1) of the Act, is required to refuse permission to appeal. In our opinion, the grounds of appeal relied upon by Gonva do not identify any arguable case of appealable error. There is no other reason why it would be in the public interest to grant permission to appeal. The appeal raises no issues of importance and general application, or in relation to which there is a diversity of decisions at first instance, which warrant guidance by way of appellate review or otherwise manifest any substantial injustice.

[31] With respect to ground 1, s 392(2)(a) of the Act requires that, in determining an amount of compensation to be ordered to be paid in lieu of reinstatement, the Commission must take into account "the effect of the order on the viability of the employer's enterprise". That means the consideration must, along with the other matters set out in s 392(2), be treated as a matter of significance in the decision-making process.[14] However, a requirement to "have regard to" or "take into account" a set of considerations leaves open what weight or influence each of the particular matters is to have in the decision to be made.[15] It is for the decision maker to determine the appropriate weight to be given to each in assessing the appropriate amount of compensation to be subject of an order of the Commission.

[32] There can be no doubt that the Commissioner considered the effect of any order for compensation on Gonva's business. The Commissioner expressly considered each of the matters in s 392(2) including the effect of the order on the viability of the enterprise in s 392(a).[16] The Commissioner recorded that there was no evidence with respect to the viability of the business other than an assertion by Mr Gonzalez that he could not afford any compensation although the Commissioner took into account that Gonva is a small business and that the fact it was considering removing Ms Ramirez's Monday shifts was "indicative of a concern about revenue and profitability."[17] Given the state of the evidence, the Commissioner indicated she was unable to discount any compensation awarded on the basis of the effect on the viability of Gonva's business. That conclusion was open to the Commissioner. There is no arguable case for appealable error on the basis that the Commissioner failed to take into account the effect of the amount of compensation on the viability of Gonva's business.

[33] Mr Gonzalez's true complaint appears to be that the Commissioner did not make further inquiries in relation to the state of Gonva's business. We do not consider that this complaint gives rise to an arguable case of appealable error in the circumstances of this matter. Administrative decision-makers are not generally obliged to conduct further inquiries to supplement material provided to them. In *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123 (***SZIAI***), for example, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said in relation to what was then the Refugee Review Tribunal:[18]

> In the exercise of its review function, the Tribunal may obtain such information as it considers relevant. In this sense it has an inquisitorial function. That does not, however, impose upon it a general duty to undertake its own inquiries in addition to information provided to it by the applicant and otherwise under the Act.

[34] Similarly, in *Minister for Home Affairs v DUA16* [2020] HCA 46; (2020) 271 CLR 550 (***DUA16***), Kiefel CJ, Bell, Keane, Gordon and Edelman JJ observed:[19]

> As Griffiths J correctly held in the Full Court, there is no general obligation on the Authority to advise referred applicants of their opportunities to present new information. Nor is there any general obligation upon the Authority to get new information. This is so even if the submissions are hopeless, or if they contain errors, even major errors, about facts or law. However, the power in s 473DC is still subject to the usual implication that it must be exercised within the bounds of legal reasonableness. Hence, this Court has held that a decision can be invalid if it is made in circumstances which exceed the high threshold of legal unreasonableness for the Authority's failure to exercise the power in s 473DC to get new information

[35] Nor, as a general rule, does procedural fairness require a decision-maker to direct the attention of a person to apparent omissions in their case.[20]

[36] It is possible that, in some circumstances, the failure of an administrative decision-maker to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could constitute a failure to undertake the review required by the applicable statute or cause the decision to exceed the threshold of legal unreasonableness.[21] The cases in which failure to conduct an inquiry have invalidated a decision have been generally been regarded as "rare" or "exceptional".[22] The test of unreasonableness presents a "high threshold" and the fact that it might have been reasonable to make an inquiry does not mean that a failure to do so constitutes error.[23]

[37] The distinction between inquisitorial and adversarial proceedings is not always neat. Although the Commission is able to inform itself in such manner as it considers appropriate,[24] most proceedings before the Commission are conducted in an adversarial manner and the Commission relies upon such evidence as is presented by the parties. It may be that some functions of the Commission are more akin to an inquisitorial process. In that situation at least, it is possible that a failure to make an obvious inquiry about a critical fact, the existence of which could be easily ascertained, might result in error.[25]

[38] The procedures adopted in proceedings arising from the dismissal of an employee, including unfair dismissal proceedings, have traditionally been understood to be adversarial rather than inquisitorial in nature.[26] The current procedures adopted by the Commission reflect that unfair dismissal proceedings are conducted in an adversarial manner. The *Fair Work Commission Rules 2024* (Cth) require that an application for an unfair dismissal remedy be served on the former employer and that a respondent lodge a response to the application, together with any supporting documents, within 7 days of being served with the application.[27] The Commission customarily makes directions in advance of conducting a hearing or determinative conference requiring the parties to file evidence and submissions in advance to enable the Commissioner's function to be undertaken efficiently and fairly.[28]

[39] In unfair dismissal proceedings, the Commission is required, by s 387, to take into account a series of matters when considering whether a dismissal is harsh, unjust or unreasonable. It is required, by ss 391(4) and 392(2), to take into account other factors in determining the amount of any order with respect to remuneration lost or compensation in lieu of reinstatement. That does not mean that, in each case, the Commission is required to conduct

its own independent inquiry into each of those factors. The Commission will ordinarily consider those matters on the basis of the material presented by the parties.

[40] In this matter, we do not consider there is an arguable case that the Commissioner erred by not making further inquiries in relation to the financial position of Gonva's business. Mr Gonzalez appeared at the hearing and presented the case on behalf of Gonva. Submissions and evidence were filed in advance of the hearing. The proceedings were conducted in an adversarial manner. It would have been open to the Commissioner to request additional material to be produced in relation to a wide range of issues potentially relevant to whether the dismissal was unfair and what relief, if any, should be granted. There is no reason to suggest, however, that the Commissioner was required to conduct further inquiries. Beyond a bare assertion that Mr Gonzalez could not afford to pay compensation, there does not appear to have been any material before the Commissioner suggesting that the financial state of Gonva's business was such that a compensation order would threaten its viability. The bald assertion made by Mr Gonzalez did not require the Commissioner to conduct any other inquiry. The Commissioner was entitled to rely on the material presented. It is not relevant that the Commissioner did request that Gonva provide payslips for Ms Ramirez.

[41] With respect to ground 2, the decision at first instance demonstrates that the Commissioner considered the evidence presented by the parties concerning Gonva's allegations of serious misconduct in considerable detail. The Commissioner found that the allegations concerning Ms Ramirez's queries regarding her employment, recording of calls and use of her phone in the workplace "did not occur as alleged."[29] The Commissioner's careful and thorough consideration of the evidence was informed by the benefit she had of seeing and hearing the evidence being given.[30] The relevant inquiry in relation to the Small Business Fair Dismissal Code was whether Mr Gonzalez's belief that Ms Ramirez's conduct was sufficiently serious to justify her immediate dismissal was based on reasonable grounds. Gonva's submissions on appeal do no more than assert the truth of allegations found by the Commissioner to be unsubstantiated. There is no reasonably arguable case that there were errors in the factual findings of the Commissioner. It is, in any event, not in the public interests for permission to appeal to be granted in order for the Full Bench to revisit those findings.

[42] With respect to ground 3, the Full Bench understands that proceedings in a court or tribunal may well be intimidating and a new experience for self-represented litigants. The same was true for both parties in these proceedings. The assertion that the Commissioner was prejudiced because of the gender, language or cultural background of Mr Gonzalez appears to be made solely on the basis that the Commissioner accepted Ms Ramirez's evidence and generalised assertions as to the interactions between the Commissioner and Ms Ramirez during the hearing. The submission has no merit. As we have said, the Commissioner's findings were based on a careful consideration of the evidence. The reference in the decision to the evidence given by Ms Ramirez concerning the "cultural issues" she believed were influential in the events leading to her dismissal was open to the Commissioner and, in any event, the Commissioner indicated that any cultural considerations could not affect the disposition of the application.[31] The alleged error in the Commissioner not having regard to a witness statement

that was filed, but not admitted into evidence, is difficult to follow and of no substance. No arguable case of appealable error is raised by that submission.

Conclusion

[43] For the reasons outlined above, the Full Bench orders that permission to appeal is refused.

VICE PRESIDENT

Appearances:

J Gonzalez, Managing Director, Gonva Group Pty Ltd.
L Ramirez appearing for herself.

Hearing details:

2024.
Sydney (video using Microsoft Teams):
18 September.

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[1] *Ramirez v Gonva Group Pty Ltd* [2024] FWC 1522.

[2] *Ramirez v Gonva Group Pty Ltd* [2024] FWC 2304.

[3] *Gonva Group Pty Ltd v Ramirez* [2024] FWC 1808.

[4] [2024] FWC 1522 at [40].

[5] [2024] FWC 1522 at [55].

[6] [2024] FWC 1522 at [108]-[109].

[7] [2024] FWC 1522 at [110]-[115].

[8] [2024] FWC 1522 at [123].

[9] [2024] FWC 1522 at [128]-[130].

[10] [2024] FWC 1522 at [137].

[11] *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30] (Spender, Kiefel, Dowsett JJ); *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025; (2013) 238 IR 258 at [9]-[12].

[12] *WorkPac Pty Ltd v Bambach* [2012] FWAFB 3206; (2012) 220 IR 313 at [14].

[13] *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266; [2010] FWAFB 5343 at [26].

[14] *Edwards v Giudice* (1999) 94 FCR 561 at [5] (Moore J); *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56] (Collier, Bromberg and Katzmann JJ); *Re 4 yearly review of modern awards* [2019] FWCFB 6067 at [13].

[15] *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 at 187-188 (Hill J); *Application by Construction, Forestry and Maritime Employees Union – The Maritime Union of Australia Division for an entry permit for Shane Reside* [2024] FWC 3409 at [7].

[16] [2024] FWC 1522 at [128]-[130].

[17] [2024] FWC 1522 at [129].

[18] (2009) 111 ALD 15; 259 ALR 429 at [16].

[19] *Minister for Home Affairs v DUA16* [2020] HCA 46; (2020) 271 CLR 550 at [27] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

[20] *Broussard v Minister for Immigration & Ethnic Affairs* (1989) 21 FCR 372 at 481 (Gummow J); *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564 at 593–594 (Fisher, Wilcox and Spender JJ).

[21] *SZIAI* at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *DUA16* at [27]-[28] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

[22] *Minister for Immigration and Citizenship v Le* [2007] FCA 1318; (2007) 164 FCR 151 at [77] (Kenny J); *DXF22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 75; (2024) 303 FCR 466 at [47] and [49] (Wigney, Hespe and Kennett JJ) (***DXF22***).

[23] *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 at [30] (Bennett J); *Kaur v Minister for Immigration and Border Protection* [2007] FCAFC 184; (2017) 256 FCR 235 at [33] (Dowsett, Pagone and Burley JJ); *DXF22* at [47] (Wigney, Hespe and Kennett JJ).

[24] *Fair Work Act 2009* (Cth), s 590(1).

[25] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77; (2018) 262 FCR 527 at [120]-[121] (Bromberg, Katzmann and O'Callaghan JJ).

[26] *Liddell v Lembke (t/a Cheryl's Unisex Salon)* (1994) 56 IR 447 at 455 (Wilcox CJ and Keely J); *Department of Social Security v Uink* (1997) 77 IR 244 at 248; *Fox v Australian Industrial Relations Commission* [2007] FCAFC 150; (2007) 161 FCR 263 at [75] (Buchanan J).

[27] *Fair Work Commission Rules 2024* (Cth), rules 21 and 66(1).

[28] Consistently with its obligations under s 577 of the Act.

[29] [2024] FWC 1522 at [83].

[30] See, for example, [2024] FWC 1522 at [52]-[53].

[31] [2024] FWC 1522 at [109].