



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kristen Gordon

v

Sens Catering Group Pty Ltd
(U2022/3106)

COMMISSIONER SIMPSON

BRISBANE, 11 JULY 2022

Application for unfair dismissal remedy – dismissal unfair – order for compensation

[1] On 14 March 2022, Ms Kristen Gordon (**Ms Gordon/the Applicant**) made an application to the Fair Work Commission (**the Commission**) under s.394 of the *Fair Work Act 2009* (**the Act**) for an unfair dismissal remedy against Sens Catering Group Pty Ltd (**Sens /the Respondent**).

[2] A conciliation before a Commission Conciliator did not take place and the matter was then allocated to me. I listed the matter for a Directions Hearing on 26 May 2022. The Respondent did not attend the Directions Hearing and had earlier indicated that they did not wish to participate in the hearing and did not wish to file any further material. I set dates for the filing of material for both parties.

[3] After the Directions Hearing, my chambers sent an email to the Respondent contact being Mr Jerry Chen (**Mr Chen**) as follows:

“Dear Mr Chen,

I refer to the above matter.

The Commissioner advises that there are factual disputes that need to be resolved, including whether the Respondent is a small business with less than 15 employees and whether the Applicant was dismissed. The Commissioner puts you on notice that the hearing for this matter will occur at **10:00AM Friday, 1 July 2022** by telephone because of these factual disputes, and it is a matter for you if you participate.

Chambers will send a notice of listing and directions shortly outlining the dates for filing of material. It is also a matter for you if you file material in accordance with the directions. The Commissioner again puts you on notice that should you not submit material in accordance with the directions, the matter will be decided in the absence of material from you.”

[4] No response was received.

[5] The Respondent failed to file by the date listed in the Directions. My chambers sent the following email:

“Dear Mr Chen,

I refer to the attached Notice of Listing/Directions which required you to file material by 23 June 2022.

The Commissioner notes that you foreshadowed you were not going to file any material, and seeks that you advise if this is still the case and if you intend on participating in the hearing listed at 10:00AM this Friday, 1 July 2022 by telephone.

The Commissioner again puts you on notice that if you do not file material and fail to attend the hearing, the matter will be decided in your absence.”

[6] The Respondent responded this same day including the following:

“ ...

Please accept my apologies for the delayed response, I have summarized a personal statement for your review.

Since I have no further information or evidence to provide, I confirmed that I will not attend the hearing and we will accept any form of decision that Fair work made on the matter.”

[7] The hearing went ahead on 1 July 2022 by telephone, with Ms Gordon appearing on her own behalf. At the hearing, based on the evidence before me, I was satisfied that the Applicant was dismissed and that the dismissal of Ms Gordon was harsh, unjust or unreasonable and an order for compensation should be made. The following are my reasons.

SUMMARY OF EVIDENCE AND SUBMISSIONS

Small Business

[8] In the Form F3, the Respondent indicated that they had 1 full-time employee and 10 casual employees, 7 of them being on a regular basis at the time of the Applicant’s dismissal.

[9] The Applicant submitted that the Respondent was not a small business as at the time she was dismissed, as Mr Chen had two restaurants he owned directly (Sens and Goya) both overseen by Phoebe Wang (**Ms Wang**) at the relevant time; as well as shares in multiple café businesses in Australia, including a new venture in Queens Street, a Sens café in Brisbane, another café “Two Birds One Stone” which the Applicant said she was asked to help open back in December; and numerous cafes in China, including Two Birds One Stone Guangzhou and Two Birds One Stone, Shanghai.

[10] The Respondent did not appear at the hearing and therefore no further evidence regarding this could be obtained from the Respondent. Based on the evidence before me, I was unable to be satisfied the employer is a small business and have proceeded to deal with the matter on the basis that it is not.

Evidence and Submissions on whether the Applicant was dismissed and Merits

Background

[11] In the Form F3 the employer raised a further jurisdictional objection that the Applicant wasn't dismissed.

[12] The Applicant submitted that she was a supervisor for the Respondent and was a reliable, hard-working employee for a little over 14 months and was engaged as a casual albeit working full time hours.

[13] The Applicant stated that she had been utilised to help open multiple businesses for the owner, Mr Chen, and had a strong positive working relationship with managers and staff and had established or contributed to a loyal customer base for the business. Part of the Applicant's duties included rostering staff, time sheets and generally helping the business to run smoothly.

[14] The Applicant believed her dismissal was initiated out of personal feelings by Ms Wang, the ex-wife of the owner, Mr Chen, who was recently brought into the business to assist after the previous general manager of the company was dismissed in November 2021. The Applicant said both Ms Wang and Mr Chen (on separate calls) asked her to post in the group chat that Ms Wang was Mr Chen's wife, and she would be making business decisions in place of the former manager Monique.

[15] The Applicant submitted that she had been sat down at various times by Ms Wang and pushed to resign, with Ms Wang even stating that the Applicant could "go to Fair Work with Monique If you want, we don't care". The Applicant submitted that in the same conversation, after she logically explained things to Ms Wang, she would always completely change her mind and become friendly and tell the Applicant that everything was fine. The Applicant submitted that it was her belief that the reason for these unsettling and very confusing "chats" revolved around the fact that the Applicant still spoke with the former general manager, (although they requested, she stop all communication), and her disagreeing with some of Ms Wang's "orders" and offering alternative solutions. The Applicant submitted that she did this respectfully, and with the business's best interests at heart.

[16] The Applicant gave evidence that Ms Wang came on board in December 2021. The Applicant said that Sens Café makes less money than the new venture Goya, so Sens staff were constantly pulled to work at Goya, often to the detriment of the business and staff that had to work consistently understaffed and stressed. The Applicant said she brought this up in a text chain between managers as it was an ongoing problem not being addressed and Ms Wang took exception to these texts. The Applicant said she messaged Ms Wang personally after this to clarify.

[17] The Applicant said she received messages from her co-worker Ms Mariel Veas (**Ms Veas**) who was at work when this exchange was occurring and saw Ms Wang's reaction first hand and wanted to give the Applicant the "heads up" on what was happening. The Applicant said these messages were a shock as she had no idea she would cause such a reaction, as this was not her intention.

Week prior to alleged termination

[18] The Applicant said the week before her dismissal, she was brought in for a meeting because she had told Dream Nareekul, the shop manager, she was going through IVF and therefore had some days she couldn't work, and some things she couldn't do for the implantation time. The Applicant submitted she was forced to explain this whole part of her personal life to Ms Wang because the question was raised whether she could be working during this. The Applicant said that she could and stated that money was more important than ever during this time, and she could do everything as normal, except lifting milk crates from the fridge.

Saturday 12 March 2022

[19] The Applicant submitted that the last "disagreement" with Ms Wang occurred on Saturday 12 March, during a managerial group text regarding staff rostering, which was an important aspect of her role. The Applicant stated that she expressed that the business needed to hire another staff member for their other shop as Ms Wang consistently sent their shop's rostered staff over there, with her solution for now being understaffed, to "close the floor- do takeaways only/ close cold drinks section" which severely affected the turnover and regular customer base.

[20] The Applicant submitted that Ms Wang continuously pushed that they only needed four staff for weekends and would make comments when they had five staff on. The Applicant submitted that before Ms Wang came, they always required five staff to handle the weekend rush. After reading the Applicant's messages suggesting a solution to this ongoing problem, the Applicant said that Ms Wang became very irate and shut the conversation down.

[21] The Applicant submitted that she was informed by the manager, who was with Ms Wang at the time, that she was told by Ms Wang to "FIRE HER RIGHT NOW!! Hire another supervisor I don't care about the cost, do it now!" The Applicant stated that when the Applicant asked why Ms Wang was so upset about the messages the Applicant had sent, Ms Wang stated repeatedly that the Applicant "didn't add any smiley faces! There are no emotions!" The Applicant submitted that apparently because of this Ms Wang took what the Applicant was saying as "unfriendly".

[22] The Applicant submitted that night Ms Wang called another staff member and tried to convince that staff member to take the Applicant's job. The Applicant stated that this was before she even knew there was a big issue happening. The Applicant submitted that she was unaware that her completely reasonable text messages had created so much upset.

[23] Ms Veas provided a statement in support of the Applicant which was admitted into evidence uncontested. Ms Veas said that on Saturday 12 March, Ms Wang came into the store

while they were closing to talk to Dream Nareekul. Ms Veas said she was packing up the shop when Ms Wang received messages from the Applicant that made her so angry she smashed her phone on the counter, jumped up and down while screaming at Dream Nareekul she must “FIRE HER (Kristen) IMMEDIATELY” and to get a new supervisor, she doesn’t care what it costs.

[24] Ms Veas said it was a very aggressive display and very uncomfortable. Ms Veas said she asked to see the messages to understand why Ms Wang was so angry. Ms Veas said they were normal messages and she told Ms Wang she didn’t think the Applicant meant anything bad by them. Ms Veas said Ms Wang replied that the Applicant was arguing with her, and because there were no emojis, she meant what she was saying to be rude. Ms Veas said she told Ms Wang that is just how the Applicant writes texts, but Ms Wang was furious and kept saying over and over to Dream Nareekul, to fire the Applicant immediately.

[25] Ms Veas said that afternoon, she was called by Dream Nareekul who offered Ms Veas the Applicant’s job. Ms Veas said Dream Nareekul sounded unsure about what she was asking. Ms Veas said without warning, Ms Wang took the phone off Dream Nareekul and told Ms Veas she will give \$60,000 to do the Applicant’s job. Ms Veas said Ms Wang also said “are you worried about hurting her feelings? Don’t worry about that we have wanted to get rid of Kristen for a long time.” Ms Veas said when she said no and said she needed to talk to Ms Gordon first, Ms Wang said she would pay Ms Veas whatever she wanted to take the role, and to “name my price.” Ms Veas said Ms Wang told her that either way Ms Gordon is gone, so if she says no, they will get a new supervisor anyway, and Ms Veas will miss the opportunity. Ms Veas said the situation was very abrupt and made no sense to her, and she felt uncomfortable and declined the position. Ms Veas said she talked with the Applicant that afternoon and warned her bad things were happening.

Sunday 13 March 2022

[26] The next afternoon after she had worked a full shift, the Applicant said the manager Dream Nareekul and her partner ‘John’ asked to talk to her and told her they were forced to dismiss her. The Applicant stated that Dream Nareekul was in tears through this and stated she tried many times to change Ms Wang’s mind, since the Applicant was an integral part of the operation, but Ms Wang was adamant the Applicant was to be fired immediately. The Applicant said she asked for a reason, and the best ‘John’ could say was because the business is getting rid of any staff that didn’t agree with the owners, and the Applicant didn’t always agree with what Ms Wang wanted.

[27] The Applicant submitted that Dream Nareekul then asked her to stay for at least one week but at best until 23 March because Dream Nareekul was going to be in Sydney organising her visa, and they needed the Applicant and did not have a replacement. The Applicant submitted that she asked, “Did you tell Phoebe (Ms Wang) you won’t be here, therefore you can’t fire me now?” And she said yes, but she doesn’t care.

[28] The Applicant stated that she was also asked by Dream Nareekul to stay until the Wednesday 23 March, as the roster was already out and they were already short on staff. The Applicant stated that she agreed to do shifts to assist Dream Nareekul during this time and her last day of work was 23 March 2022.

[29] The Applicant also gave oral evidence about the conversation she had with Dream Nareekul in which Dream Nareekul advised her she was terminated, saying it lasted for about an hour and it was only after the Applicant had been told that she her employment was terminated, that Dream Nareekul asked her if she would do the casual shifts until 23 March.

[30] The Applicant said she conversed with Ms Veas about the outcome of the conversation with Dream Nareekul and decided to work the additional shifts for the requested days (until Dream returned from Sydney) as Dream Nareekul knew the Applicant leaving immediately would have no effect on the owners but would affect the team and also the Applicant financially.

[31] Ms Veas evidence was that on Sunday 13 March, Dream Nareekul and ‘John’ asked to talk to the Applicant when she finished work. Ms Veas said she heard Dream Nareekul ask to meet the Applicant, and the Applicant also told Ms Veas. Ms Veas said she made sure she finished work before the meeting because she did not want to be there for it.

[32] Ms Veas said the Applicant messaged her later that afternoon very upset and told her she had been fired. Ms Veas said the next day when Dream Nareekul came into work and saw her, she burst into tears. Ms Veas said Dream Nareekul could not believe what she had to do and was very worried about the Applicant and how this had affected her.

Monday 14 March 2022

[33] On Monday 14 March 2022 the Applicant filed an application for unfair dismissal remedy.

Sunday 20 March 2022

[34] The Applicant said on Sunday one week after being dismissed, Ms Wang came and spoke with her and offered her two weeks paid leave and a position running a new store that they would be part owners of. The Applicant said there were holes in the offer and the Applicant did not believe this was going to come to fruition and they made no agreements, as the Applicant wanted to see an offer in writing.

[35] In relation to the conversation on 20 March with Ms Wang, the Applicant said she did not want to speak to Ms Wang. The Applicant said Ms Wang cried when she found out about the Applicant’s miscarriage, however the Applicant felt that in fact Ms Wang was worried about a court case. The Applicant had filed an unfair dismissal application on the previous Monday 14 March.

[36] The Applicant said Ms Wang said to her that “obviously they cannot work together because they do not have the same values,” but instead offered for the Applicant to open up a new store and the Applicant could manage that. The Applicant said that she responded that if Ms Wang thought she was untrustworthy why would she offer a better role. The Applicant said Ms Wang replied that they only owned a very small percentage of this business so it wouldn’t really be working for the Respondent anymore. The Applicant said that she responded that these people don’t really know her, and why would they hire her. The Applicant said she also asked Ms Wang if she there would be an interview and if there was any paperwork to see what it was all about.

[37] The Applicant said Ms Wang replied there was no one to interview because its five Chinese investors that do not really know hospitality and Ms Wang said she would just tell them that the Applicant is 'good' and she would get the job. The Applicant said she thought this was suspicious. The Applicant said it was at this point Ms Wang said the Applicant could have two weeks off and then she could go and do this job.

[38] The Applicant said the offer was not to return to her job, it was to go off and run a mystery café in a job from people that did not know her and in a business that the Respondent had a 5% share of, or 'something like that'. The Applicant said she asked to see something in writing, and nothing was ever given to her. The Applicant said she just wanted the conversation to end, so she said to Ms Wang, 'okay thanks for talking with me' and she went back to work.

[39] The Respondent submitted in its material filed prior to the hearing that Ms Wang asked Dream Nareekul to have a chat with the Applicant, and to notify her that she was dismissed with two weeks' notice. The Respondent submitted that a week after, on Sunday 20 March 2022, after Ms Wang reported to Mr Chen the situation, Ms Wang came to the shop and had a direct chat with the Applicant. The Respondent submitted that from what Mr Chen knew, they had a good chat and offered the Applicant two weeks paid leave in good faith (even though she is a casual employee) and the Applicant agreed to return back to work after her annual leave. Further, the Respondent submitted that the Applicant was happy to keep working with Sens coffee for the new shop opening soon at QSV shopping centre.

[40] Ms Veas said Ms Wang came in on Sunday 20 March and wanted to talk to the Applicant. Ms Veas said they talked for a little while, and when the Applicant came back to work she said to Ms Veas "They are unbelievable" or something similar. Ms Veas said the Applicant told Ms Veas she had been offered to run the new store and given 2 weeks off paid, and Ms Wang asked her a lot of questions about the miscarriage.

[41] Ms Veas said the Applicant said Ms Wang was pretending she "never fired her", and even said that to her. Ms Veas said she knows this is not true and talked to the Applicant about how crazy it was to pretend this when everyone was put through so much drama.

[42] Ms Veas said during conversations with the Applicant about this that Ms Veas asked if she would take the offer, and the Applicant said she hadn't received any other information about the offer and did not feel good about taking the offer because it didn't seem legitimate. Ms Veas said the following week she talked to another staff member Monika Mezaks who said Ms Wang offered her the Applicant's job as well.

Letter of Mr Chen

[43] Mr Chen, the Director of the Respondent, submitted written material provided to the Commission that included the following:

"According to the information I have heard from Phoebe and some other staff, on 12/03, Saturday, Kristen and Phoebe have had some argument in regard to the staffing issue, Three staff called sick for the weekend shift, as the result, our Broadbeach shop (Goya Cafe) was short of staff and quite hassled with the weekend rush. Therefore, Phoebe ask

SENS Southport to send one staff to help Goya on Sunday, so both shops would have 4 FOH staff. She believe she made the right decision as Goya is normally busier than SENS and average sales is also higher than SENS Southport. Kristen wouldn't agree with her decision as she thought SENS need at least 5 FOH staff for busy weekend. As a result, there was some argument and conflict in their group chat.

On 13/03, Sunday, Phoebe asks Southport shop manager, Dream, to have a chat with Kristen, and to notify her that she was dismissed with two weeks notice.

Week after, I believe its Sunday 20/03, After Phoebe reported me the situation. Phoebe came to the shop and had a direct chat with Kristen.

According to my understanding, as I was verbally told by Phoebe, Kristen was supposed to be back at work after the two weeks paid leave.

I have attached the payment receipt for the annual leave period.

According to the information I have, the whole process and conversation between Kristen and us, is not harsh and we offered two weeks paid leave with good faith and expecting her would back after that.

This is all I know in regarding to this matter. Unfortunately, I have no further information or evidence to support this issue as I never got involved directly.”

[44] Attached with this material were payment summaries indicating that the Applicant had been paid an amount of \$867.00 on 22 March 2022, \$905.00 on 29 March 2022, and \$777.25 on 4 April 2022. Mr Chen also attached a document headed ‘Leave Request’ submitted on 20 March 2022 from ‘Kristen’ for the period 23/4/22 to 7/4/22.

Conclusion on whether the Applicant was dismissed

[45] The Respondent has raised a jurisdictional objection that the Applicant was not dismissed. Accordingly, I must first determine whether the Applicant was indeed dismissed.

[46] I am satisfied that the Applicant’s casual role was terminated on 13 March 2022 by way of the meeting with Dream Nareekul and ‘John’. Casual employees are not entitled to notice and the evidence does not support a conclusion that the Applicant was dismissed with notice as the Respondent has submitted in its written material. As the Respondent elected not to participate in the hearing there is no evidence to support this submission. The evidence of the Applicant contradicts this claim. I am more inclined to regard the casual employment that occurred from 14 to 23 March 2022 after the communication of the Applicant’s termination, as the Applicant being engaged to work on another casual contract until Dream Nareekul returned from Sydney on 23 March.

[47] I am also satisfied that the evidence concerning the meeting on 20 March 2022 arranged by Ms Wang on behalf of the Respondent affirms the fact of the dismissal occurring on 13 March 2022.

[48] Casual employees do not accrue paid leave and are not entitled to it. The Respondent would probably have been aware that the Applicant was disputing her dismissal as the unfair dismissal application was filed on 14 March. I am inclined to the view that Ms Wang's offer of additional payment to the Applicant as a casual employee and a period of 'paid leave', and the potential offer of other future employment with another business at the end of that period of 'leave' were attempts to resolve the dispute about the earlier dismissal, rather than either an offer to rescind the termination, or to attempt to maintain a purported ongoing casual employment relationship.

[49] The Applicant gave oral evidence that the only reason that she completed the leave form was because she needed the money to pay bills and she hadn't been looking for another job because she had agreed to do the additional casual shifts as requested by Dream Nareekul to assist Dream Nareekul with her visa application. The Applicant said she believed that if she did not enter the leave application into the computer as Ms Wang had wanted, she would not be paid the money.

[50] The Applicant said the only drop box options were leave with pay or leave without pay. The Applicant also said she had just hired three new staff and trained them and was embarrassed that she had been dismissed and did not want people to know.

[51] I accept this explanation and do not regard the leave application as persuasive that the casual employment relation was not terminated on 13 March. As stated above already, I regard the casual engagement after the communication of her termination on 13 March as a separate casual engagement on those dates. On that basis there was a termination of employment and there is jurisdiction to determine whether the dismissal was harsh, unjust or unreasonable.

[52] Even if I am wrong in that view, and the employment relationship remained on foot until 23 March, or even until early April on the basis that the additional payment could be regarded as having the effect of extending the employment relationship, it remains the case that a termination of employment was communicated on 13 March and the evidence supports a conclusion that the Respondent never offered to rescind the termination, and/or any evidence to suggest an offer to rescind was ever accepted by the Applicant.

[53] If it were to be the case that the termination did not have effect until after the application was filed, then the application would have been filed before the termination had occurred. That would amount to an irregularity in the form or manner in which the application was made. On the particular facts of this case, if that were the case it would be appropriate to exercise power under s.586(b) to waive that irregularity, however for the reasons set out above in my view it is unnecessary to do so as the termination of the casual employment relationship had effect before the application was filed.

[54] I am also not satisfied on the basis of the evidence that a formal offer of an actual position was ever made to the Applicant by Ms Wang on 20 March 2022. It appears from the evidence that Ms Wang was referring to a potential new role which could exist in the future. This was not a firm offer of employment. In any event, even if it could have been regarded as a firm offer which I reject, it was not an offer of ongoing employment, it would be an offer for a new contract of employment. In the absence of any evidence from the Respondent it appeared to be a discussion about a potential offer to work in an enterprise where the Respondent would

not be the employer. It would seem reasonably clear Ms Wang was indicating the Chinese Investors would agree to employ the Applicant if Ms Wang recommended they do so but at the relevant time it appears Ms Wang did not yet have authority to make such an offer and there is no documentary evidence to suggest otherwise. There was also some limited evidence in this matter that the potential future role never came to fruition in any event.

CONSIDERATION

[55] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account the considerations under section 387 of the Act.

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

[56] A valid reason was described in *Selvachandran v Petron Plastics Pty Ltd*¹ as one which is “...sound defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee’s capacity or conduct or based on the operational requirements of the employer’s business.”

[57] As stated, I have concluded the dismissal occurred on 13 March 2022. The Applicant and Ms Veas were the only persons who have given evidence in this matter. It would seem from the evidence that the only reason given to the Applicant for her dismissal was that the business is getting rid of any staff that didn’t agree with the owners, and the Applicant didn’t always agree with what Ms Wang wanted.

[58] The evidence supports a conclusion that the Applicant was merely trying to express a view as to what would be in the best interests of the business in regard to staffing across the two venues. The evidence does not support a conclusion that the Applicant refused to follow a lawful and reasonable direction and there is nothing else to support a conclusion that her actions constituted a valid reason for dismissal.

[59] On the basis of that evidence, I am not satisfied that the Respondent had a valid reason for dismissal based on the Applicant’s conduct or performance.

(b) Whether the person was notified of the reason

[60] The Applicant was notified of the reason for dismissal at the meeting on 13 March 2022 when her employment was terminated.

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

[61] The Applicant was not given an opportunity to respond to the reason for termination. Despite the written submissions of the Respondent suggesting otherwise, it is apparent from the evidence before the Commission that Ms Wang gave instructions to Dream Nareekul to dismiss the Applicant immediately and there is no suggestion that anything the Applicant could have said to Dream Nareekul could have changed the decision that the Applicant be dismissed.

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

[62] This consideration will only be relevant where an employee seeks to have a support person present to assist in discussions in relation to dismissal and the employer refuses. The evidence does not establish that the Applicant requested a support person for the meeting on 13 March 2022. This is therefore a neutral consideration.

(e) Was the Applicant warned about unsatisfactory performance before dismissal

[63] The evidence does not support a conclusion that the Applicant was given a warning about her performance.

(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

[64] Whilst I have not been satisfied that the Respondent is a small business for the purposes of the Act, the employer is of a size that it is likely this impacted on the procedures followed in effecting the 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

[65] The Respondent does not appear to have dedicated human resource management specialists, and this is likely to have had an impact on the procedures followed in effecting the dismissal.

(h) Any other matters that the FWC considers relevant

[66] At the time of termination, the Applicant was undergoing a fertility program and Ms Wang was aware of this. The termination has had a significant financial impact on the Applicant which has impacted on her ability to continue with the program and has also caused her financial hardship.

REMEDY

[67] The Applicant has made clear she does not seek reinstatement and in all of the circumstances of this case I am satisfied reinstatement would not be an appropriate remedy.

[68] Section 390(3)(b) of the Act provides that the Commission may only issue an order for compensation if it is appropriate in all the circumstances. Compensation as a remedy is designed to compensate an unfairly dismissed employee, in lieu of reinstatement, for losses reasonably attributable to the unfair dismissal, within the bounds of the statutory cap on compensation that is to be applied.²

[69] I must determine whether an order for compensation is appropriate.

Section 392(2)(c) - remuneration that the Applicant would have received, or would have been likely to receive

[70] Whilst there was some strain on the employment relationship at the time of termination because of the state of the relationship between Ms Wang and the Applicant, there appears to have been no evidence that there were any concerns with the Applicant's performance. Mr Chen made clear in the written material submitted for the Respondent that he did not have an issue with the Applicant's performance and in fact it seems instructed Ms Wang to attempt to resolve the issue with the Applicant on 20 March, although it is clear from the evidence Ms Wang did not make an offer for the Applicant to be reemployed in her former role, but instead proposed that she could pursue a different job at a different entity as set out above.

[71] Had the Applicant not been dismissed by the Respondent, I am inclined to the view that the employment relationship would have been likely to last at least another three months.

[72] On the basis of the limited evidence before the Commission, the Applicant's income appeared to vary from week to week. On the basis of that limited evidence including payslips provided, I have estimated that the Applicant would have been likely to earn at least in the order of \$1102 per week gross before tax based on \$29 per hour multiplied by 38 hours a week. \$1102 multiplied by 13 weeks (3 months) equals \$14,326.

Section 392(2)(e) - any remuneration during period between the dismissal and the making of the order for compensation and section 392(2)(f) - income reasonably likely to be so earned during the period between the making of the order for compensation and the actual

[73] I intend to deduct from that amount the gross earnings made from the Respondent after 13 March 2022 being the date of the termination. The additional payments were in the form of the additional casual shifts and sums paid as 'leave'. I have also assessed these as a gross sum being \$1,044, \$1102 and \$906.25 totalling an amount of \$3,052.25. Deducting this amount from \$14,326 arrived at a figure of \$11,273.75.

[74] The Applicant submitted that she started working at Koko Café and Bar on 11 April 2022, but after setting the venue up they changed their opening hours to Thursday to Sunday only and the owners decided to work the shifts they had her on, in an attempt to save on wages, given it was new business. The Applicant's last shift at Koko was 15 May 2022. A payslip provided by the Applicant indicates that she earned \$4,813.95 from the Koko Café and Bar and this amount should be deducted from the assessed compensation. Deducting this amount from \$11,273.75 arrives at a figure of \$6,459.80.

[75] The Applicant submitted that she had received a full time offer of employment starting 27 May 2022. The earnings from this new employment are at least equivalent to the earnings in her former employment. This approximately coincides with 12 weeks after her termination and on that basis, given I assessed her likely period of employment had she not been dismissed to have been three months (13 weeks), it is appropriate to deduct another week from the order of compensation given the Applicant had commenced earning another source of income commensurate with her former income in the 12th week after her termination. Deducting

another week from the amount of compensation, at the rate of \$1102 reduces the amount to \$5,357.80.

Section 392(2)(d) – Applicant’s efforts to mitigate the loss suffered because of the dismissal

[76] The Applicant submitted that she applied via Seek and Jora for local jobs and posted on FB hospitality groups looking for work. She stated that she attended one interview for a café manager at Pacific Fair. The further evidence provided at the hearing satisfies me that the Applicant has taken appropriate steps to mitigate her loss and no further deduction should be made on that basis.

Section 392(2)(a) - effect of the order on the viability of the Respondent’s enterprise

[77] There was no evidence that an order that the Respondent pay compensation to the Applicant would affect the viability of the Respondent.

Section 392(2)(b) - length of the Applicant’s service with the Respondent

[78] The duration of the Applicant’s employment was a period of about 14 months. I do not propose to amend the compensation figure on account of this issue.

Section 392(2)(g) - any other matter that the FWC considers relevant

[79] There are no other matters that I consider relevant.

CONCLUSION ON REMEDY

[80] I intend to issue an order that the Respondent, Sens Catering Group Pty Ltd, pay to the Applicant, Ms Kristen Gordon, the sum of \$5,357.80 gross taxed according to law, plus 9.5% superannuation on that amount paid into Ms Gordon’s nominated superannuation fund within 21 days of the date of this decision. An order to that effect will be issued separately and concurrently with this decision.

The image shows a handwritten signature in black ink over a circular official seal. The seal features the text 'THE FAIR WORK COMMISSION' around the perimeter and a central emblem with a shield and a figure. The signature appears to be 'C. J. Anderson'.

COMMISSIONER

Appearances:

Ms Kristen Gordon on her own behalf.

Hearing details:

2022

Brisbane (by Telephone)

1 July

Printed by authority of the Commonwealth Government Printer

<PR743619>

¹ (1995) 62 IR 371 at 373.

² *Deborah Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 at [17].