



DECISION

Fair Work Act

2009

s.394 – Application for unfair dismissal remedy

Lynita Adams

v

Diamond Beach Holdings Pty Ltd T/A Therapy Care

(U2024/14017)

COMMISSIONER MATHESON

SYDNEY, 18 JULY 2025

Application for relief from unfair dismissal.

[1] Lynita Adams (**Applicant**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that she was unfairly dismissed from her employment with Diamond Beach Holdings Pty Ltd T/A Therapy Care (**Respondent**). The Applicant seeks financial compensation.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

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

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

When has a person been unfairly dismissed?

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

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

Background

[6] The uncontested factual background to the matter is as follows:

- The Respondent is a provider of services to disabled persons in receipt of funding under the National Disability Insurance Scheme (NDIS).¹
- The Applicant was granted a visa to enable her to work in Australia and Respondent was the Applicant's work sponsor in respect of that visa.
- The Applicant and her family relocated to Australia from South Africa.
- The Applicant commenced her employment with the Respondent on 24 March 2024 in the role of Occupational Therapist.²
- The Applicant was covered by the *Health Professionals and Support Services Award 2020 (Award)* during her employment with the Respondent.
- In July 2024 the Respondent offered the Applicant the opportunity to relocate however the Applicant declined the offer.
- On 30 October 2024 the Respondent invited the Applicant to a meeting to discuss structural changes to its business.³
- On 31 October 2024 the Applicant attended the meeting in the presence of human resources and was notified that her employment was terminated due to her role being made redundant.⁴ The Applicant was provided with a letter confirming this during the meeting (**Termination Letter**).⁵ The Applicant's dismissal took effect on 1 November 2024.⁶
- The Applicant commenced employment with another employer on 20 January 2025 and is paid an annual salary of \$95,000 in respect of that role.

[7] By way of summary, the Respondent submitted that the dismissal was a genuine redundancy in accordance with s.389(1)(b) of the FW Act.

[8] This is contested by the Applicant who submitted that the Respondent:

- did not comply with its obligations in the Award to consult about the redundancy;⁷ and
- failed to properly consider redeployment within the Respondent's enterprise.⁸

[9] Further, the Applicant submits, by way of summary, that:

- there was no valid reason for her dismissal;⁹
- while she was notified that she was dismissed due to redundancy, the Applicant was not given an opportunity to respond to the reason for her dismissal;¹⁰
- she was not given any prior warnings;¹¹
- the Respondent is a big business and there was no excuse for the way in which the dismissal was handled.¹²

The hearing

[10] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[11] After considering the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act). The hearing was held on 19 February 2025.

Permission to appear

[12] The Applicant sought to be represented before the Commission by a paid agent. The Respondent sought to be represented before the Commission by a lawyer.

[13] Relevantly, section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[14] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[15] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.¹³ The decision to grant permission is a two-step process. First, it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.¹⁴

[16] On the question of representation, the Applicant relied on the grounds in:

- Section 596(2)(a) and submitted:

- that the matter is complex in that there is a jurisdictional objection that there was a genuine redundancy;
 - the objection concerns the consultation process required under the Award and a whether redeployment had been properly considered;
 - granting permission would enable the matter to be dealt with more efficiently having regard to that complexity;
- Section 596(2)(b) and submitted that the Applicant was a South African national who is not familiar with Australian industrial relations law and who is unable to properly represent herself in a way that would have an impressive or powerful effect;
- Section 596(2)(c) and submitted that the Respondent is a large corporation with a dedicated human resources division and the balance of industrial power would, absent the Applicant being represented, swing heavily in favour of the Respondent, giving rise to unfairness.

[17] The Respondent did not object to the Applicant being represented and indicated that it believed it would be fair and reasonable given the Applicant was in South Africa and unable to represent herself in person. Having regard to the matters raised by the Applicant and Respondent I granted permission to the Applicant pursuant to Section 596(2)(b) of the Act on the basis that the Applicant lives in South Africa, does not have experience with the Australian legal framework and in the context of a matter in which complex jurisdictional questions are raised it would be unfair not to allow her to be represented because she was unable to represent herself effectively.

[18] The Respondent subsequently sought permission to be represented by a lawyer and having already granted permission for the Applicant to be represented I granted permission for the Respondent to be represented pursuant to Section 596(2)(c) it would be unfair not to allow the person to be represented taking into account fairness between the Respondent and other persons in the same matter.

[19] Accordingly, at the hearing the Applicant was represented by Mr P. Mullally and the Respondent was represented by Ms K. Maxwell.

Witnesses

[20] The Applicant gave evidence on her own behalf.

[21] The following witnesses gave evidence on behalf of the Respondent:

- Andrew Zorzit (**Mr Zorzit**), the Respondent's Managing Director;
- Karlie Scurr (**Ms Scurr**), the Respondent's Operations Manager; and
- Samantha Goodall (**Ms Goodall**), the Respondent's Human Resources Manager.

Submissions

[22] The Applicant filed submissions in the Commission on 17 January 2025. The Respondent filed submissions in the Commission on 6 February 2025. Submissions in reply were filed by the Applicant on 12 February 2025. The Respondent filed an amended outline of submissions on 14 February 2025.

Has the Applicant been dismissed?

[23] A threshold issue to determine is whether the Applicant has been dismissed from her employment.

[24] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[25] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[26] There was no dispute, and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[27] I am therefore satisfied that the Applicant has been dismissed within the meaning of Section 385 of the FW Act.

Initial matters

[28] Under section 396 of the FW Act, the Commission is obliged to decide the following matters 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.

Was the application made within the period required?

[29] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[30] It was not disputed, and I find that the Applicant was dismissed from her employment on 1 November 2025 and made the application on 22 November 2025.

[31] I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[32] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[33] It was not in dispute, and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[34] It was not in dispute, and I find that the Applicant was an employee, who commenced employment with the Respondent on 24 March 2024 and was dismissed on 1 November 2024, a period exceeding 6 months.

[35] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Modern award coverage and annual rate of earnings

[36] It was not in dispute, and I find that, at the time of dismissal, the Applicant was covered by the Award, which is a modern award.

[37] Further, it was not in dispute and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings together with such other amounts worked out in accordance with regulation 3.05 of the *Fair Work Regulations 2009* (being \$95,000), was less than the high income threshold, which, for a dismissal taking effect on or after 1 July 2024, is \$175,000.

[38] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[39] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[40] As mentioned above, the Respondent was not a small business employer within the meaning of section.23 of the FW Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis).

[41] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

Was the dismissal a case of genuine redundancy?

[42] Section 389(1) of the FW Act states that a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[43] Section 389(2) of the FW Act goes on to state that a person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

- (a) the employer's enterprise; or
- (b) the enterprise of an associated entity of the employer.

[44] I set out the context for this matter below before considering the questions relevant to whether the Applicant's dismissal was a genuine redundancy.

Context

The Applicant's visa

[45] The Applicant had been granted a Temporary Skill Shortage (subclass 482) Visa (**Visa**). A letter from the Department of Home Affairs to the Applicant explains the conditions of the Visa as follows:

- only work in the occupation for which your visa was approved. To work in a different occupation you must be granted a new TSS visa
- only work for the employer who nominated the position you are working in (limited exceptions apply)
- not cease employment for a period that exceeds 60 consecutive days
- hold any licence, registration or membership that is mandatory to perform the occupation nominated in relation to you
- comply with each condition or requirements to which the licence, registration or membership is subject
- notify [the Department of Home Affairs] as soon as practicable if the licence, registration or membership ceases to be in force, or is revoked or cancelled, or if an application for the licence, registration or membership is refused
- not engage in work that it inconsistent with the licence, registration or membership, including any conditions or requirements to which the licence, registration or membership is subject.

[46] The letter goes on to state:

‘If you stop working for the employer who nominated you, within 60 days you must do one of the following:

- find another employer who is willing to nominate you
- be granted another type of visa
- make appropriate arrangements to depart Australia

or you may be in breach of condition 8607 and could have your visa cancelled.

Your visa permits you to change employers if they have an approved TSS nomination with you identified as the nominee, and the occupation specified in the nomination is the same as the occupation that was approved for this visa’.

[47] Despite these conditions, the Applicant gave evidence that her visa permitted her to work in any role for a period of six months while she explored other sponsorship opportunities.¹⁵ During closing submissions the Applicant submitted that this information had been given to her from a migration lawyer and submitted that the website indicates that in July 2024 the conditions did change however further evidence of this change was not provided to the Commission. As such, I consider it likely that if the Applicant ceased working for the Respondent, she had 60 days to find another employer to nominate her, be granted another type of visa or arrange to depart Australia.

The consultation term of the Award

[48] As noted above, the Applicant was covered by the Award. Clause 34 of the Award provides:

34.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
 - (i) the introduction of the changes; and
 - (ii) their likely effect on employees; and
 - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made.

34.2 For the purposes of the discussion under clause 34.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and
- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

34.3 Clause 34.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer’s interests.

34.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 34.1(b).

34.5 In clause 34 **significant effects**, on employees, includes any of the following:

- (a) termination of employment; or
- (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- (c) loss of, or reduction in, job or promotion opportunities; or
- (d) loss of, or reduction in, job tenure; or
- (e) alteration of hours of work; or
- (f) the need for employees to be retrained or transferred to other work or locations; or
- (g) job restructuring.

34.6 Where this award makes provision for alteration of any of the matters defined at clause 34.5, such alteration is taken not to have significant effect.

Meeting with the Applicant in July 2024

[49] The Applicant gave evidence that in or around July 2024, management approached her proposing a potential promotion if she would agree to move to a different location at either Hervey Bay or Newcastle in a senior role.¹⁶ The Applicant had only been working for the Respondent for three months at that time and gave evidence that she thought this was an indication as to how the Respondent viewed her work.¹⁷

[50] The Applicant said that during a meeting about this she advised Ms Scurr and Toni Ologbo, the Respondent's Human Resources Business Partner, that she would consider the promotion at a later stage as uprooting her family would be difficult.¹⁸ The Applicant described the response of Ms Scurr and Toni Ologbo as 'neutral' and gave evidence that she was told to consider the proposal.¹⁹

[51] During cross examination Ms Goodall referred to this meeting. Ms Goodall was asked whether 31 October 2024 (being the date on which the Applicant was told her employment would be terminated) was the first occasion that the Applicant had any inkling that her position was going to be made redundant. Ms Goodall responded:

"The meeting took place on the 31st, but the conversation around relocation - sorry, on 31 July - formed part of this as an effort to see if we could relocate Lynita and other occupational therapists, but that meeting was held not as a group, it was individual, separate meetings, formed part of the whole process".²⁰

[52] Ms Goodall was then asked:

"So are you saying, Ms Goodall, that the meeting on 31 July 24, asking the Applicant to move away from where she was, was part of this redundancy process?"²¹

to which she responded:

“Yes. Because post 1 July, when the NDIS rolled out significant changes underneath the framework, we then had to go and look at measures as to how we could continue to support the occupational therapy team with caseload, and that formed part of those conversations, to see if we could redeploy - sorry, relocate two different locations that we did not have a large team working at which would then, therefore, fill their caseload to meet their minimum availability hours”.²²

[53] Ms Goodall was then asked whether she told the Applicant, on 31 July 2024, that this move would possibly save her job to which she responded:

“No. Because, at that stage, we hadn't gone into the processes or gotten to the part of the process where the financials showed that we had no other option but to proceed with redundancies. This was purely the start of the process, knowing that the changes on the NDIS framework meant that we needed to relocate and it was the very initial stage of, let's call it, the redundancy process in hope that if we were able to relocate Lynita and two others that we had the conversation - sorry, two other occupational therapists, one speech pathologist, in hope that if we were able to relocate, it may alleviate some of the issues we were facing, in terms of lack of referrals coming in”.²³

[54] It was then put to Ms Goodall that she did not share this information in the meeting of 31 July 2024 or tell the Applicant that there was a financial reason that the Respondent wanted to transfer her to which she responded:

“No, we did not disclose it at that time, due to the significance that the move would obviously cause Lynita and I didn't want to concern others that this was the potential for other people within the business”.²⁴

[55] Ms Scurr also raised the meeting with the Applicant on 31 July 2024 during cross examination in which the following exchange occurred between Mr Mullally and Ms Scurr:

Mr Mullally: Now, apart from the meeting with the applicant, on 31 October, did you have any discussions with the applicant prior to then, about the potential of her losing her job?

Ms Scurr: I had a meeting with the applicant in July, where I had discussed options around what we consider redeployment or reallocation or relocation to another location in Queensland, given that there had been prior discussions around Lynita being able to move to an area that was cheaper to live in. We had that discussion as we had been monitoring finances and wanted to try and provide for an option of relocation, prior to coming to the decision that we did. So, yes, there had been conversations with Lynita.

Mr Mullally: On 31 July?

Ms Scurr: Correct.

Mr Mullally: I put it to you, Ms Scurr, that there was no mention that she might lose her job, was there?

Ms Scurr: At that time, that was months prior to the decision coming, where we then were trying everything in our power to offer her employment in another location, before coming to that decision.

Mr Mullally: But you didn't put that to her, did you?

Ms Scurr: No. We put forward the option of being relocated and redeployed.

Mr Mullally: But you didn't attach the critical background and that was that, 'The company is in financial trouble and we're going to have to make people redundant, so we can offer you this relocation'. You didn't say that to her, did you?

Ms Scurr: No. However, at that point in time I don't believe it was relevant to include information around the company's financials to an occupational therapist, at that time.

Mr Mullally: I agree. But - - -?

Ms Scurr: Apologies, that's highly sensitive information that would not filter down to that level, at that point in time.

Mr Mullally: But you, in answer to my question about having discussions with the Applicant, you identified the meeting of 31 July 24 as a relevant meeting and I'm suggesting to you that you failed to tell her that taking the relocation might well have been to her overall benefit. You didn't say that to her, did you?

Ms Scurr: I did not approach in the meeting that she might lose her job, no.

Mr Mullally: No. But are you telling the Commission that that was part of what you considered to be the discussion process with her, that commenced in July 24?

Ms Scurr: I still think it was relevant and I also think that we then, further, discussed all options around redeployment, post the meeting, as well with Lynita, in our response to her.

Mr Mullally: Do you mean after 31 October?

Ms Scurr: Yes. I still think that it is relevant because, at that point in time we were monitoring financials and we were trying everything in our power to try and avoid redundancies for staff.²⁵

[56] During re-examination Ms Scurr was asked why she did not tell the Applicant, in July 2024, that her employment was on the line to which she responded:

“I am a human being that genuinely cares about our staff and participants and I do not think that in a meeting where we were trying to do everything in our power to keep our staff employed that it would have been beneficial to have provided that information. All

I think that would have created was more fear. I don't believe that that would have provided any reassurance, from my experience with dealing with people within the industry that we work in, over the last seven years. I don't believe that that would have been received well in that meeting. And I also don't think that it is appropriate that financials, at an executive level, are shared to team members below the executive level. That's why we have an executive team".²⁶

[57] It was put to Ms Goodall during cross examination that the Applicant may "well have survived" if she had taken the transfer to which Ms Goodall responded:

"No, it's not correct because that location now no longer exists. It had to be closed and those people working in those locations were also made redundant. So, in effect, if she had relocated she probably would have still been in the position of being made redundant, due to the fact that we were performing so poorly financially and this was simply a decision around having to make people redundant, due to not having enough money coming into the bottom line".²⁷

[58] While Ms Goodall and Ms Scurr appear to suggest that the meeting with the Applicant on 31 July 2024 formed part of the redundancy process, it cannot possibly be considered part of consultation as they did not inform the Applicant about the reasons she was being asked to relocate or that her job was at risk of redundancy if she did not take up the offer. The Applicant did not know why relocation was being offered and her evidence suggests she assumed the offer was a promotional opportunity due to her work performance. Had the Applicant been fully informed, her response may have been different.

Respondent's financial position and decision to make employees redundant

[59] Ms Goodall gave evidence that:

- due to operational requirements the Respondent identified the need for structural changes within the organisation;²⁸
- a review was conducted to assess ongoing business needs, workforce requirements and the impact on employees;²⁹
- a decision was made that the following roles would be made redundant:
 - five occupational therapists, including the role held by the Applicant;
 - one customer service officer;
 - one human resources business partner; and
 - one registered nurse;³⁰
- the Respondent determined that the Applicant's role was no longer required before meeting with the Applicant on 31 October 2024 and after considering possible alternatives to redundancy.³¹

[60] During cross examination Ms Goodall was asked:

"...So you have spoken about the redundancy and the need for operational changes in your witness statement. Can you just explain to the Commission how this particular redundancy, I think you have mentioned there were five other OTs, a nurse and a customer service officer who were made redundant around about the same time? How did this evolve? When did this first start to be considered by the company?"³²

to which she replied:

“Sure. We hold executive team meetings and leadership team meetings monthly. Upon reviewing financials as early as June of 2024 we started to see a significant decline and a change after 1 July from the NDIS, in terms of changes under the framework. We saw that we were seeing a decline in caseloads being referred in for occupational therapists which meant that we had less work, essentially, being filtered through to the business. We had brought over multiple occupational therapists from overseas which formed a majority of the occupational therapy team, to which then we had, you know, across the board, multiple OTs not hitting billable hours, which essentially there's a criteria of work, from the business perspective, planning to hit a minimum to be able to cover a wage and we were running at a significant loss. In June and July – I'm sorry, July of 2024, post those changes, that is when we started to review financials and we became significantly aware, closer to August, that we needed to make some drastic changes or we would eventually, essentially, become insolvent”.³³

[61] Ms Goodall then confirmed that a review took place in August 2024 and that a decision was made that five occupational therapists needed to be made redundant.³⁴ The Applicant was asked whether this decision was made at the executive team meeting in August to which she responded:

“It wouldn't have been. It would have been reviewed. The discussion was had at that meeting. The financials were presented in terms of the total cost of the team versus the reduction that we would need to see to be able to break even or attempt to break even, and then following that meeting it was a discussion with the managing director, Andrew Zorzit, to then come to a decision around a timeline of when this would have to have occurred. The following meeting around that, again, I haven't included in my statement. I would have to pull that from a calendar to see when that occurred. It would have been within the same month of August”.³⁵

[62] It was then put to Ms Goodall that the final decision was made by the managing director to which she responded:

“Yes. We implemented increased marketing efforts in August, agreed to increase marketing efforts in August to see a hopeful turnaround for September. If we didn't meet the metrics, which we did not, we would then have to proceed with making occupational therapists, and further to that, two others redundant.”³⁶

[63] Ms Goodall was then asked whether she agreed that the decision was made in August 2024 to which she responded:

“The discussions for the process around increasing profits was initiated in August. The final decision around proceeding with redundancies would have had to have occurred post the marketing effort of a four-week period at the end of September. Then the meetings around redundancies started taking place from October”.³⁷

[64] Ms Goodall then gave evidence that the decision that the five occupational therapists were to be made redundant would have been made some time in September³⁸ and that the Applicant was among these five occupational therapists.³⁹

[65] Ms Goodall was asked how the five occupational therapists were chosen to which she responded:

“Yes. We looked at finance, financial metrics. Lynita's salary was 95k, obviously allowing for the 10k relocation allowance. The other four occupational therapists within the team were all on 85k, however, given that Lynita's salary was higher, it meant that the decision was to financial as well to look at redundancy due to that higher salary, essentially costing more to the business, which meant that it was a faster turnaround in us attempting to turn losses into profits”.⁴⁰

[66] Mr Zorzit gave evidence that:

- he is the Respondent's Managing Director, sole director of the Board⁴¹ and has a fiduciary duty to maintain the Respondent's solvency;⁴²
- the Respondent made a loss of \$409,219 for the 2023-2024 financial year as reflected in its income tax return and has assets valued at \$640,409 compared to liabilities of \$1,315,814;⁴³
- in August and September 2024 the Respondent experienced losses of \$105,837 and \$143,430 respectively;⁴⁴
- having considered the Respondent's August 2024 and September 2024 profit and loss statements, the income tax return and operations numbers, the Respondent decided to make eight employees redundant and close its Fraser Coast office.⁴⁵

[67] During cross examination Mr Zorzit was asked when the decision was made to make the Applicant redundant to which he replied:

“I couldn't refer to an exact date, but it was in the month of October following the results – the financial results that came through. So the cadence went roughly like this: we have an executive team meeting usually by week three of the month, which allows the financial reporting from the previous month to come through, and also operational information that's delivered – HR information, marketing – that's delivered at the executive team meeting. It was at that meeting that the – well I guess the, for want of a better word, extremely disappointing results from September came through, following very disappointing results from August, and also coupled with the announcements that were made on the NDIS framework changes that came into effect from October 3. So it was around that time of the executive meeting understanding the changes that were coming from the NDIS regards the way that younger persons on the NDIS would be impacted by their ability to gain access to the NDIS, and indeed be removed from the NDIS framework, which formed a large portion of a lot of our occupational therapy work, which led to that redundancy. So there was a two – two parts: the threat, that external threat that we couldn't manage around the changes to legislation, and then some resultant financial impact around operations that caused those losses. So the decision was made pretty much mid-October, give or take a few days – mid-October to late October, around that time”.⁴⁶

[68] Ms Scurr was a member of the executive team⁴⁷ and confirmed that the executive team met on a monthly basis.⁴⁸ During cross examination Ms Scurr agreed that there was a change in the financial fortunes of the Respondent from about 1 July 2024.⁴⁹ Ms Scurr was asked when the first occasion was that the executive team discussed the potential redundancy of the Applicant to which she responded:

“This is something that we had been monitoring for a number of months, throughout and after July of last year. We had been monitoring the financial performance of the allied health team, in particular the occupational therapy team, for a number of months, to which we had seen that it actually tracked backwards, hence the decisions were made around the redundancies. It had been for a period of a number of months, prior to coming to the decision that we came to”.⁵⁰

[69] During cross examination Ms Scurr was asked when the decision was made by the executive team to make the Applicant redundant and was somewhat evasive in her response before being pressed for answer to the question, her answer being:

“Between July and when the meeting happened, on 31 October”.⁵¹

[70] Ms Scurr was then asked:

“Given that you said that the executive team was reviewing finances from 1 July 24, when was the decision made, by the executive team, to make the applicant redundant?”

to which she responded:

“I believe we had met the week prior and noted that that was an important decision that needed to be made, to which then the meetings were held”.⁵²

[71] The following exchange then took place between Mr Mullally and Ms Scurr during cross examination:

Mr Mullally: “The week prior to when?”

Ms Scurr: “To when the meeting was held with Lynita where we discussed the options”.

Mr Mullally: “So on 31 October 24 we know there was a meeting that you attended with Ms Goodall, and you say to the Commission that the decision to actually make her redundant, make the applicant redundant, was made a week before that?”

Ms Scurr: “We had discussed that that was going to be the outcomes, however, obviously those meetings were held and further consultation was provided during that time.”

Mr Mullally: “I know that's what you want to say, but my question is, trying to drill down your evidence, and that is I think you said that the decision had been made a week before 31 October, is that correct?”

Ms Scurr: “The executive team had met and reviewed the financials, yes”.

Mr Mullally: “And made the decision to go ahead with a number of redundancies actually, wasn't there?”

Ms Scurr: “Correct”.⁵³

[72] During re-examination Ms Scurr was again asked when the decision was made to make the Applicant redundant to which she replied:

“We had had a number of meetings within the executive team. I don't have a specific date for you. I believe it could have been the week before, where we had made the discussion, or we had made the decision and looked at financial data, to which we then acted on that because we were trading at a significant loss”.⁵⁴

[73] When the evidence of Ms Goodall, Mr Zorzit and Ms Scurr is considered together, I find that:

- the Respondent held its executive team meeting monthly;
- changes to the NDIS framework came into effect from 1 July 2024 and the Respondent started to see a decline in occupational therapist caseload from this time;
- given these circumstances, a discussion was held with the Applicant on 31 July 2024 to see if she would be willing to relocate but the financial situation of the Respondent and possibility of redundancy was not discussed with her at this time;
- from around August 2024 the Respondent became aware that it would need to make changes or become insolvent;
- as a result, a review was conducted in August 2024 which found that five occupational therapists would need to be made redundant to break even or attempt to break even;
- a meeting about this was had with Mr Zorzit in August 2024 and instead of implementing redundancies it was decided that marketing efforts would be increased for a four week period to attempt to increase profits and see a turnaround by September 2024;
- the Respondent continued to experience losses in August 2024 and September 2024 and during the October 2024 executive meeting where the financial results for these months were discussed, a definite decision was made to make eight roles redundant and to close the Fraser Coast office;
- among the roles selected for redundancy was the Applicant's role, including because the Applicant was paid a higher salary than other occupational therapists (being paid \$95,000 per year instead of \$85,000 per year) and the redundancy of her role would lead to a greater cost saving;
- while the precise date is unclear, the executive meeting at which this definite decision was made was held the week prior to 31 October 2024.

30 October 2024 invitation to a meeting

[74] At 4.59pm on Wednesday 30 October 2024 the Applicant was invited to a meeting at 10.30am the following day, being 31 October 2024. The meeting invitation said:

“Dear Lynita,

I hope this message finds you well.

I am writing to schedule a meeting to discuss an important update regarding your role with Therapy Care. We would like to meet with you to discuss proposed changes within the organisation that may impact your current position. This meeting will provide an

opportunity for us to go over the details and discuss any questions or concerns you may have.

...

Please feel free to bring a support person with you to the meeting if you would like. Your wellbeing is our priority, and we encourage you to reach out if you need any additional support during this time."

Meeting on 31 October 2024

[75] Ms Goodall gave evidence that the redundancy of the Applicant's position was communicated to the Applicant in the meeting on 31 October 2024⁵⁵ and this was when the Applicant was first notified of the proposal that her role would be impacted due to restructuring.⁵⁶

[76] Ms Goodall gave evidence that during this meeting:

- she adhered to a script and invited questions from the Applicant;⁵⁷
- the Applicant was provided with an opportunity to consider the potential impact and respond;⁵⁸
- the Applicant was provided with all relevant information about the reasons for the proposed redundancy, including the operational changes necessitating the decision;⁵⁹
- she invited the Applicant to discuss redeployment opportunities within the organisation;⁶⁰
- she gave the Applicant a letter advising of her entitlements, including notice and redundancy pay.⁶¹

[77] Ms Scurr's evidence was that she was present at a meeting on 31 October 2024 and during this meeting:

- Ms Goodall followed a script that had been prepared to ensure consistency and clarity in the communication with all occupational therapists that were being dismissed;⁶²
- the redundancy of the Applicant's position was communicated to the Applicant;⁶³
- Ms Goodall provided the Applicant with an opportunity to ask questions and seek clarification regarding the redundancy process;
- the Applicant was invited to discuss any concerns she had, including but not limited to the possibility of redeployment within the organisation;⁶⁴
- the Applicant was provided with information regarding the reasons for the proposed redundancy, including changes to the NDIS;
- after Ms Goodall read the script, the Applicant stated that she had no questions but questions but was just shocked;
- at this point Ms Goodall went into further detail about the current volume of referrals, expected billable hours for the occupational therapy team versus the administrative hour being paid and explained that redundancies were necessary to rebalance the supply and demand for occupational therapy supports;
- Ms Goodall pointed out that the occupational therapy team was currently running at a significant financial loss;
- Ms Goodall told the Applicant that 30 paediatric clients had been removed from the NDIS due to changes under NDIS legislation;⁶⁵

- Ms Goodall offered the Applicant support by way of the Respondent's Employee Assistance Program, liaison with the Migration Agency and contacting the Global Talent Agency who had helped the Respondent recruit the Applicant;⁶⁶
- Ms Scurr interjected at this point and stated that a client with a diagnosed disability of level one autism spectrum disorder, who had been removed from the NDIS, joined 1500 applicants per week across Australia that were being reassessed;⁶⁷
- Ms Goodall provided her personal telephone number to the Applicant, invited the Applicant to contact her over the weekend if she needed any further support or had any further questions and offered to provide a letter of recommendation to the Applicant to help her seek employment with another company;⁶⁸
- Ms Goodall expressed that the meeting was confidential due to other redundancies taking place after the meeting;⁶⁹
- the Applicant was provided with a letter advising her of her entitlements, including notice and redundancy pay.⁷⁰

[78] During cross examination Ms Scurr agreed that on several occasions the Applicant said she was shocked and in shock.⁷¹

[79] A copy of the script Ms Scurr indicated was used by Ms Goodall was provided to the Commission and states:

‘Good [morning/afternoon], [Employee's Name].

Thank you for meeting with me today. I know this conversation isn't easy, and I want to start by acknowledging the valuable contributions you've made here. Your dedication to our clients and team has not gone unnoticed, and we deeply appreciate everything you bring to your role.

As you may be aware, we're currently undergoing some changes to respond to shifts within the National Disability Insurance Scheme, or NDIS. Recent adjustments in the NDIS framework are leading us to focus more on a broader range of clients, including adults and older individuals, due to increased demand in these areas. As a result, we are moving towards a model that requires more expertise in fields like assistive technology and home modifications.

Our goal is to continue growing as a comprehensive service provider, supporting clients at all stages of life. However, these changes have meant that we've had to make the difficult decision to reduce certain roles focused primarily on paediatric services, as this area has seen a decrease in funding and demand under the NDIS.

Additionally, the NDIS has introduced "Foundational Supports," which affects the type of services we can offer to paediatric clients, and we've noticed an increasing number of children are no longer qualifying for the scheme. This environment makes it challenging for us to sustain certain paediatric-focused positions.

I know this is a lot to take in, and I want to be fully transparent with you. Regrettably, this means that your current role with us is no longer required. We have explored redeployment options within the organisation, but due to the nature of demand and availability across locations, this isn't a feasible option at this time.

I want you to know that we are here to support you in every way we can as you navigate this transition. We're offering a consultation period until 8 November 2024 and our HR team is available to help answer any questions and guide you through the next steps.

Thank you for the dedication and care you have shown to our clients and to our team. We understand that this news is difficult, and we are committed to supporting you in whatever way we can.

As part of this difficult transition, I want to make sure you're aware of the resources available to you. I encourage you to reach out to the Global Talent Agency to explore further employment opportunities, which may assist with your visa and employment pathway here in Australia.

We also have our Employee Assistance Program available if you would like to have a conversation with EAP from today. EAP will remain available to you for 3 months after your employment with Therapy Care terminates. You can email Bluebird Psychology on email@bluebirdpsychology.com.au or call them on 02 9659 5696. Please do not be shy about using this resource.

Again, thank you for your efforts and dedication'.

[80] The Applicant's evidence was that during the meeting:

- she was notified that her employment was going to be terminated due to her role being made redundant;⁷²
- she was given a redundancy letter that stated the decision was final;⁷³
- no redeployment options were discussed or offered to her.⁷⁴

[81] The Applicant said that had redeployment been considered or discussed, she would have had the opportunity to express which roles she would have deemed acceptable or unsuitable, particularly in relation to any potential demotion in position.⁷⁵ The Applicant's evidence was that she would have been willing to accept a lower-paying role or position of lower status temporarily so she had a source of income while she continued to search for another opportunity as an Occupational Therapist.⁷⁶

Termination Letter of 31 October 2024

[82] The Termination Letter provided to the Applicant at the meeting on 31 October 2024 stated:

'Decision regarding redundancy

Following the consultation meeting we had with you about the potential redundancy of your position, I regret to confirm that we have decided that our position is no longer needed.

As was explained to you, the reason for this is your role is no longer required by the organisation.

All ways of avoiding or limiting the redundancies and all alternative positions for redeployment have now been considered but unfortunately there are none that are available.

Date your employment will end

We have decided that your employment will, therefore, terminate by reason of redundancy on 1 November 2024. We are content for you to take the remaining days off work to 1 November 2024 to find yourself further employment.

Consultation period

We will continue to consult with you and any representative you may have in relation to your redundancy until 8 November 2024. This will not change the decision that had been made but you can find out what you need to find out to move forward.

Your salary and notice

You will, following the termination of your employment, receive a payment of \$1,634.62 (excluding superannuation) in lieu of your 1 week's entitlement.

Leave entitlements

You are entitled to \$2,263.34 for your accrued unused annual leave which will be paid to you.

Redundancy pay

Unfortunately, as you have not been employed for a year, no redundancy payment is payable under the *Fair Work Act 2009* (Cth).

Timing of payments

These payments will be paid with your final salary to your normal bank account on 7 November 2024 less applicable tax.

Your obligations

Please return company property to me today.

Thank you for your past service to the company and I wish you well in the future'.

[83] During cross examination Ms Goodall was asked what her intention was from the description of 'Consultation period' in the Termination Letter to which she responded:

"To allow Lynita time to consult with us for any further questions. If we could provide her with support, in seeking further job opportunities. My understanding for the consultation period is that there's no exact description of what needs to be discussed during that period. It could be anything from further reasoning as to why that role was made redundant, whether or not we could support her in other ways in seeking

employment. If there's any questions around the award or our process of the consultation period I would refer back to our legal support, which is Kylie, Ms Maxwell".⁷⁷

Events following the meeting on 31 October 2024

[84] Ms Goodall gave evidence that after the meeting on 31 October 2024 and on the same day, she sent the Applicant an email addressing what had been discussed, the reasons for the redundancy, the nature of the changes, the expected effect on the Applicant and other matters.⁷⁸ That email was provided to the Commission and:

- stated the reasons for the redundancy of the Applicant's role;
- stated that the Respondent had explored redeployment options, but given current demand and location constraints, redeployment wasn't possible at that time;
- offered "a consultation period until 8 November 2024";
- asked the Applicant to consider reaching out to the Global Talent Agent regarding further employment options that may have assisted her with her visa; and
- advised that the Respondent's Employee Assistance Program was available for a three month period post termination.

[85] The Applicant gave evidence that when she returned to her office following the meeting on 31 October 2024, she found that access to her computer and work phone had been removed.⁷⁹

[86] The Applicant's evidence was that:

- upon arriving at her office to pack up her personal belongings, the Applicant's only goal was to leave the premises and head home;⁸⁰
- several colleagues came to check in on her;⁸¹
- one of these colleagues was to attend a meeting after the Applicant, was already distraught and the Applicant consoled her;⁸²
- she informed her colleagues that it would be the last time she would be working with them;
- she was not aware that her redundancy was meant to be kept secret;⁸³
- did not disclose specific details of the meeting on 31 October 2024 and nor did she inform anyone else that they would be losing their jobs.⁸⁴

[87] The Applicant's evidence was that later that same afternoon, she received a letter from the Respondent's lawyer threatening the Applicant with legal action if she spoke to anyone about her redundancy.⁸⁵ Ms Scurr gave evidence that the Applicant was issued a cease and desist letter by the Respondent's lawyers because the Applicant spoke with another occupational therapist and informed her of the redundancy when she had been requested to observe confidentiality in relation to the meeting.⁸⁶

Applicant's letter of 6 November 2024

[88] On 6 November 2024 the Applicant sent a letter to the Respondent.⁸⁷ In that letter the Applicant raised a number of concerns which included, by way of summary:

- that the redundancy decision communicated to her on 31 October 2024 came as a shock to her and her family, particularly as they were foreign nationals and relocated for the role;
- she had been informed only hours before the meeting about a ‘restructure’ and was unprepared;
- she was not allowed to farewell clients or colleagues and was dismayed to receive a harsh legal letter;
- a genuine consultation process was not followed in that the Respondent did not:
 - notify of the proposed changes and expected effects;
 - discuss steps taken to avoid or minimise the impact; nor
 - consider employees’ ideas and suggestions regarding the changes;
- the manner in which the meeting on 31 October 2025 was held indicates it was not a genuine consultation meeting but was rather a meeting where the Applicant was informed that a decision had been made;
- the letter provided to her during the meeting on 31 October 2024 stated:

“Following the consultation meeting we had with you about the potential redundancy of your position, I regret to confirm that we have decided that your position is no longer needed”

which implied that a transparent discussion took place, which was not the case;

- no redeployment options were discussed with the Applicant during the meeting;
- the Applicant was aware that there were roles available within Therapy Care and which were advertised online prior to the meeting and available at the time of the meeting;
- the Applicant checked the criteria for those roles and considered she met it;
- the Respondent previously approached the Applicant with a relocation offer for roles in other locations but this was not discussed during the meeting;
- the letter also stated:

“We will continue to consult with you until 8 November 2024. This will not change the decision that had been made, but you can find out what you need to find out to move forward”;

- the Applicant considered that the redundancy was premeditated for reasons unknown to her;
- the redundancy decision had significantly impacted her and her family who had relocated from another country to Australia, committed to a 12 month lease, placed her children in local schools and day care, furnished her home and purchased a vehicle on credit.

Respondent’s response on 7 November 2024

[89] Ms Goodall gave evidence that after the initial meeting on 31 October 2024 and until 8 November 2024, the Respondent engaged with the Applicant and considered her responses.⁸⁸

[90] On 7 November 2024 the Respondent wrote to the Applicant and, by way of summary:

- restated the reasons for the redundancy as discussed in the meeting on 31 October 2024;
- set out clause 34.1 of the Award;
- stated that the Applicant was properly notified of the definite decision to make her redundant and was “given a consultation period until 8 November 2024 to discuss, as required by the Award”;
- stated that in the case of *Ingersole v Castle Hill Country Club*⁸⁹ it was decided that the “definite decision” required by the award in that case was the decision to terminate the employment as a result of redundancy and no consultation was required prior to the time of communicating that decision;
- stated that the Applicant had until 5pm the following day to raise issues that the Applicant thought would be critical for the Respondent to consider in relation to the redundancies that had been decided and that the issues the Applicant raised “should be regarding how to mitigate the effects on employees of the redundancies” and “suggestions regarding the changes”;
- stated that a transparent discussion took place on 31 October 2024 in which the Applicant was informed of the reasons for redundancy, that the Respondent followed up by an email the same date and expressed the view that it had met its consultation obligations under the Award;
- stated that the Applicant had not identified any roles in other locations with the group that she would be willing to undertake;
- stated, in relation to the role of Complex Care Disability Support Worker (in Richmond):
 - this was paid a salary of \$68,092.96 to \$72,044.96, representing a reduction of more than 9.3% of the Applicant’s salary of \$95,000 at the time of her redundancy;
 - in *Scott Harrison v FLSmidth Pty Limited T/A FLSmidth Pty Limited* [2018] FWC 6695 the Commission decided that a reduction of more than 9.3% in the employee’s salary was a demotion;
 - the role would be considered a demotion;
- stated, in relation to the Complex Care Disability Support Worker role, that the Applicant would need to have the Department of Home Affairs approve the Applicant carrying out a non-occupational therapy role and while the Applicant was applying for that approval, she would not have any employment duties to carry out;
- stated, in relation to the role of NDIS Behaviour Support Practitioner (in Blacktown):
 - that the Respondent understood the Applicant would need to put forward a submission to the NDIS to be approved for the role;
 - due to the Applicant’s lack of achievement of proficiency levels in that type of role, the Respondent would have to reduce the Applicant’s salary to be more than 9.3 percent less than her salary of \$95,000;
 - the Applicant would require significant retraining to undertake the role;
 - the Applicant would need to be employed by Assist Disability Services Pty Ltd which would mean that she would need to reapply for nomination and sponsorship by that entity, during which time there would not be any employment duties that she could fulfil;

- stated that the Respondent understood that the Applicant's visa was specifically approved for her position as an occupational therapist and as such, it would need to make another application to the Department of Home Affairs for the Applicant to be redeployed into another role, providing a an 'additional barrier' to redeployment.

Was the Applicant's job no longer required to be performed by anyone?

[91] I accept that the Respondent saw a decline in the caseload of its occupational therapists following changes to the NDIS framework from July 2024, resulting in the decision to make five occupational therapist roles redundant. In these circumstances I accept that, in accordance with s.389(1)(a) of the FW Act, the Respondent no longer required the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

Was the Respondent required to comply with clause 34 of the Award?

[92] It was not in contest that the Respondent had an obligation to comply with clause 34 of the Award however the reason why this obligation arose and when it was triggered warrant further consideration.

[93] Clause 34 of the Award is entitled 'Consultation about major workplace change'. Clause 34.1 provides that if an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, then it must do the things prescribed by clause 34.1. Clause 34.5 provides that significant effects on employees include termination of employment, among other matters.

[94] While the Respondent held concerns about its financial position as early as July 2024 and redundancies were a possibility identified by the review as early as August 2024, it seems that marketing efforts were undertaken in hope that redundancies were not required and that the definite decision was made in the October executive meeting held the week prior to 31 October 2024. That 'definite decision' was to close the Fraser Coast office and make eight roles redundant, including five occupational therapist roles. It does not appear to be in contest, and I find that in the context of the Respondent's operations, this was a definite decision to make a major change in structure that was likely to have significant effects on employees such that the obligation to consult in accordance with clause 34 of the Award was enlivened.

Did the Respondent comply with the obligation in clause 34 of the Award to consult about the redundancy?

Applicant's Submissions

[95] The Applicant submitted that the process adopted by the Respondent did not comply with the consultation provisions in clause 34 of the Award and that the dismissal cannot therefore be due to a genuine redundancy.⁹⁰ In particular, the Applicant submitted that the Respondent contravened the Award by failing to give the Applicant written notice of the proposed changes or restructuring as required by clause 34.1 or the details of the proposed changes and information mandated in clause 34.2.⁹¹

[96] The Applicant submitted that those provisions are preparatory to the obligation to consult with the Applicant and referred to the decision of the Commission in *CFMEU v Mt Arthur Coal* in which the Full Bench said: ⁹²

‘[108] The following propositions may be drawn from these cases about what constitutes consultation:

- the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation⁹³
- a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account⁹⁴
- the consultation needs to be real; it must not be a merely formal or perfunctory exercise⁹⁵
- even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences⁹⁶
- the party to be consulted [must] be given notice of the subject upon which that party’s views are being sought before any final decision is made or course of action embarked upon⁹⁷
- while the word ‘consultation’ always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to ‘consultation’ has about it an inherent flexibility⁹⁸
- a right to be consulted, though a valuable right, is not a right of veto⁹⁹
- the consultation obligation is not concerned with a likelihood of success of the process, only to ensure that it occurs before a decision is made to implement a proposal¹⁰⁰
- an ordinary understanding of the word “consult” would suggest that the obligation to consult does not carry with it any obligation either to seek or to reach agreement on the subject for consultation. Consultation is not an exercise in collaborative decision-making. All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made¹⁰¹
- the requirement to consult affected workers would ... not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their views taken into account when a decision is made¹⁰²
- genuine consultation would generally take place where a process of decision-making is still at a formative stage¹⁰³

- the opportunity to consult must be a real opportunity not simply an after thought¹⁰⁴
- consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal¹⁰⁵
- there is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, ‘this is what is going to be done’ and saying to that person ‘I’m thinking of doing this; what have you got to say about that?’. Only in the latter case is there ‘consultation’¹⁰⁶
- it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent ‘consultation’ is robbed of this essential characteristic¹⁰⁷
- any offer to consult in relation to the matter was in the context that the respondent had already made an irrevocable decision, then the party had not, to use his Honour's words, consulted about the decision in any meaningful way.¹⁰⁸

[97] The Applicant submitted that having regard to the approach taken by the Respondent, the extremely short timelines and only one meeting, there was no consultation because:

- the Respondent had already made up its mind about restructuring and the Applicant’s future in the business and what was being put to the Applicant had been decided without any input from the Applicant;
- the meeting of 31 October 2024 was no more than an afterthought and an attempt to comply;
- there was no genuine opportunity for the Applicant to try and persuade the Respondent not to proceed with her redundancy;
- the process was completed before the Applicant was involved;
- the meeting of 31 October 2024 was not genuinely an opportunity for the Applicant to have meaningful input into the process, restructure and her future role in the business but was rather a case of telling the Applicant her fate;
- this was a formal and perfunctory exercise by the Respondent¹⁰⁹

Respondent’s Submissions

[98] The Respondent submitted that while consultation is the goal of clause 34 of the Award, it is not meant to be a consultation of the character submitted by the Applicant and that the obligation was to have a *discussion* with the Applicant and the Respondent did so.¹¹⁰ The Applicant submitted that:

- the plain and ordinary meaning of an Award should be honoured over the extraneous interpretations unless there is ambiguity;¹¹¹
- *CFMEU v Mt Arthur Coal*¹¹² dealt with the interpretation of an enterprise agreement and consultation provisions in the *Work Health and Safety Act 2011* (NSW)(**WHS Act**) that look very different to clause 34 of the Award.¹¹³

[99] In this regard, the Respondent also provided a table identifying the source of consultation obligation from which the principles in *CFMEU v Mt Arthur Coal*¹¹⁴, as set out in the Applicant's submissions,¹¹⁵ were drawn, noting that the obligations are different to the obligation in the Award.

[100] The Respondent also referred to the matter *Ingersole v Castle Hill Country Club*¹¹⁶ which considered compliance with the following consultation term of the *Registered and Licensed Clubs Award 2010*, which is in similar terms to clause 34 of the Award:

‘(8) Consultation regarding major workplace change.

(8.1) Employer to notify

- (a) Where an employer has made a definition (sic) to decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
- (b) **Significant effects** include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotional opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work locations; and the restructuring of jobs. Provided that where the Award makes provision for alteration of any of these matters and alteration is deemed not to have significant effect.

(8.2) Employer to discuss change.

- (a) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the change.
- (b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.
- (c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.

[101] In that matter the applicant raised that in dismissing her from her employment on 1 March 2012 on the grounds of redundancy, the respondent failed to consult with her in accordance with the above clause.¹¹⁷ The facts of the matter were that:

- the applicant has been employed by the respondent since 2002;
- at a meeting on 29 February 2012 the board voted in favour of a resolution to make the applicant's position redundant effective 1 March 2012;
- on 1 March 2012 a meeting was held with the applicant in which:
 - the applicant was told her position had been made redundant effective immediately;
 - the applicant was told what her statutory entitlements were;
 - the respondent told the applicant it would assist her in gaining alternative employment; and
 - the applicant was told that she would be paid in lieu of notice and was to hand in her keys and leave that day;
 - the applicant was told that the decision was an operational one and that the respondent was "not tracking financially";
 - the applicant asked about redeployment and was not that no other suitable positions existed;
 - the respondent told the applicant it would meet the cost of a recruitment firm to assist her in finding re-employment;
- the applicant was told that the details would be confirmed in a letter to be sent by certified mail by close of business that day;
- the applicant was asked to return her keys, the password for her computer and any of the respondent's materials;
- the applicant was accompanied to her office, was told not to access her computer and was offered boxes for her belongings;
- on 1 March 2012 the applicant was sent a letter indicating that she was not required to work out her notice period and setting out her monetary entitlements of \$64,387.21, which included four weeks' pay in lieu of notice, annual leave and leave loading, accrued but untaken time in lieu of additional days worked, accrued long service leave, outstanding wages and 16 weeks' redundancy pay.

[102] The applicant in that matter submitted that the change fell within the meaning of "major workplace change" in cl.8 of the award but that there was no relevant notification or discussion.¹¹⁸

[103] The Court said that from the time of the making of a "definite decision" to introduce major changes as described in cl.8 of the award, the applicant had workplace rights to the application of the consultation and notification provisions of the award.¹¹⁹ However there was an issue as to when those rights were activated and the extent of those rights was to be determined in light of the construction of the relevant provisions of the award.¹²⁰ The Court said that consistent with the principles outlined in *Australian Licenced Aircraft Engineers Association v Qantas Airways Limited*¹²¹ the clauses in the award were to be interpreted to give effect to their plain and ordinary meaning in the industrial context, having regard to the subject matter, text and purpose of the award as a whole.¹²²

[104] The Respondent noted that the Court said:

“While cl.8 of the Award would clearly encompass a two-step process involving a definite general policy decision to introduce major changes in organisation or structure on which consultation would be required before any subsequent impacts, such as particular redundancies, were put into effect, not all decision-making that involves termination of employment (particularly for smaller employers) necessarily proceeds by way of a preliminary definite decision. Rather, the employer may make a definite decision to introduce major change in organisation or structure which consists of a decision to terminate particular employees’ employment.”¹²³

[105] The Respondent went on to point out that the Court said:

“In this case the Club had discussions with Ms Ingersole on the morning of 1 March 2012. As outlined above, in the 1 March 2012 meeting involving Ms Ingersole, Mr Walker, Mr Geraghty and Mr Moore, there were discussions about the implementation and introduction of the change consisting of the redundancy resolution insofar as that change affected Ms Ingersole, the effects the change had on her and of any measures to avert or mitigate the adverse effect of such change. I accept that the events happened in the way that Mr Walker described them. On his evidence it is plain that Ms Ingersole was consulted as soon as practicable after the decision to make her redundant. She asked questions. She made complaints. She was given explanations. She asked whether it was a unanimous vote of the Board and was given a response and told that decisions could be made by a majority. She asked about alternative positions and was told that there were none suitable. The discussions about the implementation of the redundancy decision included the offer of assistance in relation to the outplacement counselling services”.¹²⁴

[106] The Respondent submitted that similarly, the meeting held on 31 October 2024 with the Applicant was sufficient to meet the requirement to discuss the workplace changes that were afoot and that the Respondent then generously gave the Applicant further time to discuss the matter, to mitigate the effect of the changes.¹²⁵ The Respondent submitted that the decision in *Ingersole v Castle Hill Country Club*¹²⁶ emphasises that it was a discussion that needed to be held and not a discussion that would necessarily influence the decision that had to be notified to the Applicant as soon as the decision had been made.¹²⁷

Did the Respondent comply with clause 34 of the Award?

[107] As noted above, the Respondent submitted that while consultation is the goal of clause 34 of the Award, it is not meant to be consultation of the character submitted by the Applicant, that the obligation was to have a *discussion* with the Applicant and the Respondent did so.¹²⁸

[108] While the Respondent has sought to distinguish ‘discussion’ from ‘consultation’, in my view this does not properly consider the context in which the term ‘discussion’ is used in clause 34 of the Award. Clause 34 is entitled ‘Consultation about major workplace change’ and its purpose is clearly concerned with ‘consultation’.

[109] The term ‘consult’ is defined in the Macquarie Dictionary as:

“1. to seek counsel from; ask advice of. 2. to refer for information. 3. to have regard for (a person’s interest, convenience etc.) in making plans. – *verb* (i) 4. (sometimes followed by *with*) to consider or deliberate; take counsel”¹²⁹

[110] The meaning of ‘consult’ was further considered by the Full Bench in *Consultation clause in modern awards*¹³⁰ who found that the word ‘consult’ means more than the mere exchange of information and referred to *Dixon v Roy*¹³¹ in which Young J said:

“The word ‘consult means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response.”¹³²

[111] The Full Bench said that inherent in the obligation to consult is the requirement to provide a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action.¹³³ The Full Bench referred to the following observation of Logan J in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (QR)*:¹³⁴

“... A key element of that content [of an obligation to consult] is that the party to be consulted be given notice of the subject upon which that party’s views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according the nature and circumstances of the case. In other words, what will amount to “consultation” has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto. To elaborate further on the ordinary meaning and import of a requirement to “consult” may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, “this is what is going to be done” and saying to that person “I’m thinking of doing this; what have you got to say about that?”. Only in the latter case is there “consultation. ...”

[112] The Full Bench went on to say:

“We respectfully adopt his Honour’s observations. Similar to the obligation to accord a person procedural fairness, the precise content of an obligation to consult will depend on the context. The extent and significance of a proposed change, in terms of its impact on the affected employees, will have a bearing on the extent of the opportunity to be provided. Hence a change of limited duration to meet unexpected circumstances may mean that the opportunity for affected employees to express their views may be more limited than would be the case in circumstances where the proposed change is significant and permanent. It is also relevant to note that while the right to be consulted is a substantive right, it does not confer a power of veto. Consultation does not amount to joint decision making.”¹³⁵

[113] As clause 34 is concerned with ‘consultation’ about ‘major workplace change’, the ‘discussion’ is, in my view, one of several subsets of the overall consultation process. In particular, clause 34.1 provides that if an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have

significant effects on employees, then it must do all the things prescribed by clause 34.1. These things extend beyond discussion.

[114] Clause 34.1(a) requires that the employer ‘give notice of the changes to all employees who may be affected by them and their representatives (if any)’. While clause 34.1(a) of the Award does not prescribe a time period for the provision of the notice, the obligation in clause 34.1(a) should be understood in the broader context of clause.

[115] In this regard clause 34.1(b) also requires that the employer ‘discuss’ with affected employees and their representatives (if any):

- (i) the introduction of the changes; and
- (ii) their likely effect on employees; and
- (iii) measures to avoid or reduce the adverse effects of the changes on employees.

[116] The term ‘discuss’ is defined in the Macquarie Dictionary as ‘to examine by argument; sift the considerations for and against; debate; talk over’.¹³⁶ Discussion therefore goes beyond a one-way communication or notification.

[117] While clause 34.1 refers to a *definite decision* to make major changes in production, program, organisation, structure or technology both the chapeau to clause 34.1 and clause 34.1(b)(ii) suggest that the *effects* of the changes on employees are, at the point of consultation under clause 34, ‘*likely*’ effects and not ‘*definite*’ effects. In my view this is because it is contemplated that these ‘*likely*’ effects are to be the subject of discussion between the employer and the employee prior to the actual implementation of the major change.

[118] Clause 34.1(b)(iii) requires that the employer discuss with the employees and their representatives (if any) measures to avoid or reduce the adverse effects of the changes on employees. Again, the reference to ‘avoid or reduce’ suggests that the clause contemplates the adverse effects on employees are not yet set in stone, otherwise ‘discussion’ about these matters, would be futile.

[119] The requirement in clause 34.1(c) to commence discussions as soon as practicable after a definite decision has been made provides a further indication as to the intent of the clause, encouraging early discussion about matters such as mitigation rather than later when the decision has been implemented and the effects of the major change have been realised.

[120] Clause 34.2 provides that for the purposes of this discussion; the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and
- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

[121] As is the case with the reference to the ‘*likely* effects’ in the chapeau to clause 34 and in 34.1(b)(ii), the reference to the ‘*expected* effect’ in clause 34.2 suggests that the effects of the major changes on employees have not yet been set in stone, i.e. because the changes have not yet been discussed and implemented. Clause 34.2 requires the employer to provide information about the ‘*expected* effect’ along with other matters ‘*likely* to affect’ employees.

While clause 34.2 does not prescribe a time frame by which the employer needs to provide the relevant information in writing to employees, in my view the clause intended that provision of such information would inform ‘discussion’ about such matters.

[122] I consider that the requirements in both clauses 34.1(a) and 34.2, including the requirement to give notice of the changes and to provide information about them in writing, were intended to support meaningful discussions during the consultation process.

[123] Clause 34.4 of the Award requires that the employer promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 34.1(b).

[124] The Respondent sought to distinguish the cases and principles referred to in *CFMEU v Mt Arthur Coal*¹³⁷ on the basis that the consultation term under the Award is different to the obligation in the relevant instruments those cases. However, given the goal of clause 34 of the Award is consultation, and that the obligation to *discuss* the matters in clause 34.1(b) needs to be understood in that context, I consider that many of the principles identified in *CFMEU v Mt Arthur Coal*¹³⁸ remain relevant to the current matter including that:

- the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation;¹³⁹
- a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account;¹⁴⁰
- the consultation needs to be real; it must not be a merely formal or perfunctory exercise;¹⁴¹
- even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality... The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences;¹⁴²
- while the word ‘consultation’ always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to ‘consultation’ has about it an inherent flexibility;¹⁴³
- the opportunity to consult must be a real opportunity not simply an after thought;¹⁴⁴
- the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation;
- a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account;
- the consultation needs to be real; it must not be a merely formal or perfunctory exercise;
- even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality... The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as

to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences.¹⁴⁵

[125] As I have earlier found, the meeting of 31 July 2024 does not assist the Respondent in meeting its consultation obligations in circumstances where nobody actually told the Applicant why they were asking her to consider a transfer at this time. Had they done so, she may have responded in a different way.

[126] Once the definite decision had been made, the process the Respondent adopted broadly involved:

1. Inviting the Applicant to a meeting on 30 October 2024 to ‘discuss proposed changes within the organisation that may impact [the Applicant’s] current position’ but without providing further detail about these changes at that time.
2. Meeting with the applicant on 31 October 2024 to:
 - a. advise the Applicant, predominantly by way of a pre-prepared script:
 - i. of the redundancy of her role and reasons for it;
 - ii. that redeployment was not a feasible option;
 - iii. that there would be a ‘consultation period’ until 8 November 2024; and
 - iv. that the Respondent’s Employee Assistance Program would be available and she could contact a recruitment agency, Global Talent Agency, to explore further opportunities;
 - b. notify the Applicant of the termination of her employment and provide her with the Termination Letter which indicated the termination would take effect the following day.

[127] There is very limited evidence about what the Applicant said on 31 October 2024 during the meeting. The evidence suggests she was shocked and did not say much at all. This is unsurprising as the Applicant was not given advance notice of the matters to be raised in the meeting or information as contemplated by clause 34.2 of the Award such that she had time to prepare for the meeting.

[128] The circumstances of the persons with whom there must be consultation¹⁴⁶ is a relevant consideration. In this regard, the circumstances of the Applicant include that:

- the Applicant was living in South Africa with her family¹⁴⁷ and accepted an offer of employment with the Respondent in around June 2023;¹⁴⁸
- the Applicant embarked on a lengthy migration process involving a lot of paperwork and registrations to enable her to work in Australia at a cost of around \$2000, medical assessments for herself and her family at a cost of \$803 and a visa application at a cost of \$9000;¹⁴⁹
- the Respondent became the Applicant’s work sponsor for the purposes of her visa and the Applicant moved to Sydney with her family on 3 March 2024 before commencing her position with the Respondent on 24 March 2024, seven months prior to the termination of her employment;
- the Applicant incurred cost in relocating, committed to a 12-month lease, placed her children in local schools and day care, furnished her home, and purchased a vehicle on credit;

- the Applicant was not entitled to redundancy pay at the time her employment was terminated and was only entitled to one weeks' pay in lieu of notice so would soon be without income;
- under the Applicant's visa, the Applicant's ability to remain in Australia was dependent on her working for the Respondent;
- if the Applicant stopped working within a timeframe, which on the basis of the materials before the Commission appears to be 60 days, the Applicant's visa conditions indicate that she was required to:
 - find another employer who was willing to nominate her;
 - be granted another type of visa;
 - or make appropriate arrangements to depart Australia.

[129] The nature of the changes that the Respondent had decided to implement were such that the effects on the Applicant were very significant in her circumstances. The Applicant is an employee who moved her family to another country to take up a role with their employer and her visa permitting her to live in Australia was dependent on her employment with the Respondent or finding another sponsor. In these circumstances, there is a big difference between a meeting in which the employee is told their role is no longer required and their employment will end tomorrow compared with a process in which an employee is given all relevant information about the change, is given a genuine opportunity to provide views about this (including what could be done to mitigate the adverse effects), and have this feedback taken into account before the decision is implemented. However, at the time of the meeting on 31 October 2024 the Respondent had already decided that because of its decided changes the Applicant's employment would end the following day, and the largely scripted meeting had the character of a perfunctory exercise. While the script of the meeting and Termination Letter contemplated a 'consultation period' ending on 8 November 2024, it is difficult to see how consultation can take place when the Applicant's employment had already ended, and the effects of the changes had been realised.

[130] I accept that in some circumstances, an employer may make a definite decision to introduce major change in organisation or structure which consists of a decision to terminate particular employees' employment and this appears to have occurred in the case of the Respondent. However, this does not mean that the Respondent was not required to consult prior to implementation of its decision. I also acknowledge that in some cases, consultation may be able to be delivered in a compacted timeframe. However in the circumstances of the Applicant, a process of the kind adopted by the Respondent cannot have been the intent of the consultation obligations in clause 34 which clearly contemplate a process of discussion between the employer and employees who stand to be effected by the change, informed by relevant information being provided to them so they can raise matters about the changes and have those matters considered by their employer.

[131] The Respondent:

- did not give the Applicant notice of its decided changes or relevant information in writing, including the expected effect of the changes as contemplated by clauses 34.1(a) and 34.2 prior to notifying her of the termination of her Applicant's employment; and
- the Respondent had already made the decision about what the effects for the Applicant were going to be - termination of the Applicant's employment the following day.

[132] I do not consider that the Respondent ‘discussed’ with the with the Applicant the introduction of the changes, their effect on her and measures to avoid or reduce the adverse effects on her as contemplated by clause 34.1(b). Instead, the Applicant was simply told what was going to happen to her. The intention of the meeting on 31 October 2024 becomes even clearer taking account that the Human Resources Manager largely followed the script referred to earlier in this decision and when the Applicant returned to her office following the meeting, she found that access to her computer and work phone had already been removed.¹⁵⁰

[133] The Applicant was effectively denied any real opportunity to raise matters and have them considered as contemplated by clause 34.4 before she was dismissed. As submitted by the Applicant in closing submissions, the Respondent had already made the decision that redeployment would not be possible without consulting the Applicant and there were a broad range of things that may have been discussed had she been afforded that opportunity, such as the Applicant’s willingness to take a cut in pay. Such an opportunity was important in the Applicant’s circumstances given the significant impacts that would flow to her from the very sudden termination of her employment, particularly if another sponsor could not be found within the timeframe prescribed by her visa conditions.

[134] In the circumstances of this matter, I find that the Respondent did not comply with its consultation obligations under clause 34 of the Award.

Would it have been reasonable in all the circumstances for the Applicant to be redeployed within the Respondent’s enterprise or the enterprise of an associated entity of the Respondent?

Applicant’s submissions

[135] The Applicant submitted that there was a failure by the Respondent to properly consider the question of redeployment in Respondent’s enterprise¹⁵¹ and that the Respondent cannot establish that it was not reasonable to redeploy the Applicant.¹⁵² In particular, the Applicant submitted that the Respondent, at the only meeting held to arrange the Applicant’s dismissal, dismissively stated that there were no roles available and that it was required to do much more than that.¹⁵³

Respondent’s submissions

[136] The Respondent submitted that it is has acquitted its obligation under section 389(2) of the Act and referred to *Ulan Coal Mines Limited v Honeysett & Ors; R Murray & Ors v Ulan Coal Mines Limited*¹⁵⁴ in which the Full Bench said:

“...Of course, the job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or with a reasonable period of retraining. Other considerations may be relevant such as the location of the job and the remuneration attaching to it...”

[137] The Respondent submitted that:

- significant retraining would be required for the Applicant to undertake the role of Complex Care Disability Support Worker, a role identified by the Applicant as a role she could undertake;¹⁵⁵

- while significant training would not be required for the Behaviour Support Practitioner role the Applicant identified with a related company of the Respondent, approval or the Applicant undertaking this role would have required an application for provisional registration with approval of that application at the discretion of the NDIS Quality and Safeguards Commission.¹⁵⁶

[138] The Respondent submitted that:

- the redeployment issue was discussed with the Applicant in the meeting on 31 October 2024, having been raised by Mr Goodall, but the Applicant did not raise the existence of other jobs that she could do until the following week;¹⁵⁷
- the obligation is to discuss redeployment, not necessarily resolve it with the aid of the Applicant;¹⁵⁸
- this is not a case where, as supposed by the Applicant at paragraph 50 of her submissions, that the Respondent has assumed or concluded what the Applicant would have been prepared to do in all the circumstances.¹⁵⁹ Rather, in the current case the Respondent knew that the Applicant could not do the roles she put forward as possible redeployment options because her visa would have made performing those roles an illegal act.¹⁶⁰ In particular, under visa subclass 482 (temporary skill shortage), condition 8607, which is outlined in the *Migration Regulations 1994*, states that the visa holder must, among other things, work only in the occupation nominated in their most recent subclass 482 visa application;¹⁶¹
- the occupation nominated in the Applicant's most recent subclass 482 visa application was the occupation of occupational therapist, this is the only occupation in which the Respondent could have offered the Applicant work and the other roles canvassed by the Applicant during the consultation/discussion period were therefore not reasonable redeployment options in the circumstances.¹⁶²

Applicant's qualifications and experience

[139] The Applicant is a degree qualified occupational therapist.¹⁶³ The Applicant gave evidence that experience included working with adolescents up to late adulthood,¹⁶⁴ psychiatric patients¹⁶⁵ and children between the ages of 6 and 18 at a special needs school.¹⁶⁶

The role of 'Complex Care – Disability Support Worker'

[140] The Applicant filed copies of two job advertisements with the Commission which she said were suitable positions available at the time of her redundancy.¹⁶⁷

[141] One of these advertisements indicated the Respondent was seeking Complex Care – Disability Support Workers in Richmond on a casual/vacation basis. The advertisement provided does not appear to be in its complete form but indicated that the role required:

- experience with working with people living with a disability or working towards qualifications;
- able to follow procedure and ensure the client's personal preferences are adhered to;
- confident communicator who can maintain professional boundaries with clients and their families;
- experience working within designated timeframes;
- adaptability for unexpected changes due to client and rostering needs;

- an open and enthusiastic manner with a commitment to working with people living with disabilities;
- demonstrated ability to work effectively in a team environment and individually;
- ability to work day/nights and weekends;
- ability to work in Richmond;
- driven, energetic and committed;
- flexible and reliable.

[142] Ms Goodall gave evidence that when the Applicant brought this role to the Respondent's attention, which was after her dismissal, the Respondent confirmed to the Applicant that she would have to undergo significant retraining to undertake that role and in particular, training and competency assessments both online and in person with a Registered Nurse in relation to:

- ventilator support;
- tracheostomy management;
- enteral feeding support;
- urinary catheter support (in-dwelling urinary catheter, in-out catheter, suprapubic catheter);
- complex bowel care;
- complex wound care support;
- medication administration;
- subcutaneous injections; and
- epilepsy management.¹⁶⁸

[143] During cross examination Ms Goodall was asked why the retraining would be unreasonable and whether she assessed what it would mean for the Respondent to do that retraining to which she responded:

“Yes. Upon looking at the positions that Lynita had presented in her letter, which was in November some time, and looking at these two options, it was not suitable and reflecting, after the fact, it was illegal for us to look at appointing her to another position because of her visa. The training that you're referring to, in terms of complex care; requires extensive training, internally and externally, to be able to be appointed to that role. However, again, due to the visa, it's not something that we can simply provide a contract variation of move her into that role. We have to apply to the Department for that change in her position and we would need to pay for those changes as well, to which we financially were not in a position to do so”.¹⁶⁹

[144] Despite the high level descriptors used in the advertisement that do not point to the competencies identified by Ms Goodall, I do accept that the care requirements for the Complex Care – Disability Support Worker role would likely have required working with NDIS participants with complex care needs, that the Applicant would have required skills and significant additional training in the areas described by Ms Goodall. Taking into account the nature of the role and Applicant's skills, qualifications and experience, I do not consider that it would have been reasonable to redeploy her to this role.

The 'NDIS Behaviour Support Practitioner' role

[145] The other role of NDIS Behaviour Support Practitioner was a full time role based in Blacktown advertised by 'ASSiST'. The Respondent acknowledged that this was a role with

Assist Disability Services Pty Ltd, a related company of the Respondent.¹⁷⁰ The advertisement for this role set out following key requirements:

- experience working with children, young people and adults who have a disability and present with complex challenging behaviours;
- demonstrated knowledge in the development and implementation of behavioural intervention strategies, risk management strategies and skills development plans;
- Bachelors/Master's Degree in Occupational Therapy, Psychology, Social Work or similar;
- genuine desire to provide the best quality support for people with disabilities;
- reliable character;
- well-developed communication and interpersonal skills;
- ability to work both independently and as part of a team;
- confident communicator who can maintain professional boundaries with clients and their families;
- knowledge of NDIS practice standards and funding model is desirable;
- excellent written and verbal communication skills;
- impeccable time management and multi-tasking abilities.

[146] In relation to the position of NDIS Behaviour Support Practitioner, Ms Goodall gave evidence that the Applicant would have needed to:

- submit an application to the NDIS Quality and Safeguards Commission and approval would be at the discretion of that Commission;
- be sponsored by Assist Disability Services Pty Ltd, and not the Respondent, and would not have had any duties that she was able to fulfil during her application for sponsorship.¹⁷¹

[147] In its letter to the Applicant of 7 November 2024 the Respondent had stated, in addition to the above matters, that:

- due to the Applicant's lack of achievement of proficiency levels in that type of role, the Respondent would have to reduce the Applicant's salary to be more than 9.3 percent less than her salary of \$95,000;
- the Applicant would require significant retraining to undertake the role;
- the Applicant would need to be employed by Assist Disability Services Pty Ltd which would mean that she would need to reapply for nomination and sponsorship by that entity, during which time there would not be any employment duties that she could fulfil.

[148] However in its submissions, the Respondent appeared to concede that significant training *would not* be required for the NDIS Behaviour Support Practitioner role.¹⁷²

[149] In its letter of 7 November 2024 the Respondent had also stated in relation to redeployment generally that the Respondent understood that the Applicant's visa was specifically approved for her position as an occupational therapist and as such, it would need to make another application to the Department of Home Affairs for the Applicant to be redeployed into another role, providing an 'additional barrier' to redeployment.

[150] The Applicant clearly had qualifications and experience that were directly relevant to the NDIS Behaviour Support Practitioner role, being a degree qualified occupational therapist¹⁷³ who had worked adolescents, adults,¹⁷⁴ psychiatric patients¹⁷⁵ and children with special needs¹⁷⁶ who would likely have exhibited "challenging behaviours" as referred to in

the advertisement. Given that no significant training would have been required, I see no reason why she would not have been able to competently carry out the role.

[151] It is apparent that the Respondent had already decided that redeployment was not an option before the meeting on 31 October 2024 and I do not accept that the Respondent discussed redeployment with the Applicant beyond telling her that it was not available. In *Technical and Further Education Commission T/A TAFE NSW v Pykett*¹⁷⁷ the Full Bench said that evidence as to whether there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee would usually include canvassing the steps taken by the employer to identify work which could be performed by the dismissed employee. In this respect the Respondent has brought little evidence to show what it actually did to explore redeployment. I am not convinced that the Respondent actually gave any thought to redeploying the Applicant to the NDIS Behaviour Support Practitioner role before notifying the Applicant of her dismissal on 31 October 2024 and it is apparent that it was the Applicant that brought this role to the Respondent's attention. However, in its letter of 7 November 2024 sent to the Applicant following the dismissal, the Respondent seemed to assume that the role was not suitable because it would have required the Applicant to take a pay cut. Had the Respondent undertaken a proper consultation process with the Applicant and explored redeployment options with the Applicant before deciding that there were none, it would likely have learned the Applicant would have been willing to accept a lower-paying role or position of lower status.¹⁷⁸ The Respondent should not have made the assumption that a role would not have been accepted by the Applicant on the basis of lower pay and should not have ruled out redeployment on the basis of such an assumption.

[152] The residual concerns of the Respondent appear to relate to the requirement for the Applicant to change employers, reapply for sponsorship, and submit an application to the NDIS Quality and Safeguards Commission. In circumstances where the Applicant's skills and experience matched the role requirements it is unclear as to why an application to the NDIS Quality and Safeguards Commission would have been problematic. Further, the Applicant was, to her credit, able to act quickly to secure a role with another employer post her dismissal and this would also have involved an application for sponsorship which appears to have been dealt with relatively quickly. In this regard it is unclear as to why sponsorship with Assist Disability Services Pty Ltd or the application processes would have been problematic for the Respondent. While I accept that changing employers would have likely resulted in the need to make further applications the evidence does not, in my view, establish that these requirements were such that they made redeployment to the NDIS Behaviour Support Practitioner role unreasonable. Further, while the Respondent has indicated that during the application process there would not be any employment duties that the Applicant could fulfil, this did not necessarily mean that redeployment was unreasonable in circumstances where it has failed to consult with the Applicant about these matters. Had it properly consulted the Applicant some of these issues and transitional arrangements concerning potential redeployment could have been explored.

[153] I have earlier set out the circumstances that applied to the Applicant, including that the Applicant is an employee who moved her family to another country to take up a role with their employer, her visa permitting her to live in Australia was dependent on her employment with the Respondent and if that employment terminated she only had 60 days to find another work sponsor. There was another employer, being an associated entity of the Respondent, searching for a person with the Applicant's skills and experience and if it had sponsored the Applicant it is likely she would have been able to remain in Australia. These circumstances are, in my view,

also relevant to the consideration of section 389(2). Having regard to the matters above, I find that it would have been reasonable in all the circumstances to redeploy the Applicant to the NDIS Behaviour Support Practitioner role.

Finding regarding genuine redundancy

[154] In the circumstances of this matter, I find that:

- the Respondent did not comply with its consultation obligations under clause 34 of the Award, being this was an obligation in a modern award that applied to the employment to consult about the redundancy; and
- it was reasonable for the Applicant to be redeployed within the Respondent's enterprise or the enterprise of an associated entity of the Respondent.

[155] As such, I find that the dismissal was not a case of genuine redundancy within the meaning of section 389(1) of the FW Act.

[156] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[157] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[158] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.¹⁷⁹

[159] I set out my consideration of each below.

Section 387(a) - was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[160] The Applicant was dismissed because the Respondent no longer required that her role be performed by anyone. The reason for the Applicant's dismissal was not related to the Applicant's capacity or conduct. Accordingly, there cannot have been and was not a valid reason for her dismissal related to her capacity or conduct.

[161] In the circumstances of this case, I regard it as a neutral matter in relation to my consideration of whether the Applicant's dismissal was harsh, unjust or unreasonable.

Section 387(b) and (c) - was the Applicant notified of the valid reason and given an opportunity to respond to any valid reason related to their capacity or conduct?

[162] The matters in section 387(b) and (c) of the FW Act deal with whether there was procedural fairness in relation to a reason for dismissal related to capacity or conduct. As noted above, the reason for the Applicant's dismissal was not related to the Applicant's capacity or conduct. As such, I regard these as neutral matters in relation to my consideration of whether the Applicant's dismissal was harsh, unjust or unreasonable.

Section 387(d) - Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[163] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[164] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”¹⁸⁰

[165] The Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal. However, the Applicant raised that she was not told that the meeting on 31 October 2024 could result in her dismissal and I deal with this further in consideration of section 387(h).

Section 387(e) - Was the Applicant warned about unsatisfactory performance before the dismissal?

[166] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

Sections 387(f) and (g) - to what degree would the size of the Respondent's enterprise and absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[167] The Respondent was not a small employer. I find that the size of the Respondent's enterprise was not likely to impact on the procedures followed in effecting the dismissal. Further, the Respondent did not lack dedicated human resource management specialists and expertise.

Section 387(h) - What other matters are relevant?

[168] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[169] The Applicant submitted that the Commission should have regard to the overall circumstances of the employment, including the availability of roles at the time of dismissal and Applicant's full CV.¹⁸¹ In particular, the Applicant submitted that the Commission should take into consideration that:

- the Respondent breached clause 34 of the Award and therefore section 389(1)(b) of the FW Act;¹⁸²
- there was a failure by the respondent to properly consider the question of redeployment of the Applicant in the Respondent's enterprise;¹⁸³
- the Respondent, at the only meeting held to arrange the Applicant's dismissal, dismissively stated that there no other roles available, an asserted fact that is disputed by the Applicant;¹⁸⁴
- the process adopted by the Respondent was not a fair go all round.¹⁸⁵

[170] The Respondent submitted that the Commission should have regard to the fact that the Applicant was on a temporary skills shortage visa which meant she could only work an occupational therapist.¹⁸⁶

[171] The Applicant was not told that the meeting on 31 October 2024 was about her dismissal and I accept that the communication of her dismissal in this meeting came as a shock to the Applicant. In the Applicant's circumstances the failure of the Respondent to consult or properly explore redeployment with her meant that the Applicant was not given a proper opportunity to share her views, including on matters of mitigation. The process adopted by the Respondent in failing to provide such an opportunity and hastily implementing the decision to dismiss the Applicant was particularly poor in circumstances where the dismissal was to have very significant effects on the Applicant and her family. I consider these to be relevant considerations.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[172] I have made findings in relation to each matter specified in section 387 as relevant.

[173] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.¹⁸⁷

[174] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh, with significant weight given to the failure to consult with the Applicant as required by the consultation provision in the Award which had particularly acute impact on the Applicant in her circumstances. I am also satisfied that the dismissal was unreasonable because there was another role to which I have found it was reasonable to redeploy her.

[175] Having found that the dismissal was harsh and unreasonable, I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Conclusion

[176] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[177] Being satisfied that the Applicant:

- made an application for an order granting a remedy under section 394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of section 385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[178] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

- (a) I am satisfied that reinstatement of the Applicant is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[179] The Applicant submitted that reinstatement is not appropriate because there has been a loss of trust and confidence.¹⁸⁸

[180] The Respondent submitted that reinstatement is inappropriate because the relationship between the parties has broken down and the Applicant now has gainful employment.

[181] Having regard to the matters referred to above, I consider that reinstatement is inappropriate. I will now consider whether a payment for compensation is appropriate in all the circumstances.

Compensation as a remedy - what must be taken into account in determining an amount?

[182] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

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

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

Section 392(2)(b) - Length of the Applicant's service

[184] The Applicant's length of service was short at 7 months however in the circumstances of this matter I consider that the Applicant's length of service does not support reducing nor increasing the amount of compensation ordered.

Section 392(c) - Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

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

had not been the actual termination.”¹⁸⁹ This consideration is aligned to step 1 of the approach in *Sprigg* as described above.

[186] The Applicant submitted that:

- she has more than 10 years’ experience as an occupational therapist and this is a career job;
- she has a solid CV;
- she expected to remain employed for at least the length of her Visa, being two years; and
- based on her experience and the range of duties she could have been deployed to undertake, her employment would have continued.¹⁹⁰

[187] When calculating the remuneration that the Applicant would have received or would have been likely to receive, if the Applicant had not been dismissed, the intention is to put the Applicant in the financial position he or she would have been in but for the unfair dismissal. In the current matter, the assessment is complex because it is difficult to determine with certainty the outcome for the Applicant had the Respondent consulted with the Applicant in compliance with the consultation provision of the Award. However, had the Respondent undertaken such consultation and properly explored redeployment I find that this would have taken place over approximately three weeks. The Applicant was paid a salary of \$95,000 per year however of this salary, \$10,000 was paid as a relocation allowance up front, therefore reducing the Applicant’s weekly payments to \$1,634.62 per week.¹⁹¹ In respect of this three week period the Applicant would therefore have earned \$4,903.86.

[188] It also seems likely that had consultation taken place and redeployment been properly explored, the Respondent would have found that the impediments to redeploying the Applicant to the NDIS Behaviour Support Practitioner would not have been so significant as to make redeployment unreasonable. However, this does not mean that redeployment would have happened immediately at the conclusion of the consultation period as sponsorship needed to be arranged with the Respondent’s associated entity, Assist Disability Services Pty Ltd. In the Applicant’s circumstances it seems unlikely that processing the relevant applications would have taken a significant amount of time. To demonstrate this, in the time between the Applicant’s dismissal on 1 November 2024, the Applicant was able to apply for roles, secure an offer and be in a position to start with another employer by 20 January 2025, a period of just 11 weeks. The Applicant managed to do this within the compacted timeframe while managing some significant life changes, such as relocation. However, the applications associated with the Applicant changing roles would have nevertheless been required in the event of redeployment and I accept that in the Respondent’s circumstances there would be little to do during the transition between entities while the applications awaited approval, given it was reducing the overall headcount of its occupational therapists. The Applicant was paid her outstanding annual leave entitlements on termination and the final pay slip suggests she did not have a significant leave balance that could have been drawn on during a transitional period. However, I do not consider this was fatal to redeployment and had the Respondent consulted with the Applicant about this, it is likely that the Applicant would have been amenable to a reasonable arrangement to enable her to maintain employment and stay in Australia.

[189] I accept that if the Applicant was redeployed, it would likely have been to a role with a lower salary. Notwithstanding this, the full time NDIS Behaviour Practitioner role still required a degree qualification and as the other occupational therapists for the Respondent earned

\$85,000,¹⁹² I consider that this is the salary that would likely to attach to the role in respect of a degree qualified occupational therapist.

[190] The Applicant's evidence was that she would have been willing to accept a lower-paying role or position of lower status temporarily so she had a source of income while she continued to search for another opportunity as an Occupational Therapist.¹⁹³ As such, and given the Applicant's employability, I do not consider that she would have remained in this role for more than 11 weeks following her dismissal as she would likely have started searching for and found another, higher paying role to commence in the new year as she ultimately did on 20 January 2025.

[191] I consider that the most likely scenario that would have materialised had the Applicant not been dismissed is that the Applicant would have:

- remained employed and paid by the Respondent for a further period of three weeks to enable it to properly consult and explore redeployment and would have earned \$4,903.86 during this period;
- remained employed but without income on a negotiated unpaid arrangement for a period pending approval of her applications associated with redeployment, which I consider would have been a further period of around four weeks;
- been redeployed on a salary of \$85,000 per annum and remained in that role for a further four weeks, earning \$6,538.46, until she secured an offer for and commenced alternative employment.

[192] As such, I find that the amount of remuneration that the Applicant would have received or would have been likely to receive during the relevant period is \$11,442.32.

Section 392(2)(d) - Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[193] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.¹⁹⁴ What is reasonable depends on the circumstances of the case.¹⁹⁵

[194] The Applicant submitted that the Applicant had taken reasonable steps to minimise the impact of the dismissal by:

- moving quickly to obtain employment;
- applying for a range of Occupational Therapy roles in Sydney in November 2024 without success;
- obtaining a role on 3 December 2024 and commencing a position in Western Australia on 20 January 2025.¹⁹⁶

[195] I find that the Applicant has taken reasonable steps to mitigate her loss suffered because of the dismissal and do not consider that any adjustment to the amount of compensation should be made on this basis.

Remuneration earned – Section 392(2)(e) and income reasonably likely to be earned – Section 392(2)(f)

[196] Remuneration earned from the date of dismissal to the date of any compensation order is required to be taken into account under section 392(2)(e) of the FW Act. Remuneration reasonably likely to be earned from the date of any compensation order to the date the compensation is paid is also required to be taken into account under s.392(2)(f) of the FW Act. Any remuneration likely to be earned after the dismissal date to the end of the period of anticipated employment determined for the purpose of s.392(2)(c) is a relevant amount to be taken into account in accordance with the *Sprigg* formula.

[197] The Applicant commenced her new role on 20 January 2025 and has earned income since that date however I have earlier found that the Applicant would have only remained employed for a further 11 weeks (i.e. until 17 January 2025). I am satisfied that the Applicant did not earn remuneration between the period of her dismissal and 17 January 2025, beyond payment of one week's notice of termination in lieu which was an amount of \$1,634.62.¹⁹⁷

Section 392(2)(a) - Effect of the order on the viability of the Respondent's enterprise

[198] The Respondent submitted that a relevant consideration under section 392(2)(a) is that the reasons for dismissing the Applicant were fiscal and in this regard pointed to:

- a loss of \$409,216 for financial year 2023-2024 as reflected in the Respondent's Income Tax Return where assets and liabilities were \$640,509 and \$1,315,814 respectively;¹⁹⁸
- a loss of \$105,837 in August 2024 and a loss of \$143,430 in September 2024, as shown in profit and loss statements and once intercompany "management fees" of \$125,000 are taken into account in September.¹⁹⁹

[199] The Respondent submitted that it is already at risk of not being a viable enterprise.

[200] The Applicant submitted that an order of any amount would have no effect on the viability of the employer's enterprise because the Respondent operates in the health care industry with Government and NDIS contracts and there is no evidence that it cannot make a compensation payment within the unfair dismissal jurisdiction. It also submitted that the redundancies put into effect on 31 October 2024 have not been taken into account in the financial assessment of the Respondent.

[201] During cross examination Mr Zorzit gave evidence that he had borrowed money from family, had put his house on the market and was making arrangements with creditors and suggested that payment of compensation may be the "straw that breaks the camel's back".²⁰⁰ Mr Zorzit also acknowledged that the Respondent's turnover was \$9.03 million in 2023 and \$16.6 million in 2024.²⁰¹ Mr Zorzit was asked whether, based on the August and September 2024 figures, the Respondent would expect to turnover \$17 million at the end of the 2025 financial year to which he responded:

"I think, based on the redundancies that we've had to make, that has reduced our capacity, but it's also been - I perhaps it will be slightly lower than that, sir. But we've also - the reason we've taken the steps that we have, which is why we're here, is because we need to reduce costs overall. There has been some sacrifice to revenue, as a result of some of those reductions, but I've tried to keep that absolutely minimal".²⁰²

[202] It was put to Mr Zorzit that the redundancies would result in savings of around one million dollars per year, including on-costs, to which he responded:

“Yes. I think that's - I think that's pretty close. I would also add to that, that we closed the Fraser Coast clinic that was losing money. Also an external marketing consultant. Also a marketing assistant that went on maternity leave, or parental leave, won't be returning to employment. So there's - you know, the list goes on. It's exhaustive and exhausting as a process. It's very difficult pulling yourself out of a very difficult financial situation which we found ourselves, following very successful trading in financial years 22 and 23. But I think your assessment of \$1 million a year in savings is, I think, maybe even slightly - slightly low, we're aiming for more than that. The reason for more than that is because our trading losses, look to be around circa \$100,000 a month. It also doesn't include the bigger aspects of we've got bank borrowings, as well, to the tune of \$50,000 a month, which are not included in those numbers. So our task, or my task, is to actually find savings beyond that number that you've just described. \$1 million savings won't get us out of - won't allow us to keep the sheep station”.²⁰³

[203] Mr Zorzit was then asked whether \$1 million in savings would improve the situation and “keep the ship balanced” to which he responded:

“I feel like it's been - you know, if we're talking purely in a financial sense, it's been definitely a necessary step and one that we're keeping a very, very close eye on because we are at a very sensitive time. Interestingly, for the court to understand the way our business operates is that December and January are our two most challenging months due to a lot of people going on leave, clients taking holidays or breaks from services, so it is our actually most - we're just coming out of our most difficult trading two months which closely followed a raft of redundancies, including during those last two months. So I'm really hoping that there's some daylight ahead of us, but we're certainly not there yet.”²⁰⁴

[204] Mr Zorzit also acknowledged that consultant fees had reduced from \$56,695.15 to \$26,000 by January, and that these fees would be the same in February and would reduce a little further by March.²⁰⁵

[205] In closing submissions the Applicant submitted that:

- Mr Zorzit had confirmed that the Respondent was still operating and not insolvent;
- The Respondent had saved outgoings of at least a million dollars a year in salaries through redundancies and cutting consultancy fees from \$50,000 to \$26,000;
- the Respondent is a company which will be turning over in the order of \$17 million in 2025 and has increased its turnover from \$9.83 million in 2023 up to \$16 million which is a large number from which compensation would be a “drop in the ocean”.²⁰⁶

[206] I accept that the Respondent has encountered difficult financial circumstances since changes to the NDIS framework in July 2024. While the attempts to trade its way out of these via an additional marketing push were unsuccessful, it has acted to reduce its costs via redundancies and the evidence establishes that it stands to make significant savings as a result. I have found that the amount of remuneration that the Applicant would have received or would have been likely to receive during the relevant period was only \$11,442.32 and I am not persuaded that the Respondent's circumstances are so dire that an order of compensation in the

scale of what is being contemplated would affect the viability of the enterprise in any material way.

Section 392(2)(g) - Other relevant matters

[207] The Respondent submitted that a relevant consideration under section 392(2)(g) is that five Occupational Therapists, one Customer Service Officer, one Human Resources Business Partner and one Registered Nurse were made redundant at the time of the dismissal of the Applicant due to the fiscal considerations outlined above.

[208] The Respondent also submitted that a further relevant consideration is that it had invested \$30,28.22 into the Applicant's position made up of:

- \$21,650 in payments to the recruitment agency it used, Global Talent Agency Pty Ltd being:
 - \$6,250 as a deposit for international recruitment on 16 July;
 - \$12,500 being a further recruitment fee;
 - \$2,900 for a "supervision package";
- A \$600 "professional fee" paid on 12 November 2024 after the Applicant's dismissal in relation to "applying for a refund request to the Department of Home Affairs in relation to the cessation of employment of the Applicant.
- \$6,618.22 in fees related to the Applicant's Visa.²⁰⁷

[209] I accept that the Respondent incurred costs associated with the Applicant's employment, the bulk of these related to payments made to its recruitment agency. However the Applicant has also incurred cost and liabilities in relocating to Australia to take up employment with the Respondent with her role to be made redundant only seven months later and the circumstances of both the Applicant and Respondent need to be considered.

[210] I have taken into account that if the Applicant was redeployed there would have been a requirement to make certain applications and that there would have been little for her to do during the transition between entities while those applications awaited approval. The amount of income I have anticipated the Applicant would have earned during the anticipated period of employment was adjusted to contemplate a four week period during which I have found that the Applicant would have remained employed but without income on a negotiated arrangement pending approval of her applications associated with redeployment.

Is an order for payment of compensation appropriate?

[211] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one..."²⁰⁸

[212] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.²⁰⁹ The Respondent knew the business was in financial difficulty as early as July 2024 when changes to the NDIS came into effect and its communication with the Applicant about this was poor. The Applicant's employment was terminated with only a day's prior notice and she was without an income until such time as she was able to secure alternative employment. Had the Respondent been more transparent with the

Applicant about the circumstances it was encountering and how they were likely to impact the Applicant, it is likely that measures could have been explored such that the Applicant's loss could have been mitigated.

[213] In all the circumstances, I consider that an order for payment of compensation is appropriate because the Applicant suffered loss during her anticipated period of employment.

Compensation – how is the amount to be calculated?

[214] As noted by the Full Bench, “[t]he well-established approach to the assessment of compensation under section 392 of the FW Act... is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket (Sprigg)*.²¹⁰ This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*²¹¹.”²¹²

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

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination. Workers’ compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[216] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be \$11,442.32 on the basis of my finding that the Applicant would likely have remained in employment for a further period of 11 weeks and would have earned income across seven of those weeks, with four of those weeks being paid at a rate based on a lower annual salary of \$85,000. This estimate of how long the Applicant would have remained in employment is the “anticipated period of employment”.²¹³

Step 2

[217] Only monies earned since termination for the anticipated period of employment are to be deducted.²¹⁴ I have earlier found that the Applicant was paid \$1,634.62²¹⁵ notice in lieu of termination. Deducting this amount from \$11,442.32 brings the amount to \$9,807.70

Step 3

[218] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.²¹⁶ I do not

consider there are any facts in this matter that would warrant any further adjustment for contingencies.

Step 4

[219] I have considered the impact of taxation but have elected to settle a gross amount of \$9807.70 less taxation as required by law.

[220] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that “the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case.”²¹⁷

[221] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by section 392(2) of the FW Act.

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

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

[223] I am satisfied that misconduct of the Applicant did not contribute to the employer’s decision to dismiss her. Therefore the amount of the order for compensation is not to be reduced on account of misconduct.

Compensation – how does the compensation cap apply?

[224] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

- (a) the amount worked out under section 392(6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

[225] The amount worked out under section 392(6) is the total of the following amounts:

- (a) the total amount of the remuneration:
 - (i) received by the Applicant; or
 - (ii) to which the Applicant 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 Applicant 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 Applicant for the period of leave in accordance with the regulations.

[226] The Applicant was not on leave without pay or without full pay during the 26 weeks immediately before the dismissal.

[227] There was no dispute and I find that the total amount of the remuneration received by the Applicant during the 26 weeks immediately before the dismissal was \$47,500.

[228] There was no dispute and I find that the total amount of the remuneration to which the Applicant was entitled during the 26 weeks immediately before the dismissal was \$47,500.

[229] The high income threshold immediately before the dismissal was \$175,000. Half of that amount is \$87,500.

[230] The amount of compensation ordered by the Commission must therefore not exceed \$47,500.

Conclusion regarding compensation

[231] In light of the above, I will make an order that the Respondent pay \$9,807.70 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision.



COMMISSIONER

Appearances:

Mr P. Mullaly of Workclaims Australia for the Applicant.

Ms K. Maxwell of Frank Law + Advisory for the Respondent.

Hearing details:

2025.

Sydney, online by video using Microsoft Teams.

February 19.

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¹Respondent's Outline of Argument at [1].

² Form F2 – Unfair Dismissal Application, response to q. 3.2; Form F3 – Employer response to unfair dismissal application, response to q. 1.2.

³ Form F2 – Unfair Dismissal Application, response to q. 3.2.

⁴ Form F2 – Unfair Dismissal Application, response to q. 3.2.

⁵ Form F2 – Unfair Dismissal Application, response to q. 3.2.

⁶ Form F2 – Unfair Dismissal Application, response to q. 1.4; Form F3 – Employer response to unfair dismissal application, response to q. 1.4

⁷ Applicant’s Submissions at [16].

⁸ Applicant’s Submissions at [42].

⁹ Applicant’s Submissions at [27].

¹⁰ Applicant’s Submissions at [30].

¹¹ Applicant’s Submissions at [32].

¹² Applicant’s Submissions at [35].

¹³ *Warrell v Fair Work Australia* [2013] FCA 291.

¹⁴ Ibid.

¹⁵ Applicant’s Reply Statement at [17].

¹⁶ Applicant’s Statement at [68].

¹⁷ Applicant’s Statement at [70].

¹⁸ Applicant’s Statement at [71].

¹⁹ Applicant’s Statement at [72].

²⁰ Transcript of Proceedings at PN 258.

²¹ Transcript of Proceedings at PN 259.

²² Transcript of Proceedings at PN 259.

²³ Transcript of Proceedings at PN 260.

²⁴ Transcript of Proceedings at PN 261.

²⁵ Transcript of Proceedings at PNs 367 -375.

²⁶ Transcript of Proceedings at PN 392.

²⁷ Transcript of Proceedings at PN 262.

²⁸ Goodall Statement at [3].

²⁹ Goodall Statement at [3].

³⁰ Goodall Statement at [3].

³¹ Goodall Statement at [12].

³² Transcript of Proceedings at PN 229.

³³ Transcript of Proceedings at PN 229.

³⁴ Transcript of Proceedings at PNs 239 – 240.

³⁵ Transcript of Proceedings at PN 241.

³⁶ Transcript of Proceedings at PN 242.

³⁷ Transcript of Proceedings at PN 243.

³⁸ Transcript of Proceedings at PN 245.

³⁹ Transcript of Proceedings at PN 247.

⁴⁰ Transcript of Proceedings at PN 248.

⁴¹ Zorzit Statement at [1].

⁴² Zorzit Statement at [5].

⁴³ Zorzit Statement at [3].

⁴⁴ Zorzit Statement at [4].

⁴⁵ Zorzit Statement at [4].

⁴⁶ Transcript of Proceedings at PN 470.

⁴⁷ Transcript of Proceedings at PN 343.

⁴⁸ Transcript of Proceedings at PN 344.

⁴⁹ Transcript of Proceedings at PN 351.

- ⁵⁰ Transcript of Proceedings at PN 352.
- ⁵¹ Transcript of Proceedings at PNs 354 - 347.
- ⁵² Transcript of Proceedings at PN 359.
- ⁵³ Transcript of Proceedings at PNs 360 - 363.
- ⁵⁴ Transcript of Proceedings at PN 393.
- ⁵⁵ Goodall Statement at [2], [13].
- ⁵⁶ Goodall Statement at [7].
- ⁵⁷ Goodall Statement at [13].
- ⁵⁸ Goodall Statement at [7].
- ⁵⁹ Goodall Statement at [8].
- ⁶⁰ Goodall Statement at [9].
- ⁶¹ Goodall Statement at [13].
- ⁶² Scurr Statement at [3].
- ⁶³ Scurr Statement at [3].
- ⁶⁴ Scurr Statement at [4].
- ⁶⁵ Scurr Statement at [5].
- ⁶⁶ Scurr Statement at [6].
- ⁶⁷ Scurr Statement at [7].
- ⁶⁸ Scurr Statement at [8].
- ⁶⁹ Scurr Statement at [11].
- ⁷⁰ Scurr Statement at [12].
- ⁷¹ Transcript of Proceedings at PN 378.
- ⁷² Applicant's Reply Statement at [6].
- ⁷³ Applicant's Reply Statement at [7].
- ⁷⁴ Applicant's Reply Statement at [13].
- ⁷⁵ Applicant's Reply Statement at [14].
- ⁷⁶ Applicant's Reply Statement at [16].
- ⁷⁷ Transcript of Proceedings at PN 248.
- ⁷⁸ Goodall Statement at [10].
- ⁷⁹ Applicant's Statement at [79].
- ⁸⁰ Applicant's Reply Statement at [62].
- ⁸¹ Applicant's Reply Statement at [63].
- ⁸² Applicant's Reply Statement at [64].
- ⁸³ Applicant's Reply Statement at [69].
- ⁸⁴ Applicant's Reply Statement at [70].
- ⁸⁵ Applicant's Statement at [80].
- ⁸⁶ Scurr Statement at [13].
- ⁸⁷ Applicant's Statement at [81].
- ⁸⁸ Goodall Statement at [11].
- ⁸⁹ [2014] FCCA 450.
- ⁹⁰ Applicant's Submissions at [15]. [41].
- ⁹¹ Applicant's Submissions at [43].
- ⁹² [2021] FWCFB 6059 at [108].
- ⁹³ *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [212].
- ⁹⁴ *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 178–179.
- ⁹⁵ *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 101.

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- ⁹⁶ *QR Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, [81].
- ⁹⁷ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].
- ⁹⁸ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].
- ⁹⁹ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].
- ¹⁰⁰ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431 at [60].
- ¹⁰¹ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431 at [60].
- ¹⁰² *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211].
- ¹⁰³ *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211].
- ¹⁰⁴ *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company Pty* (1998) 88 IR 202, 217.
- ¹⁰⁵ *Sinfield v London Transport Executive* [1970] 1 Ch 550, 558.
- ¹⁰⁶ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [45].
- ¹⁰⁷ *Consultation clause in modern awards* [2013] FWCFFB 10165 at [35].
- ¹⁰⁸ *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company Pty* (1998) 88 IR 202 at 218.
- ¹⁰⁹ Applicant's Submissions at [45].
- ¹¹⁰ Respondent's Submissions at [7].
- ¹¹¹ Respondent's submissions at [8] with reference to *Kucks v CSR Limited* [1996] IRCA 166.
- ¹¹² [2021] FWCFFB 6059.
- ¹¹³ Respondent's submissions at [9].
- ¹¹⁴ [2021] FWCFFB 6059 at [108].
- ¹¹⁵ Applicant's submissions at [44].
- ¹¹⁶ [2014] FCCA 450.
- ¹¹⁷ [2014] FCCA 450 at [4].
- ¹¹⁸ [2014] FCCA 450 at [111].
- ¹¹⁹ [2014] FCCA 450 at [133].
- ¹²⁰ [2014] FCCA 450 at [134].
- ¹²¹ [2013] FCCA 592 at [26] – [27].
- ¹²² [2014] FCCA 450 at [134].
- ¹²³ [2014] FCCA 450 at [150].
- ¹²⁴ [2014] FCCA 450 at [203].
- ¹²⁵ Respondent's Submissions at [16].
- ¹²⁶ [2014] FCCA 450.
- ¹²⁷ Respondent's Submissions at [16].
- ¹²⁸ Respondent's Submissions at [7].
- ¹²⁹ Macquarie Dictionary Online.
- ¹³⁰ [2013] FWCFFB 10165.
- ¹³¹ BC910541 26 September 1991
- ¹³² [2013] FWCFFB 10165 at [30].
- ¹³³ [2013] FWCFFB 10165 at [31].
- ¹³⁴ [2010] FCA 591 at [44] to [45] A subsequent appeal against his Honour's decision failed in relation to the decision to convict QR of a breach of the relevant enterprise agreement. The appeals against sentence were upheld, but only to the extent of setting aside the penalties of \$390,000; \$231,000 and \$33,000 in relation to the appellants and inserting the sums of \$192,200; \$112,000 and \$16,000. (2010) 204 IR 142.
- ¹³⁵ [2013] FWCFFB 10165 at [32].

¹³⁶ Macquarie Dictionary Online.

¹³⁷ [2021] FWCFB 6059 at [108].

¹³⁸ [2021] FWCFB 6059 at [108].

¹³⁹ *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [212].

¹⁴⁰ *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 178–179.

¹⁴¹ *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 101.

¹⁴² *QR Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, [81].

¹⁴³ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].

¹⁴⁴ *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company Pty* (1998) 88 IR 202, 217.

¹⁴⁵ *QR Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, [81].

¹⁴⁶ *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [212].

¹⁴⁷ Applicant’s Statement at [19].

¹⁴⁸ Applicant’s Statement at [26].

¹⁴⁹ Applicant’s Statement at [28] – [34].

¹⁵⁰ Applicant’s Statement at [79].

¹⁵¹ Applicant’s Submissions at [42].

¹⁵² Applicant’s Submissions at [50].

¹⁵³ Applicant’s Submissions at [50].

¹⁵⁴ [2010] FWAFB 7578 at [34].

¹⁵⁵ Respondent’s Submissions at [19].

¹⁵⁶ Respondent’s Submissions at [20].

¹⁵⁷ Respondent’s Submissions at [22].

¹⁵⁸ Respondent’s Submissions at [22].

¹⁵⁹ Respondent’s Submissions at [23].

¹⁶⁰ Respondent’s Submissions at [23].

¹⁶¹ Respondent’s Submissions at [23].

¹⁶² Respondent’s Submissions at [23].

¹⁶³ Applicant’s Statement at [6] – [7].

¹⁶⁴ Applicant’s Statement at [8].

¹⁶⁵ Applicant’s Statement at [10].

¹⁶⁶ Applicant’s Statement at [11] – [12].

¹⁶⁷ Transcript of Proceedings, PN 201.

¹⁶⁸ Goodall Statement at [5].

¹⁶⁹ Transcript of proceedings at PN 257.

¹⁷⁰ Respondent’s Submissions at [20].

¹⁷¹ Goodall Statement at [7].

¹⁷² Respondent’s Submissions at [20].

¹⁷³ Applicant’s Statement at [6] – [7].

¹⁷⁴ Applicant’s Statement at [8].

¹⁷⁵ Applicant’s Statement at [10].

¹⁷⁶ Applicant’s Statement at [11] – [12].

¹⁷⁷ [2014] FWCFB 714 at [37].

¹⁷⁸ Applicant’s Reply Statement at [16].

¹⁷⁹ *Sayer v Melsteel Pty Ltd* [2011] FWA FB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

¹⁸⁰ Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

¹⁸¹ Applicant's Submissions at [37].

¹⁸² Applicant's Submissions at [41].

¹⁸³ Applicant's Submissions at [42].

¹⁸⁴ Applicant's Submissions at [52].

¹⁸⁵ Applicant's Submissions at [53].

¹⁸⁶ Respondent's Submissions at [35].

¹⁸⁷ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

¹⁸⁸ Applicant's Submissions at [58] – [59].

¹⁸⁹ *He v Lewin* [2004] FCAFC 161, [58].

¹⁹⁰ Applicant's Submissions at [64] – [65].

¹⁹¹ Transcript of Proceedings at PN 300. See also Applicant's pay slips for the periods ending 7 November 2024 and 24 October 2024.

¹⁹² Transcript of Proceedings at PN 248.

¹⁹³ Applicant's Reply Statement at [16].

¹⁹⁴ *Biviano v Suji Kim Collection* PR915963 (AIRC FB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRC FB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

¹⁹⁵ *Biviano v Suji Kim Collection* PR915963 (AIRC FB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

¹⁹⁶ Applicant's Submissions at [66] – [69].

¹⁹⁷ See Applicant's payslip for the period ending 7 November 2024. While the payment is described as 'redundancy' I understand this was intended as a reference to notice in lieu as reflected in the Termination Letter as the Applicant was not entitled to payment of redundancy based on hr service under the Award.

¹⁹⁸ Zorzit Statement at [3].

¹⁹⁹ Zorzit Statement at [4].

²⁰⁰ Transcript of Proceedings at PN 426.

²⁰¹ Transcript of Proceedings at PNs 427 – 428.

²⁰² Transcript of Proceedings at PN 429.

²⁰³ Transcript of Proceedings at PN 431.

²⁰⁴ Transcript of Proceedings at PN 432.

²⁰⁵ Transcript of Proceedings at PNs 463 – 464.

²⁰⁶ Transcript of Proceedings at PN 522 – 523.

²⁰⁷ Respondent's Submissions at [44].

²⁰⁸ *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWC FB 7198, [9].

²⁰⁹ *Vennix v Mayfield Childcare Ltd* [2020] FWC FB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWC FB 4171, [5]–[7].

²¹⁰ (1998) 88 IR 21.

²¹¹ [2013] FWC FB 431.

²¹² *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWC FB 7206, [16].

²¹³ *Ellawala v Australian Postal Corporation* Print S5109 (AIRC FB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

²¹⁴ *Ibid.*

²¹⁵ See Applicant's payslip for the period ending 7 November 2024. While the payment is described as 'redundancy' I understand this was intended as a reference to notice in lieu as reflected in the Termination Letter as the Applicant was not entitled to payment of redundancy based on hr service under the Award.

²¹⁶ *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFCB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

²¹⁷ *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFCB 7206, [17].