



DECISION

Fair Work Act 2009
s 394—Unfair dismissal

Courtney Sewell

v

dnata Airport Services Pty Limited
(U2025/8727)

DEPUTY PRESIDENT BEAUMONT

PERTH, 22 SEPTEMBER 2025

Application for an unfair dismissal remedy

1 Issues and Outcome

[1] On 19 May 2025, Courtney Sewell (the **Applicant**) made an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) on the basis that she was unfairly dismissed within the meaning of s 385 of the Act. dnata Airport Services Pty Limited (the **Respondent**) disputed the assertion and by its response, raised a jurisdictional objection that the Applicant was not ‘dismissed’ as that term is understood by reference to s 386(1)(b) of the Act.

[2] The Respondent provides a comprehensive range of ground handling and other airport services in Australia. Services include ramp handling, passenger services, load control, handling cargo, catering, travel services and flight operations, amongst others.

[3] The Applicant commenced part-time employment with dnata on 16 January 2023 as a Passenger Services Delivery Agent (**PSD Agent**), working at the Perth Airport. As a PSD Agent, the Applicant was responsible for checking-in passengers, boarding tasks, arrivals, and assisting passengers where required. It was uncontroversial that the Respondent had permitted the Applicant to have an informal flexible working arrangement to accommodate the Applicant’s timetable for her tertiary studies.

[4] On 30 April 2025, the Applicant resigned from her employment with the Respondent. The Applicant’s resignation occurred in circumstances where, after having reported the alleged conduct of a male employee (sexual harassment), the Respondent investigated that conduct, found it unable to be substantiated, verbally communicated to the Applicant the investigation had come to a close on 10 April 2025, after having already communicated the outcome in writing to the male employee, and then had to be requested by the Applicant to provide an outcome letter for the investigation.

[5] Whilst the outcome of the investigation was verbally communicated to the Applicant on 10 April 2025, she did not receive the outcome letter until 28 April 2025. When the outcome of the investigation was verbally communicated to the Applicant on 10 April 2025, at that time,

it appeared that the Applicant would resume duties with the male employee against whom she had made a report. Not long after having held the discussion with the Applicant on 10 April 2025, the Respondent traversed with the Applicant options of moving to a position of Load Operator, moving to work on an airline other than the one she was on, or taking on an administrative role. All options involved a compromise by the Applicant.

[6] Whilst it had been verbally communicated to the Applicant that her allegation against the colleague had been unable to be substantiated on 10 April 2025, the outcome letter of 28 April 2025 to the Applicant, detailed that the Respondent was ‘unable to make a finding for *some* of the allegations raised throughout this process’. It was therefore unclear whether the allegation(s) or part of the allegation(s), had been substantiated. Further, whilst the outcome letter provided that the Respondent had addressed the male colleague as to what constituted acceptable behaviour in the workplace and had conducted Code of Conduct Training sessions, the letter did not disclose what the Applicant’s working arrangements would be going forward in light of the report she had made and her request to be rostered on different days or shift times to the male employee.

[7] For the reasons that follow I have concluded that the Applicant was dismissed albeit she had resigned from her position with the Respondent, the Applicant’s dismissal was unfair, and an award of compensation in the amount of \$36,468.39, is warranted.

2 Background

[8] On 20 August 2025, a hearing was held to contend with the aforementioned jurisdictional objection, merits and remedy. The Applicant provided evidence in support of her case. The Respondent relied up on the evidence of Kayleigh Aston, Manager, Operations – Perth (**Aston**).

[9] One of the incidents relied upon by the Applicant in support of her argument that she was dismissed, concerned an allegation of sexual harassment, the investigation by the Respondent of the same and the outcome of that investigation. By way of context, the alleged harasser was a male employee within the Applicant’s team. Neither party called the male employee to provide evidence.

[10] The broader context concerning the application has been extracted from the written witness statements of the Applicant and Aston and their evidence provided at hearing. An abridged version of their evidence follows.

2.1 The Applicant’s evidence

[11] In her witness statement, the Applicant purported to having been promoted to the role of Team Leader and that one of her team members was the male employee. In cross examination, the Applicant noted that she had been promoted to this position in or around May 2024, having been informed by Hadessa Ciobanu (**Ciobanu**) of the promotion.¹ However, as

¹ Transcript of Proceedings, *Sewell v dnata Airport Service Pty Ltd* (Fair Work Commission, U2025/8727, Beaumont DP, 20 August 2025), [PN65] (**Transcript**).

the evidence unfolded at hearing, it became apparent that the Applicant held the position of relief Team Leader,² rather than the substantive position of Team Leader.

Issues arising in the employment relationship

[12] The Applicant gave evidence that during her employment she approached a Duty Manager, Mihaela Filip (**Filip**), and requested to be taken off a shift in the week of 13 – 19 January 2025, due to the fatigue that Applicant was experiencing.³

[13] The Applicant stated that she had also been informed by Filip that she had to clock out and back in during a 15 hour shift so as to not alert higher management of the length of her shift time. According to the Applicant there were emails about this issue between her, Filip, Rebecca Wint and Hannah Carrington.⁴

[14] Another issue faced by the Applicant in her employment was the Respondent's refusal to grant her annual leave in July 2025.⁵ The Applicant said she had requested the annual leave in January 2025 and had explained to the Respondent that the reason why she required the annual leave was due to her having to fulfil a university commitment.⁶

[15] According to the Applicant, in January 2025 she was the successful applicant for the role of relief duty manager, but once she had been selected nothing further occurred.⁷ The Applicant said she never progressed to training and was left without any communication regarding the role.⁸

Allegation of sexual harassment, the investigation and its outcome

[16] As noted, one of the Applicant's colleagues was a male employee. The Applicant states that on 9 March 2025, the Applicant was using the Team Leader computers in the Respondent's office when the male employee entered the room at approximately 4.30PM.⁹ The Applicant says that the male employee asked her what she would be wearing to a social event that he was considering attending.¹⁰ The Applicant further says that the male employee asked her to "wear hijab with a short mini skirt", and made comments such as, "I think it would look really good" and "come on you should wear it".¹¹ The Applicant said she repeatedly said "no" to the male employee during the conversation. To bring the conversation to an end, the Applicant said she

² Ibid [PN72].

³ Witness Statement of Courtney Sewell dated 25 July 2025, [7] (**Sewell Statement**).

⁴ Ibid.

⁵ Ibid [8].

⁶ Ibid.

⁷ Ibid [9].

⁸ Ibid.

⁹ Ibid [14].

¹⁰ Ibid.

¹¹ Ibid.

informed the male employee she had to check a printer and left the room.¹² The Applicant said the conversation made her feel extremely uncomfortable.

[17] It was the Applicant's evidence that at 1730hrs that same day, a colleague arrived for shift and asked the Applicant what was wrong, and another colleague who was just finishing their shift, could (apparently) see the Applicant was upset.¹³ Having informed the colleagues as to what unfolded in respect of the male employee, the colleagues were said to have encouraged the Applicant to 'speak up'.¹⁴ The Applicant reported the incident to her the Duty Manager, Keeley MacDonald (**MacDonald**) in the following terms:¹⁵

Earlier today (09/03) I was approached by XXXX on shift around 4:30pm. He was asking what I was going to be wearing to a social event coming up that we are both attending with other work colleagues. He then told me to wear a hijab with a short mini skirt saying that a mini skirt would look good on me. I kept saying no I'm not wearing that and he was repeatedly asking me. This made me so uncomfortable that I had to say I was going to check on the printer in the old load control office so went down there for a few minutes.¹⁶ (*identifying details omitted*)

[18] The Applicant said that having been requested, she emailed MacDonald a summary of her interaction with the male employee and MacDonald replied expressing her apologies and copying Ciobanu to the correspondence.¹⁷

[19] The Applicant said that on 11 March 2025, having received no correspondence from the Respondent, she emailed Aston and Ciobanu informing them that she would be taking personal leave until 19 March 2025.¹⁸

[20] The Applicant states that Aston replied to her email, requesting the Applicant to call her. The Applicant did, and in the call, Aston was said to have disclosed to the Applicant that she was unaware of the severity of the incident.¹⁹ A second call then took place with Aston and Ciobanu, in which, according to the Applicant, Ciobanu apologised for not correctly raising the incident with Aston.²⁰

[21] On 14 March 2025, Aston called the Applicant and requested the Applicant to attend a meeting with Aston and Scott Thompson (**Thompson**), People and Culture Business Partner. The Applicant attended the meeting and recapped the events of the shift on 9 March 2025.²¹

[22] In her first witness statement, the Applicant stated that Aston verbally informed her whilst on shift on 20 March 2025, that the investigation was closed with no consequences for

¹² Ibid.

¹³ Ibid [15].

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Digital Hearing Book, 7 (**DHB**).

¹⁷ Sewell Statement (n 3) [16].

¹⁸ Ibid [18].

¹⁹ Ibid [19].

²⁰ Ibid.

²¹ Ibid [20].

the male employee because ‘either side could not be substantiated’. The Applicant further noted that Aston informed the Applicant that another employee had submitted a formal complaint against the male employee, and that the Respondent would be investigating that as a separate case to the Applicant’s case, while the male employee was on leave from 21 March to 11 April 2025.

[23] It was the Applicant’s evidence that Aston informed her that the male employee had drawn the conclusion that it was the Applicant who had complained about him.²² The Applicant said that Aston advised that the male employee was angry and showing aggressive behaviour over the phone to Aston when he was informed of the closure of the investigation and the opening of a new investigation.²³

[24] Whilst on shift on 10 April 2025, the Applicant was verbally informed by Aston, Ciobanu and Thompson that the male employee would be returning to Perth the following day and to work as usual on his return.²⁴

[25] The Applicant said she requested to be rostered on different days or shift times to the male employee, which was denied.²⁵ The Applicant said she was informed by Aston that this would be discrimination against the male employee.²⁶

[26] The Applicant states that she took personal leave on 11 April 2025 and emailed MacDonald that same day requesting personal leave for 12 and 13 April 2025.²⁷ MacDonald was said to have informed the Applicant that the male employee would not be at work that weekend; therefore the Applicant agreed to work those shifts.²⁸

[27] The Applicant said that on 14 April 2025, Aston emailed her and offered to meet her with Rebecca Wypych (**Wypych**), HR Director, in attendance.

[28] On 15 April 2025, the Applicant attended a meeting with Wypych in which the Applicant said she requested the investigation summary and outcome to be sent to her in writing. The Applicant said that Aston called her to see how the meeting with Wypych went and informed the Applicant that she would look at moving the Applicant into load control or onto another airline.²⁹

[29] On 22nd April 2025, the Applicant emailed Wypych and Thompson requesting an update on when she would be receiving the investigation outcome in writing and emailed the Duty Manager to take personal leave for 24–27 April 2025.³⁰

²² Ibid [21].

²³ Ibid.

²⁴ Ibid [22].

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid [23].

²⁸ Ibid.

²⁹ Ibid [25].

³⁰ Ibid [26].

[30] By letter of 28 April 2025, Thompson emailed the Applicant the investigation outcome. The Applicant gave evidence that once the investigation outcome was confirmed in writing, she realised that she could not return to the workplace.³¹

[31] The Applicant expressed that she considered that the Respondent was not taking her welfare seriously, and that she felt undervalued and abandoned. The Applicant said that recalling the other issues that she had faced, including those concerning her annual leave, fatigue management and the relief duty manager role, the Applicant said she was convinced that the Respondent did not want her in the workplace.³²

[32] On 30 April 2025, the Applicant emailed her resignation to Aston and Ciobanu.

[33] On 2 May 2025, Thompson replied to the Applicant's letter of resignation, noting that the Respondent had not yet accepted the Applicant's resignation:

I acknowledge receipt of your resignation letter dated 30 April 2025 in which you confirm that your last day of work will be 15 May 2025. I understand that you wish to take a period of personal leave from 30 April to 15 May so as not to work your notice period.

Your resignation from your position of Passenger Services Delivery Agent has not been accepted by dnata as yet. Your request to take personal leave until 15 May 2025 has been approved to allow both yourself and dnata to work through the matters that you have raised in your resignation letter. We do not wish for you to tender your resignation during a time when you have received difficult news and may be experiencing emotional distress.

I understand that the outcome of the investigation process relating to your complaint of sexual harassment was likely disappointing for you. As explained during the meeting held with you and as confirmed in the letter issued to you dated 28 April 2025, the allegations were unable to be substantiated. This is not to say that the conduct did not occur, but rather that dnata was unable to ascertain sufficient evidence to confirm that the conduct was to be substantiated...

I would like to organise a meeting with you together with myself and Imran Budhani (General Manager – Regional Ports) to further discuss your concerns and to see if there is a suitable resolution which would allow you to return to your role with dnata. I have scheduled a meeting as set out below....³³

[34] On 5 May 2025, the Applicant, by email, declined the meeting invitation referred to in Thompson's letter of 2 May 2025 and confirmed her resignation.

2.2 Aston's evidence

[35] Aston said that she first became aware of the Applicant's complaint against the male employee on 10 March 2025 when Ciobanu briefed her on the incident.³⁴ Aston said that Ciobanu informed her that a conversation was held between Ciobanu and McDonald in which

³¹ Ibid [28].

³² Ibid [29]–[30].

³³ DHB (n 16) 25.

³⁴ Witness Statement of Kayleigh Aston, [9] (**Aston Statement**).

options to provide immediate intervention between the two employees were discussed.³⁵ Aston understood from her discussion with Ciobanu that the Applicant was offered the option to go home without financial loss, but the Applicant chose to remain in the workplace.³⁶

[36] Aston said that she received an email from the Applicant at 1:21 AM on 11 March 2025.³⁷ The email set out the following:

Dear Kayleigh and Hedesa,

I would like to confirm whether you received my report submitted to Keeley MacDonald last night Sunday 9 March regarding the sexual harassment incident involving XXXX in the Dnata office.

Every person has a right to feel safe in the workplace and the incident has had a profound adverse impact on my mental health. The lack of contact from anyone from the Dnata senior management team regarding this incident has left me with feelings of neglect, poor self-esteem, and honestly questioning my employment within this company. I am the victim of sexual harassment by a male colleague in the workplace, I reported the incident on the night of the occurrence and have heard nothing since regarding my welfare or what actions are going to be taken.

I will be taking personal leave as a mental health week commencing Thursday 13 March, returning to work on Thursday 20 March, as per my rostered shift pattern. During this time I expect correspondence from Dnata on the measures to be implemented to keep myself and other female co-workers who have had similar experiences with XXXX, safe in the workplace.

I can assure you that this is not an isolated incident. Several other girls in the Dnata team have approached me in the past saying XXXX makes them uncomfortable with how he talks to them on shift. A few situations have been consistently calling a girl beautiful every time he sees them (something which I have experienced as well), asking girls for marriage and personal/invasive questions while on shift, and begging the team leader to let him take a wheelchair passenger to the boarding gate because he thought the passenger's daughter, who was also travelling, looked pretty. Furthermore, after my interaction with him on Sunday night, I was told by multiple colleagues that he approached a new Dnata staff member asking her for her personal phone number and she said no. He then went to another staff and got them to send the girls phone number and proceeded to try calling her that night.

I look forward to your response and immediate action plan on this matter.

Regards,
Courtney³⁸

(identifying details omitted)

³⁵ Aston Statement [10].

³⁶ Ibid.

³⁷ Ibid [11].

³⁸ DHB (n 16) 10.

[37] Aston called the Applicant on 11 March 2025 at 7:43 AM and asked the Applicant to call her once she was available, confirming that the Applicant's email had been received.³⁹

[38] Aston said that the Applicant called back at about 1:00 PM and she offered the Applicant the Respondent's Employee Assistance Program (EAP), confirmed that the Applicant was okay, and informed the Applicant that the matter would be immediately passed onto the Respondent's People and Culture Business Partner to commence an investigation.⁴⁰ Aston said that during her discussion with the Applicant she sought to understand the support that the Applicant needed from the Respondent, and the Applicant advised that she would like to take some time from work as personal leave.⁴¹ Aston stated that this was accommodated without question.⁴² EAP details were provided to the Applicant following the conclusion of the phone call.⁴³

[39] An investigation into the Applicant's report commenced on 11 March 2025. Thompson and Aston formed the investigative team, and Aston was also the decision maker in relation to the finding of the allegations.⁴⁴

[40] Aston said that prior to raising the Applicant's concerns with the male employee, she called the Applicant and advised her of the next steps in respect of the investigation and that whilst the Respondent would seek to protect her identity, the male employee would likely be able to recall the interaction and therefore draw his own conclusions about who had reported the matter.⁴⁵

[41] Aston's evidence was that the Applicant referred to two other employees who similarly said that the male employee made them feel uncomfortable by some questions that were perceived as personal in nature.⁴⁶ Aston said she approached those employees to see whether they wanted to raise concerns more formally; both employees declined.⁴⁷

[42] Aston noted that the male employee was not rostered to work on either 10 or 11 March, and he was suspended from the workplace on 12 March 2025, pending the outcome of the investigative process. He was presented the allegations in writing on 13 March 2025, and Aston reports that the male employee appeared shocked and surprised about the allegations and elected to respond straight away.⁴⁸ Aston said the male employee was offered a formal interview the following day to provide his response once he had some time to properly consider the allegations.⁴⁹ The male employee was interviewed as part of the investigation process on 14 March 2025.

³⁹ Ibid [12].

⁴⁰ Ibid [13].

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid [14].

⁴⁴ Ibid [16].

⁴⁵ Ibid [17].

⁴⁶ Ibid [18].

⁴⁷ Ibid [19].

⁴⁸ Ibid [24].

⁴⁹ Ibid.

[43] Aston said that following the interview with the male employee, she arranged an interview with the Applicant to obtain additional information regarding what had occurred on 9 March 2025, because the male employee's account was significantly different to the Applicant's statement.⁵⁰ Aston noted that the Applicant provided the same account as her original statement in relation to what had occurred on 9 March 2025.⁵¹

[44] Aston said that based on the information obtained through the investigation process, she was unable to substantiate the allegations that had been made against the male employee. The outcome of the investigation was communicated to the male employee on 21 March 2025 at 12:00 PM.⁵²

[45] Aston explained that when considering the available information and applying the balance of probabilities, taking into account the seriousness of the alleged conduct, she determined the allegations were not able to be substantiated.⁵³ Aston formed the view that there was not persuasive evidence one way or another to indicate that either version of events was more likely to have occurred.⁵⁴ But, out of an abundance of caution, the male employee was required to attend a one-on-one Code of Conduct refresher session with Wypych on 16 April 2025⁵⁵ (the male employee was on annual leave between 24 March 2025 and 9 April 2025).⁵⁶

[46] It was Aston's evidence that on the afternoon of 21 March 2025, she approached the Applicant in person at the terminal to explain that the male employee would be travelling on a flight on 22 March 2025, and whether the Applicant would like the Respondent to make arrangements to avoid any interaction.⁵⁷ Aston said that she did not hear from the Applicant regarding a shift change, and on a review of the payroll system it was evident that the Applicant worked her rostered shift on 22 March 2025, despite the possibility that she may be required to have an interaction with the male employee as a passenger.⁵⁸

[47] Aston said that on 10 April 2025, she communicated the findings of the investigation to the Applicant.⁵⁹ During this meeting, the Applicant was advised that the male employee would be returning to the workplace from 14 April 2025.⁶⁰ Aston stated that the Applicant was visibly unhappy with the outcome of the investigation, and therefore Aston arranged for a meeting to be held between the Applicant and Wypych.⁶¹

⁵⁰ Ibid [30].

⁵¹ Ibid [31].

⁵² Ibid [33].

⁵³ Ibid [36].

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid [35].

⁵⁷ Ibid [34].

⁵⁸ Ibid.

⁵⁹ Ibid [37].

⁶⁰ Ibid.

⁶¹ Ibid [39].

[48] Aston noted that the meeting between the Applicant and Wypych was scheduled for 15 April 2025 via Microsoft Teams. On that same day, the Applicant advised Aston that she would be on personal leave from 17 – 20 April 2025 and provided a medical certificate from an online service.⁶²

[49] A telephone discussion was held between the Applicant and Aston on 15 April 2025, in which Aston reports that the Applicant expressed that she did not know how she could come back to work.⁶³ Aston said she discussed with the Applicant the options that were available and proposed training on another airline or moving to a role in load control.⁶⁴ Aston said that she further informed the Applicant that there were always options and that the Respondent could even consider administration work.⁶⁵ Aston said she asked the Applicant about her desired outcome in terms of a solution and the Applicant informed her that she would think about.⁶⁶

[50] Aston said that on 22 April 2025, the Applicant sent another email to the Respondent's Service Delivery Manager mailbox to extend her personal leave until 27 April 2025 (medical certificates were provided). Aston said that on receipt of the Applicant's application to extend her personal leave, Aston queried with the Applicant via email, whether she had managed to get some support and if she had given thought to the other options that had been discussed in their call on 15 April 2025.⁶⁷

[51] Aston acknowledged that the Applicant had previously expressed a desire to have her roster changed so as to mitigate the interaction between herself and the male employee.⁶⁸ Aston noted that the nature of the operation and the skillset of the Applicant, meant that this was not possible while still maintaining the Applicant's informal flexible working arrangement – an arrangement that had been mutually entered into to accommodate the Applicant's university schedule.⁶⁹ To change the Applicant's roster would have required her to perform training on another airline, said Aston.⁷⁰

[52] Aston gave evidence that in respect of the email she sent to the Applicant on 22 April 2025, and to a later email on 24 April 2025, she did not receive a reply from the Applicant.

[53] However, Aston stated that on 22 April 2025, the Applicant emailed Wypych and Thompson noting that she was following up regarding the conversation from their meeting last week to check if there had been an update on providing her a case/investigation summary of an outcome in writing, as requested.⁷¹

⁶² Ibid [41].

⁶³ Ibid [42].

⁶⁴ Ibid.

⁶⁵ Ibid [43].

⁶⁶ Ibid.

⁶⁷ Ibid [46].

⁶⁸ Ibid [47].

⁶⁹ Ibid [48].

⁷⁰ Ibid [49].

⁷¹ Ibid [Annexure 23].

[54] On 28 April 2025, the investigation letter was provided to the Applicant.⁷²

[55] The Applicant did not return to work following the conclusion of the investigation process and sent her resignation via email on 30 April 2025.

[56] The Respondent did not accept the resignation as the Applicant's resignation letter raised several concerns, which, said Aston, had not been raised previously.⁷³ It followed that the Respondent sought an opportunity to discuss and rectify these matters where possible with the Applicant, and a meeting was scheduled for 7 May 2025.⁷⁴

[57] The Applicant declined to attend the meeting and refused to engage in any further discussions with the Respondent, sending a second email on 5 May 2025, asking that the Respondent confirm her resignation, which the Respondent did on 6 May 2025.

3 Was the Applicant dismissed?

[58] Central to the consideration of whether the Applicant was dismissed is the operation of s 386(1) of the Act.

[59] Section 386(1) of the Act defines what constitutes a dismissal for the purpose of Part 3-2 of the Act, which concerns Unfair Dismissal. The word 'dismissed' is defined in s 12 of the Act as having adopted the meaning in s 386 of the Act.

[60] Section 386(1) of the Act reads:

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

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

[61] There are exceptions under s 386(2) of the Act regarding when a person has been dismissed; those exceptions are not relevant to this case.

[62] The definition of dismissal in s 386(1) of the Act has two elements, both of which have been subject to consideration. The first traverses 'termination on the employer's initiative' and the second, 'resignation in circumstances where the person was forced to do so because of conduct or a course of conduct'. This bifurcation was explained by the Full Bench in *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli (Bupa)*,⁷⁵ in the following terms:

⁷² Ibid [52].

⁷³ Ibid [54].

⁷⁴ Ibid [55].

⁷⁵ [2017] FWCFB 3941.

[47] Having regard to the above authorities and the bifurcation in the definition of “dismissal” established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

(1) There may be a dismissal within the first limb of the definition in s 386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the “heat of the moment” or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although “jostling” by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is “forced” by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s 386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer’s conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.⁷⁶

[63] While a summary of the position under s 386(1) of the Act was proposed in *Bupa*, a later decision of the Full Bench in *City of Sydney RSL & Community Club Limited v Balgowan*,⁷⁷ gave further consideration to the operation of s 386(1)(b) of the Act, expressing:

[10] It seems clear...that the concept of constructive dismissal is to be accommodated by s 386(1)(b) and that concept is not subsumed in s 386(1)(a).

[64] The Applicant elected to rely upon s 386(1)(b) of the Act. That is, the Applicant asserts that she was forced to resign because of the conduct or a course of conduct, engaged in by the Respondent.

[65] A dismissal pursuant to the second limb of s 386(1) of the Act requires consideration of whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer’s conduct, such that the employee had no effective or real choice but to resign.

[66] The Applicant submits that the conduct she relies upon in support of her argument that she was dismissed, was not a single incident by the Respondent. Although the Applicant also considers that the evidence will establish that the primary trigger was the male employee’s sexual harassment and the Respondent’s rejection of her complaint.

[67] My findings can be succinctly put. I have found the Applicant was dismissed for the following reasons.

⁷⁶ Ibid [47].

⁷⁷ [2018] FWCFB 5.

[68] I turn first to the Applicant's report to the Respondent about the alleged behaviour of the male employee on 9 March 2025 at the Perth International Airport.

[69] The Applicant gave evidence that on 9 March 2025, the male employee asked her what she was going to be wearing to a social gathering outside of work that he was potentially going to attend. The Applicant stated that he suggested she wear a hijab with a short mini skirt. The Applicant said that the male employee said she 'will look really good' and 'I want you to wear it' and 'come on you should wear it', to which the Applicant said she repeatedly replied 'no'. The Applicant gave evidence that when the male employee 'would not let it go', she left the room on the pretence of checking a printer.

[70] Based on the Applicant's description of what unfolded at work between her and the male employee on 9 March 2025, and that the Applicant brought the alleged conduct to the attention of MacDonald on 9 March 2025 (MacDonald having copied Ciobanu to a reply on 9 March 2025, and then to the attention of Aston and Ciobanu on 11 March 2025), I find that the Applicant reported to the Respondent an incident of the male employee subjecting her to alleged sexual harassment on 9 March 2025.

[71] In respect to the report being a report about alleged sexual harassment, I observe that the Applicant described in her report that the male employee made intrusive propositions regarding the attire the Applicant should wear to a social gathering, that attire consisting of a short mini skirt and hijab. The Applicant reported that the propositions were repeated. Reference was made to the Applicant's physical appearance – that is, a mini skirt would look good on the Applicant. The conduct was of a sexual nature, it was unwelcome, and a reasonable person having regard to all the circumstances would have anticipated the possibility that the Applicant would be offended, humiliated or intimidated.

[72] That the Applicant was disappointed with the initial handling of her report by MacDonald was a reasonable response in the circumstances. Whilst MacDonald's email to the Applicant dated 9 March 2025 was supportive in its tone and offered an apology for the situation whilst highlighting that the Applicant's safety and comfort at work was the most important thing, it did not outline the steps the Applicant could take, or the response the Respondent would take, in response to a report of alleged sexual harassment. It is not the case that MacDonald did not offer support in the form of a conversation or to discuss the Applicant's options moving forward, MacDonald clearly did. However, the correspondence absent the steps so described, teamed with the subsequent delay in a representative of the Respondent following up with her about the report, was open to be received by the Applicant as disappointing.

[73] Nevertheless, on becoming aware of the Applicant's report on 11 March 2025, Aston took immediate steps to ask the Applicant to call her once she was available, and to confirm that the Applicant's email had been received.⁷⁸ In discussion with the Applicant later that day, Aston offered the Applicant EAP, confirmed that the Applicant was okay, and explained that the matter would be immediately passed onto the Respondent's People and Culture Business Partner to commence an investigation.⁷⁹ The Applicant's request for leave was accommodated. The steps taken by the Respondent at this juncture were both reasonable and appropriate.

⁷⁸ Aston Statement (n 34) [12].

⁷⁹ Ibid [13].

[74] The Respondent commenced an investigation into the Applicant's report on 11 March 2025. Whilst an external investigator was not appointed, Thompson and Aston formed the investigative team. Aston noted at hearing that she had participated in workplace investigations training previously.⁸⁰

[75] In respect of the investigation, whilst Aston did not approach the Applicant's colleagues who had conversed with her on 9 March 2025 and encouraged her to report the incident with the male employee, which I will address in due course, Aston did approach two other employees that the Applicant had referred to in reporting the incident but those employees did not want to raise concerns more formally. This was a reasonable step to take by the Respondent.

[76] It was, in addition, reasonable to instruct the male employee not to attend work pending the outcome of the investigative process. Further, the Respondent addressed the investigative process in a timely manner. It appears uncontroversial that the by 13 March 2025, the male employee had been instructed not to attend work and had been provided with the allegations in writing in respect of the incident on 9 March 2025. By 14 March 2025, the male employee had been interviewed.

[77] Having received the male employee's account of the conversation with the Applicant on 9 March 2025, Aston interviewed the Applicant on the afternoon of 14 March 2025. According to Aston, the Applicant provided the same account as her original statement.

[78] Aston gave evidence that on 17 March 2025, she called the Applicant to check in on her and to advise that the investigation was still on foot – the Respondent having not yet determined findings or an outcome.

[79] However, where the process began to go awry was on 21 March 2025. On this date, the outcome of the investigation was communicated to the male employee, but it appears not to have been communicated to Applicant in the same way.

[80] Aston gave evidence that on 21 March 2025, she provided to the male employee a letter that was said to have outlined that the allegations against him were not able to be substantiated. One will recall that the Applicant gave evidence in her first witness statement, that Aston *verbally* informed her whilst on shift on 20 March 2025, that the investigation was closed with no consequences for the male employee because 'either side could not be substantiated'.

[81] Aston *believes* that she had informed the Applicant that her investigation (into the Applicant's report of alleged sexual harassment) had concluded at that point.⁸¹ That evidence was not traversed in Aston's witness statement, and it is fair to say a level of confusion arises because Aston further noted during the hearing that there were two investigations occurring concurrently (in respect of the purported behaviour of the male employee). The other one of which, Aston says, she had alerted the Applicant to and had advised was still ongoing.

⁸⁰ Transcript (n 1) [PN67].

⁸¹ Transcript (n 1) [PN436].

[82] Aston's recollection is provided against a backdrop where there appears to have been two investigations on foot in respect of the male employee's alleged conduct (a complaint about him having been made by someone else) and Aston exhibited a lack of certainty insofar as what she had communicated to the Applicant regarding the Applicant's report. Aston's evidence was that she informed the Applicant that the investigation had been concluded but could not recall having informed the Applicant that the male employee had been cleared of the Applicant's allegations.⁸²

[83] On balance, I am persuaded and find that the Applicant was informally alerted to the investigation into her report about the male employee having come to a close on 20 March 2025. As to the outcome of that investigation, I am not persuaded that this was communicated to the Applicant at this time.

[84] Aston gave evidence that in the afternoon of 21 March 2025, she approached the Applicant and informed her that the male employee would be travelling as a passenger on 22 March 2025 and asked whether the Applicant would like arrangements to be made to avoid any interaction between herself and the male employee. As acknowledged, this was at a time when the male employee had been provided in writing with the investigative outcome, but the Applicant had not. Aston observes that whilst the Applicant informed her that she would let Aston know, a review of the Respondent's records shows the Applicant worked her rostered shift on 22 March 2025. Aston stated that this was despite the possibility that the Applicant may have been required to interact with the male employee as a passenger.

[85] Whilst expressing to the parties at hearing that I held reservations about some of the content of Applicant's second witness statement, because it appeared to reflect opinion or hearsay, other content of the statement did not fall foul of evidential rules, which are generally adhered to by the Commission.

[86] In her second witness statement, the Applicant stated that she worked on 22 March 2025 notwithstanding a possible interaction with the male employee as he transited through the airport, because Aston had informed her that due to the victimisation laws in Australia, the male employee would not be allowed to approach her or talk to her when he travelled. The Applicant further noted that Aston advised that the Applicant was to call her immediately if the male employee interacted with her because he would be breaking the law.

[87] Insofar as it is inferred by the Respondent that the Applicant's conduct on 22 March 2025 demonstrated that the Applicant was comfortable to work a shift where an interaction with the male employee was feasible, I find the inference unreasonable. Evidently, the Applicant worked the shift on 22 March 2025, given the reassurance provided by Aston (which was not countered) and at a time when the Applicant was unaware of the outcome of the investigation.

[88] It was not until 10 April 2025, the day after the male employee's leave had concluded, that Aston, accompanied by Ciobanu and Thompson, verbally communicated the outcome of the investigation to the Applicant. It was during this meeting that the Applicant was advised that the male employee would be returning to the workplace from 14 April 2025 after the Applicant's allegations were not able to be substantiated. The Applicant was not provided with

⁸² Ibid [PN436]–[PN440].

an outcome letter. Aston observed that the Applicant was visibly unhappy with the outcome of the investigation. The Applicant gave evidence that she requested to be rostered on different days or shift times to the male employee, which the Applicant said was denied. At hearing, evidence was given by Aston that to facilitate a change of roster for the Applicant, the Applicant would need to change airline or position. It therefore appears on the face of it that the Applicant's request was, as asserted by the Applicant, declined in respect of her roster on the Emirates airline.

[89] Essentially on 10 April 2025, the Applicant was placed in a position of having made a report of alleged sexual harassment against a male employee only to find herself in a situation where it appeared that she would be placed back on shift with that same male employee imminently. In her notes of 10 April 2025, the Applicant recalls that she asked whether anything was being done upon the male employee's return to ensure her safety at work, and, according to the Applicant, she was informed that nothing could be done about having her and the male employee on different shifts, as it would be discrimination against the male employee to change his roster or move him onto a different airline.⁸³ In cross examination, Aston was taken to the Applicant's note (which detailed the above) and asked whether this is what she said.⁸⁴ Aston replied, "I don't recall exactly the conversation around discrimination, but I would have explained that it would be rather difficult given the rosters of the Applicant and the male employee at the time".⁸⁵ Aston added that whilst it would have been difficult to ensure that they were on different shifts, she recalled following up with being able to give the Applicant an offer to separate her in the workplace.⁸⁶ Aston's witness statement does not disclose that she followed up with an offer in the meeting with the Applicant on 10 April 2025, and given Aston's inability to recall all of the content of the discussion with the Applicant on that date and noting Aston's evidence that it was not until 15 April 2025 that she broached training on another airline or moving to a role in load control,⁸⁷ I find that the Applicant was not provided an 'offer' in the meeting on 10 April 2025.

[90] To conduct a meeting with the Applicant in circumstances where the Respondent was not positioned in that meeting to address the Applicant's palpable concern about working with the male employee, other than the Applicant continuing to be rostered to work with the male employee, was unreasonable. The Respondent is a large employer with both human resources and industrial relations capability. Its operational managers are supported by these teams. If it was the case that the Respondent considered after its investigation and communication of the outcome to those involved, that the Applicant and the male employee could continue to work alongside each other, that view was misplaced.

[91] It was also apparent to the Applicant that at some stage that the male employee was aware that the Applicant had complained about his purported conduct. However, I do not consider criticism can be levelled at the Respondent for its inability to anonymise the Applicant as the complainant. The Respondent correctly identifies that there will be times where an

⁸³ DHB (n 16) 13.

⁸⁴ Transcript (n 1) [PN425].

⁸⁵ Ibid [PN425].

⁸⁶ Ibid [PN426].

⁸⁷ Aston Statement (n 34) [42].

allegation, whilst not naming the complainant, is provided with sufficient detail for the person in receipt of the allegation to surmise who made the report.

[92] In light of the evidence, noting that the Applicant proceeded to take personal leave, I find that the Applicant did not resign at this time.⁸⁸

[93] It is to be appreciated that the Respondent, on having observed that the Applicant was visibly unhappy with the outcome of the investigation, set up further meetings with the Applicant whilst she was on personal leave. At the meeting on 15 April 2025, between Wypych and the Applicant, the Applicant requested an investigation summary and outcome to be sent to her in writing. That the Respondent had not done so at this point raises a cause for concern. In fact, it took the Respondent until 28 April 2025 to provide the Applicant with an outcome letter, after the Applicant had emailed Wypych and Thompson on 22 April 2025 requesting an update as to when the investigation outcome would be provided in writing. The Respondent's conduct in this respect is unacceptable and, on any objective level, would give rise to the plausible perception that the employee was not valued by the employer she works for.

[94] Whilst the Respondent's dilatory conduct in respect of the provision of the outcome letter is problematic, the content of the outcome letter is equally concerning. On the face of it, the content of the outcome letter appears inconsistent with that which had been previously verbally communicated to the Applicant in respect of the male employee's conduct on 10 April 2025. The outcome letter ambiguously stated that the Respondent had formally completed the investigation into the allegations the Applicant had raised and '[w]hilst we were unable to make a finding for *some* of the allegations raised throughout this process, I want to assure you that as a business we have taken steps to ensure that the conduct you reported does not occur in the future' (italics my emphasis). Of course, Aston had verbally advised the Applicant 18 days earlier (and perhaps earlier than that when one considers the Applicant's evidence in respect of 20 March 2025) that the Applicant's allegations were not able to be substantiated, and still, here was a letter that stated the Respondent was unable to make a finding *for some of the allegations*. That the Applicant lost trust in the process and in turn with the Respondent, is unsurprising because of this and for other reasons I will detail shortly.

[95] Whilst not necessarily relevant for current purposes, because at the time the Applicant resigned from her employment after receipt of the outcome letter, she was unaware that content of the outcome letter had *perhaps* conflated two investigative outcomes,⁸⁹ or that parts of her allegation in respect to an allegation were able to be substantiated,⁹⁰ it is timely to make the following observation. At hearing, Aston provided explanation for the ambiguous wording of the outcome letter as described (which she did not author but nevertheless was a decision maker on the investigative team). The explanation proffered was that the Respondent had substantiated that an interaction between the male employee and the Applicant occurred on the shift in question, but that whilst the social event was discussed, the conversation did not extend to what was being worn.⁹¹ When asked why that aspect was not able to be substantiated – "[S]o you mean that *because the male employee* said the discussion didn't extend to what was being

⁸⁸ Transcript (n 1) [PN200].

⁸⁹ Ibid [PN377], [PN385].

⁹⁰ Ibid [PN399].

⁹¹ Ibid [PN401].

worn”, Aston replied “Correct, yes”.⁹² It appears that where the Applicant’s evidence did not align with that of the male employee or vice versa, the Respondent took the approach that the allegation was not able to be substantiated. Whilst this point will be further examined in due course, it is sufficient at this point to say that in re-examination Aston clarified that in respect of the male employee, “he wasn’t cleared, we were just unable to substantiate the allegations that were being put forward to him due to the evidence that he presented as being – different to that what we had alleged to him.”⁹³

[96] Returning to the Respondent’s argument that the Applicant’s choice was not negated, the Respondent contends that objectively assessed, the Applicant failed to demonstrate that she had no effective or real choice but to resign. The Respondent in this respect relies on accommodating the Applicant’s requests for personal leave during the relevant period, proffering alternative roles, the provision of adjusted rostering options and the provision of ongoing welfare checks, all of which were aimed at supporting the Applicant’s continued employment.

[97] The Respondent cannot be faulted in respect of its provision of EAP and offering the service or its welfare checks. It accommodated, as in my view it should have in light of the circumstances, the Applicant’s applications for personal leave.

[98] Turning to the proffering of alternative roles *for the Applicant* or adjusting roster options, the evidence of the Respondent was such that to accommodate an adjustment to the roster, the Applicant would have needed to move departments or to a different airline. Aston gave evidence about the telephone call between her and the Applicant on 15 April 2025, in which she proposed training the Applicant on another airline or moving the Applicant to a role in load control. Aston explained that the offer to work on another airline is seen by the wider workforce as a reward, so she wanted to give the Applicant the first preference.⁹⁴ In closing submissions, the Respondent confirmed that the move to another airline would not involve an increase in remuneration or status.⁹⁵ It is difficult to conceive how the move to another airline, would, in the Applicant’s circumstances, be plausibly seen as a reward.

[99] During the hearing, questions were asked about a change of roster being accommodated. Aston gave evidence that a roster change on the Emirates contract (the airline the Applicant was working on) was unable to be accommodated as the shifts vary for team leaders and check in agents. Aston said there was also a flexible workplace arrangement for the Applicant at the time that allowed her to work in relation to her university studies on a fixed roster to accommodate those studies, and the male employee was on a restricted visa which limited his availability to work more than 24 hours in a period as well. Aston said that when the Respondent is working on rosters in its organisation, all of these matters are taken into consideration to try and determine the roster that suits best not only for the operation, but for the Respondent’s employees as well.⁹⁶

⁹² Ibid [PN401].

⁹³ Ibid [PN465].

⁹⁴ Ibid [PN429].

⁹⁵ Ibid [PN520]–[PN523].

⁹⁶ Ibid [PN461].

[100] The Respondent contends that the evidence before the Commission does not support the Applicant's assertion that she had no choice but to resign. It submits the following points have been made clear: (a) a workplace investigation was conducted, consistent with the respondent's internal policies; and (b) the Applicant was given multiple options in regard to suitable workplace adjustments that could have been made to mitigate the concerns of working with the male employee. The Respondent submits that the Applicant chose not to take up or even engage with any of these proposals.

[101] Often it will be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign from employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer⁹⁷. The Full Bench of the Australian Industrial Relations Commission cautioned 'but narrow though it be, it is important that the line be closely drawn and rigorously observed', the Bench continued:

Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination⁹⁸...

[102] I agree with the Respondent's submission that the Applicant's reliance on factors other than the handling of her sexual harassment complaint have no bearing on the Commission's decision in relation to whether the Applicant was dismissed for the purpose of s 386(1)(b) of the Act. Whilst the Applicant's annual leave request was declined and a further request was not responded to – the Respondent's reasons for declining the request were, in my view, legitimate, and it was always open to the Applicant to further follow up regarding her application for leave – whether that be annual leave or authorised unpaid leave. Regarding issues in respect of fatigue, the evidence does not support a finding that issues with respect to the Applicant's fatigue management contributed to the Applicant having no choice but to resign.

[103] Further, while the Applicant asserts that she was the successful applicant for the role of relief duty manager, but once she had been selected nothing further occurred,⁹⁹ I have had regard to the evidence of Aston and am persuaded by the same. Aston sets out that the Applicant was selected for a final interview for a permanent duty manager position which took place on 21 January 2025. In this interview, the Applicant advised she was unable to commit to the full-time role of the duty manager as advertised and asked to be upskilled in relevant duties to act as relief for the duty manager role. Aston said she informed the Applicant that she would commit to reviewing her request for training and relief opportunities. It appears uncontroversial that the Applicant worked in higher duties when fulfilling the relief team leader role and whilst the Applicant had applied for a permanent duty manager position in December 2024 and had enquired about available team leader positions in March 2025, explanation had been provided as to why the Applicant was unable to assume these positions. In all the circumstances, I am not persuaded that the Applicant was the successful applicant for the relief duty manager position and received no communication about the roles. Whilst the Applicant may or may not have received a training course or correspondence, I do not consider that this would lead to a

⁹⁷ *ABB Engineering Construction Pty Ltd v Doumit* (Australian Industrial Relations Commission, Munro J, Duncan DP and Merriman C, 9 December 1996, N6999), Pt 4.

⁹⁸ *Ibid*, cited with approval in *O'Meara v Stanley Works Pty Ltd* (Australian Industrial Relations Commission, Giudice J, Watson VP and Cribb C, 11 August 2006, PR973462), [22].

⁹⁹ Sewell Statement (n 3) [9].

plausible factor contributing to a resignation. Particularly, when, the Applicant had acted in higher duties as a team leader and the Respondent had explained to her the expression of interest process and the role requirements of the permanent position.

[104] What is, however, manifestly obvious from the Respondent's evidence and submissions is that to accommodate circumstances where the Applicant would not be rostered on with the male employee would require the Applicant to change to another airline or another position – whether that be load operator or working in administration. Whilst appreciative that it was the Applicant that requested a roster change, and that Aston made mention of the male employee's visa restrictions and that a move to another airline would be perceived as a promotion (perhaps the male employee who was subject to two workplace investigations did not warrant such 'promotion' in the circumstances), there was no direct evidence adduced to support a finding that the Respondent contemplated moving the male employee at any time or that there was cogent evidence of obstacles to such move. This is a point I will further emphasise in my consideration of s 387(h) of the Act.

[105] Having made a report of alleged sexual harassment and then to have faced circumstances as I have detailed above, I find it was both open and reasonable for the Applicant to arrive at the conclusion of not feeling valued within the Respondent business and thereafter not trusting her employer. However, I do not consider it open to find that the Applicant was abandoned or that the Respondent had not proffered support in the form of EAP and regular welfare check-ins. Notwithstanding, the issue fundamentally comes down to the Applicant being placed in a position where she was not provided with an outcome letter in a timely manner, the content of the outcome letter was deficient as explained, and having to compromise her position within the business – that is having to move out of the position she occupied working on the Emirates airline, to ensure her future safety at work.

[106] When considering the authorities on resignation and their application to s 386 of the Act, the Full Bench of the Commission has stated that for the purposes of s 386(1)(b) of the Act, the test is 'whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether the termination of the employment was the probable result of the employer's conduct. Whilst appreciative of the difficulty faced by a Respondent in these circumstances, on balance it was unreasonable to place the burden of compromise on the shoulders of the Applicant on this occasion and the factors of the delay in the provision of the outcome letter and the content of the outcome letter were such as to render the conduct of the Respondent sufficiently egregious to render the Applicant's resignation as having been forced by the Respondent's conduct. It follows that I find that the Applicant's resignation was forced by a course of conduct engaged in by the Respondent, such that the termination of the Applicant's employment was the probable result of the employer's conduct.

[107] Whilst acknowledging that the Respondent delayed its acceptance of the Applicant's resignation on 30 April 2025 on the basis that the Applicant had raised concerns which the Applicant had not, according to the Respondent, previously raised, that the Applicant declined to engage in any further discussions with the Respondent after this date, does not alter my conclusion that the Applicant was dismissed for the aforementioned reasons.

4 Unfair dismissal

[108] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take account the matters in s 387 of the Act. In a matter such as this, where the Commission has rejected the Respondent's jurisdictional objection that the Applicant was not dismissed, the consideration of several of the factors in s 387 of the Act is relatively straightforward.

[109] The Act directs consideration of whether there was a valid reason for the dismissal related to the person's capacity or conduct (s 387(a)). I consider that s 387(a) is concerned with cases where there is a reason for dismissal that is related to capacity or conduct. In such cases, the Commission must consider whether the reason is valid. There was no valid reason for the Applicant's dismissal. That is, the Respondent simply had no reason for dismissal related to the Applicant's capacity or conduct and therefore it follows that s 387(a) is a neutral consideration.

[110] As to whether the Applicant was notified of the valid reason, there were no reasons for the termination of the Applicant's employment related to her capacity or conduct, of which she could be notified (s 387(b)), or to which she could respond (s 387(c)). Further, there were no discussions relating to the dismissal (s 387(d)), and no unsatisfactory performance in respect of which a warning might have been given (s 387(e)). These are all neutral considerations. In addition, there were no 'procedures followed in effecting the dismissal', therefore the considerations in s 387(f)–(g) are not relevant.

[111] The remaining consideration the Commission is obliged to take into account is outlined in s 387(h) of the Act, which refers to 'any other matters that the FWC considers relevant.' At this juncture, it is relevant to reflect further on the workplace investigation conducted by the Respondent.

[112] The flaws in the Respondent's investigation were serious. In this case, the investigation into the Applicant's report was conducted by Aston and Thompson. It is apparent that the Respondent had formed a view that where there was a misalignment in the evidence of the Applicant and the Respondent then it was the case that an allegation was unable to be substantiated.¹⁰⁰

[113] As can be appreciated, there will often be circumstances where an alleged interaction occurs between two employees in the absence of a witness or overt recording. That does not in turn mean that allegations are unable to be substantiated unless the evidence of those two employees aligns. For example, in the case presented by the Applicant, she gave evidence of having reported the incident quite soon after to two colleagues who were said to have encouraged her to make the report. It was the Applicant's evidence that at 5.30PM on the day of the incident, a colleague arrived for shift and asked the Applicant what was wrong, and another colleague who was just finishing their shift, could (apparently) see the Applicant was upset.¹⁰¹ Having informed the colleagues as to what unfolded in respect of the male employee, the colleagues were said to have encouraged the Applicant to 'speak up'.¹⁰² Neither colleague

¹⁰⁰ Transcript (n 1) [PN380], [PN396]–[PN402].

¹⁰¹ Sewell Statement (n 3) [15].

¹⁰² Ibid.

was interviewed by the Respondent¹⁰³ – it being apparent that the Respondent had not enquired whether the Applicant spoke to anyone or interacted with anyone close to the time after the interaction with the male employee. It may or may not have been the case that the evidence of the two employees proved relevant or otherwise had bearing on the findings that were ultimately arrived at by the Respondent. However, that remains unknown given the failure of the Respondent to interview the two.

[114] Further, it became apparent during the hearing that the Respondent had not only received a report about the male employee's conduct from the Applicant but had, in addition, received a report from another worker. Whilst unclear as to the nature of that report or the outcomes an investigation into the report, at one point in the hearing it appeared that the outcome letter to the Applicant had conflated the two investigations. Aston appeared to clarify that when referring to the 'investigative process', that process involved an investigation into the Applicant's report and that of another worker against the male employee.¹⁰⁴ However, in respect of the outcome letter to the Applicant, ultimately it appeared that it was parts of the first allegation made by the Applicant (not the other employee) that were able to be substantiated – allegation one being:

1. On Sunday 9 March 2025 you worked a 'Pick-Up' a shift from 1100-0200 in your role as a Passenger Services Delivery Agent. During this shift, at approximately 1630, you had an interaction with a female staff member asking what she would be wearing to an upcoming social event that you were both attending.¹⁰⁵

[115] Whilst the male employee was informed by letter on 21 March 2025 that the allegations against him were unable to be substantiated, the Applicant was not informed in writing until 28 April 2025 whereby the outcome letter, that she had requested, stated '...whilst we were unable to make a finding for some of the allegations raised throughout this process'. I have addressed the issue of the inconsistency between that which was verbally communicated to the Applicant and that which was communicated in writing. The Respondent gave evidence that it was not its usual practice to provide an outcome in writing to the Applicant, but she was informed during the process, but it was necessary to provide one to the male employee as he was suspended and the Respondent needed to formalise the process by ensuring that it was communicated to him formally.¹⁰⁶ That the Respondent considered it necessary to provide a written outcome to the male employee but not to the Applicant fails to contemplate the significance and seriousness of the report made by the Applicant and understandably led, in part, to the Applicant forming the view that the Respondent did not value her as an employee.

[116] Whilst the procedural flaws in the investigation have the effect of making the Respondent's findings vulnerable to challenge, the Commission is not reviewing the employer's decision to 'dismiss' the Applicant in a narrow sense in respect of the investigation. The Commission is considering whether, on all the evidence before it, the dismissal was harsh, unjust or unreasonable. The procedural flaws in the investigation largely related to the basis on which the Respondent drew the conclusions it did. The Commission is not positioned to making findings as to whether, on balance, the conduct as alleged by the Applicant in respect of the

¹⁰³ Transcript (n 1) [PN382].

¹⁰⁴ Ibid [PN375], [PN377].

¹⁰⁵ DHB (n 16) 138.

¹⁰⁶ Transcript (n 1) [PN356].

male employee occurred because, as has been identified, the male employee and other relevant witnesses have not been called by either party.

[117] However, it is evident that the Respondent failed to positively demonstrate that it afforded equivalence in treatment between the male employee and the Applicant, when it was the case that the Applicant had to request an outcome letter and on its receipt, it was evident that there was some level of confusion between that which had been verbally communicated to her about the allegations and that which was recorded in writing.

[118] Further, whilst the Applicant requested a change in her roster to avert further interaction with the male employee, the Respondent, in my view, failed to demonstrate on the evidence that such change could *only* be accomplished by moving the Applicant to a different airline or a different position in the business. The Respondent pressed an assertion that the male employee's visa arrangements may have precluded a change in his roster, but other than Aston's assertion, no other evidence was adduced to show that was the case.

5 Conclusion

[119] The Applicant was protected from unfair dismissal at the time she was dismissed. The Applicant has been unfairly dismissed; her dismissal having been unreasonable. It is therefore incumbent upon me to consider an order in respect of remedy.

6 Remedy

[120] In her submissions, the Applicant stated that she sought an order for the payment of money in compensation rather than reinstatement.

6.1 Reinstatement

[121] Before dealing with the quantum of compensation, the Commission must be satisfied that reinstatement is inappropriate and that an order for payment of compensation is appropriate in all the circumstances.¹⁰⁷ In relation to reinstatement, I consider that it would be inappropriate given the sentiment expressed by the Applicant that she does not seek reinstatement by way of remedy. I therefore consider that an award of compensation is appropriate in this case.

6.2 Compensation

[122] Compensation is provided to an applicant who has been unfairly dismissed for reparation for losses reasonably attributable to the unfair dismissal. It is not intended to be punitive.¹⁰⁸ The amount of compensation ordered by the Commission must not include a component for shock, distress or humiliation, or other analogous hurt, caused to the person by the dismissal.¹⁰⁹

¹⁰⁷ *Fair Work Act 2009* (Cth) s 390(3)(a)–(b).

¹⁰⁸ *Kable v Bozelle* [2015] FWC 3512, [17].

¹⁰⁹ *Fair Work Act 2009* (Cth) s 392(4).

[123] In assessing compensation, it is necessary to take into account all the circumstances of the case, including the specific matters identified in s 392(2)(a)–(g), and to consider the other relevant requirements of s 392 of the Act.

[124] The well-established approach to the assessment of compensation under s 392 is to apply the ‘*Sprigg* Formula’, derived from the decision of the Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul’s Licensed Festival Supermarket* (‘*Sprigg*’).¹¹⁰ This approach was articulated in the context of the current legislative framework in *Bowden v Ottrey Homes – Cobram & District Retirement Villages Inc* (‘*Bowden*’),¹¹¹ and I have applied this methodology in reaching my decision.

[125] Under that approach, the first step to be taken in assessing compensation is to consider s 392(2)(c), that is, to determine what the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed (the **anticipated period of employment**). In *Bowden*, this was described in the following way:

[33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:

‘... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.’

[34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the ‘anticipated period of employment’...¹¹²

[126] Once the first step of determining the anticipated period of employment has been undertaken, various adjustments are made in accordance with s 392 of the Act and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee’s misconduct, and the application of the cap of six months’ pay. This approach is, however, subject to the overarching requirement to ensure that the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case. The approach can be summarised as follows:

- Step 1: Estimate the remuneration the Applicant would have received, or have been likely to have received, if the Respondent had not terminated the employment (remuneration lost).
- Step 2: Deduct monies earned since termination.
- Step 3: Discount the remaining amount for contingencies.
- Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.
- Step 5: Apply the legislative cap on compensation.

¹¹⁰ (1998) 88 IR 21.

¹¹¹ (2013) 229 IR 6.

¹¹² Ibid 19 [24], quoting *Ellawala v Australian Postal Corporation* [2000] AIRC 1151 (‘*Ellawala*’).

6.2.1 Remuneration that the Applicant would have been received (s 392(2)(c))

[127] At the time of her dismissal, the Applicant's rate of pay appeared to be \$33.16 per hour when working 'Ordinary Higher Duties' and it appeared that over the course of the last six months, based on the evidence before me, she had worked predominantly at a rate of pay of the 'Ordinary Higher Duties'. On average the Applicant had worked approximately 35.32 hours a week over that same period, and it is to be appreciated that during this period the 'Ordinary Higher Duties' rate had increased to the amount of \$33.16 and the Applicant had received during this period Saturday Loading, Sunday Loading, Shift Loading, Time 2 Higher Duties, and Public Holiday.

[128] When calculating the gross amount earned by the Applicant over a period of 26 weeks this amounted to \$40,452.91, which amounts to gross weekly remuneration of \$1555.88.

[129] The evidence suggests that the Applicant's performance and conduct prior to her report of alleged sexual harassment was unproblematic. Further, given the Applicant's longevity with the Respondent business, it would appear that she held no imminent intention to resign from her position.

[130] In short, but for the Applicant's dismissal, I am satisfied that the Applicant would have proceeded to work for the Respondent for a period that extended to at least six months.

[131] Therefore, had the Applicant not been dismissed, she would have earned \$40,452.91 (gross).

6.2.2 Remuneration earned (s 392(2)(e) and income reasonably likely to be earned (s 392(2)(f))

[132] By letter of 16 May 2025, the Applicant was offered *casual* employment with shifts to be offered from 19 May 2025. The casual base hourly rate of pay was \$30.13 gross per hour which was inclusive of a 25% casual loading. For the period 26 May 2025 to 3 August 2025 the Applicant earned \$3,984.52 (gross).

[133] There is no evidence before me to suggest the Applicant was likely to have earned monies during the period between the making of the order for compensation and the actual payment of that compensation – the position after all was casual. No adjustment will be made on this factor.

6.2.3 Length of service (s 392(2)(b))

[134] I do not consider that the Applicant's length of service calls for any upward or downward adjustment to the compensation amount that should otherwise be ordered.

6.2.4 Other matters (s 392(2)(g))

[135] As was said in the Full Bench decision in *McCulloch v Calvary Health Care Adelaide* ('*McCulloch*'), it is important to appreciate that a deduction for contingencies is applied to

prospective losses, that is loss occasioned *after* the date of the hearing.¹¹³ Referring to *Ellawala v Australian Postal Corporation*,¹¹⁴ the Full Bench in *McCulloch* stated that a discount for contingencies is a means of taking account of the various probabilities that might otherwise affect earning capacity. Of course, at the time of hearing, any such impact on an applicant's earning capacity between the date of termination and the hearing will be known. It will not be a matter of assessing prospective probabilities but of making a finding on the basis of whether an applicant's earning capacity has in fact been affected during the relevant period.¹¹⁵ This contrasts with the exercise before me now.

[136] It is approximately four months since the Applicant's employment was terminated and there is no direct evidence that she was ill during this period or would have been otherwise unable to work. Further, I have found that she would have been employed a further six months. It follows that any contingency calculation would only have relevance for the six months (namely, between the date of my decision and the end of the anticipated period of employment). As observed, a contingency discount necessarily only applies to future circumstances and, in the context of the present matter, I am not persuaded to make any discount for contingencies.

[137] In relation to taxation, compensation will be determined as a gross amount, and it will be left to the Respondent to deduct any amount of taxation required by law.

6.2.5 Viability (s 392(2)(a))

[138] The Respondent was provided ample opportunity to address this factor, and noted that viability would not be impacted were an order for compensation to issue. I am therefore content to find that an order for the payment of compensation would not affect the viability of the Respondent's business. It follows that there will be no deduction from the compensation amount on this basis.

6.2.6 Mitigation efforts (s 392(2)(d))

[139] Decisions of this Commission and its predecessors concerning the recognition of mitigation efforts do not identify or mandate a single specific approach or formula relative to this discretionary issue.¹¹⁶ The reasonableness of the efforts taken to mitigate loss depends on the circumstances of the case.¹¹⁷ As will be evident at this point, the Applicant has furnished evidence of steps taken to mitigate her loss. I have considered that the Applicant had obtained work. In the circumstances, I am able to conclude that the Applicant made *reasonable* efforts in respect of mitigation and as a consequence will not reduce the compensatory amount.

6.2.7 Misconduct (s 392(3))

¹¹³ [2015] FWCFB 2267 (*'McCulloch'*).

¹¹⁴ *Ellawala* (n 112).

¹¹⁵ *Ibid* [43] cited in *McCulloch* (n 113) [21].

¹¹⁶ *Veal v Sundance Marine Pty Ltd* [2013] FWCFB 5205, [5].

¹¹⁷ *Biviano v Suji Kim Collection* (Australian Industrial Relations Commission, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002) [34]; *McCulloch* (n 113).

[140] Section 392(3) of the Act requires that if I consider that misconduct on the part of the Applicant contributed to the dismissal, I must reduce the amount of compensation that would otherwise be awarded. I have concluded that matter of misconduct in these circumstances is irrelevant, the Applicant having not engaged in misconduct.

6.2.8 Compensation cap (s 392(5))

[141] The amount of compensation the Commission may order is capped. If the appropriate quantum of compensation initially assessed exceeds that cap, then the Commission must reduce the amount to the amount of the cap. The Act stipulates that the compensation cap is the lesser of:

- a) the amount of remuneration received by the person, or that he or she was entitled to receive (whichever is higher) in the 26 weeks before dismissal (\$40,452.91); and
- b) half the amount of the high income threshold immediately before dismissal (\$87,500.00).¹¹⁸

[142] For the purpose of s 392(5) of the Act, I am satisfied the amount is \$40,452.91.

6.2.9 Instalments (s 393)

[143] No reason was put before me to suggest it appropriate that the compensation be paid by way of instalment, and therefore no such order is issued to that effect.

7 Conclusion

[144] The amount of compensation which is derived from the above considerations is \$36,468.39, less deduction of any tax as required by law. I consider that is an appropriate amount of compensation in all the circumstances.

[145] The calculation for compensation is set out in the following table.

Compensation	Calculation	Total Gross Amount)
Anticipated employment period	Six months = \$40,452.91(gross)	\$40,452.91(gross)
Deduct monies for misconduct	No deduction	\$0.00
Deduct monies earned since termination	\$3,984.52	\$36,468.39
Deduction for contingencies	0% as no significant element of future economic loss (no basis for any deduction for contingencies)	
Calculate any impact of	To be taxed according to law	

¹¹⁸ *Fair Work Act 2009* (Cth) s 392(5)–(6).

taxation		
Deduction for failure to mitigate loss	No deduction	
Apply the compensation cap	\$40,452.91	\$36,468.39
		\$36,468.39

[146] In determining the amount for the purpose of the Order,¹¹⁹ I have taken into account all of the circumstances of the case including the criteria set out in s 392(2) of the Act.



DEPUTY PRESIDENT

Appearances:

P Mullally for the Applicant
J Heycott of the Respondent

Hearing details:

2025.
Perth:
20 August.

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¹¹⁹ PR791969.