



# DECISION

*Fair Work Act 2009*

s.394 – Application for unfair dismissal remedy

**Ratchapol Pewsukngem**

**v**

**Choc Dee Thai Restaurant**

(U2023/1821)

COMMISSIONER SPENCER

BRISBANE, 27 SEPTEMBER 2023

*Application for relief from unfair dismissal – jurisdictional objection – Bullying application- Small Business Fair Dismissal Code – summary dismissal - whether the Employer had reasonable grounds to hold the belief at the time of dismissal - allegations of sexual harassment against Applicant – jurisdictional objection dismissed –further allegations of sexual harassment for Hearing – S28A -sexual orientation-post termination evidence-s387 assessment undertaken - termination unfair – compensation awarded.*

## INTRODUCTION

[1] Mr Ratchapol Pewsukngem (the Applicant) made an application to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy pursuant to section 392 of the Act. The Applicant submitted that he had been unfairly dismissed from his employment with Choc Dee Thai Restaurant in Palm Cove, Far North Queensland (the Respondent). The restaurant was owned by Mr Craig McGilvery and managed by his de facto partner Ms Kanokwan Saenkaew (Business Manager). The Applicant sought compensation for lost wages, in lieu of reinstatement. The Applicant stated due to the allegations of sexual harassment made against him, he considered that he could not return to the workplace. The Applicant stated that the false sexual harassment claims made by Employees and losing his job, had a significant impact on him.

[2] The Applicant was alleged to have sexually harassed several female Employees. The Employer conducted a survey of the female Employees. Five alleged to have observed instances of sexual harassment by the Applicant towards other Employees. Six of the responses claimed also experiencing alleged instances of sexual harassment by the Applicant.

*Tests in this matter – sexual harassment evidence*

[3] The Applicant commenced employment with the Respondent on 1 September 2019 as the Head Chef, on a full-time basis until his summary dismissal on 14 February 2023, by letter of termination dated 12 February 2023. The Applicant was not paid four weeks' wages in lieu of notice.<sup>1</sup> He was paid accrued leave entitlements.

[4] The Respondent raised a jurisdictional objection pursuant to section 388 of the Act, relying on compliance with the Small Business Fair Dismissal Code (SBFDC/the Code) to submit that the dismissal was fair. It was argued that Mr McGilvery, in accordance with the relevant test, held a belief on reasonable grounds<sup>2</sup> at the time of dismissal 'that the Employee's conduct [was] sufficiently serious to justify immediate dismissal.' The Applicant rejected that the Respondent on the facts and circumstances could have established on 'reasonable grounds' for his belief at the time of the termination and to conclude that the dismissal was fair.

[5] In regard to the basis for the jurisdictional objection, information was sent to the parties, on the application of the Code, including an extract from the Full Bench case of *Pinawin T/A Rose.Vi.Hair.Face.Body v Domingo*<sup>3</sup> ('Pinawin').

[6] The parties agreed that, in accordance with section 23 of the Act, the Respondent's business was a small business Employer; with less than 15 Employees at the time of the Applicant's dismissal. The Respondent argued that the termination complied with the SBFDC. The Respondent set out that he completed the checklist with the Code. The checklist is a tool to be used but does not render the dismissal 'Code compliant'. An assessment pursuant to section 387 of the Act, is only undertaken where the jurisdictional objection is not upheld. That is if it is determined that the Employer could not have held a belief, based on reasonable grounds at the time of termination.

[7] The Applicant's employment was terminated on 14 February 2023, as he commenced his period of approved annual leave. The Respondent set out reasons in the letter dated 12 February 2023 below:

*Letter of Termination of Your Employment.*

*Mr Ratchapol Pewsukngem.*

*I am writing to inform you that your employment with Choc Dee has been terminated, due to your Serious Misconduct of six (6) female Employee members within Choc Dee at various times.*

*Due to your application to the Fair Work Commission, in regard to a Bullying claim from you by Kanokwan, I sent out a Questionnaire asking all my Thai Employee, the following Questions:*

*1/ Has anyone here that works at Choc Dee ever seen or heard of any sexual harassment towards Ratchapol (Tui).*

*2/ Has anyone here that works at Choc Dee ever seen or heard of any form of Bullying or Name Calling towards Ratchapol (Tui).*

*3/ Has anyone here that works at Choc Dee ever seen or heard any form of Name Calling or Sexual Harassment from Ratchapol (Tui) towards other Employee members.*

*I was totally shocked to find out that you Ratchapol Pewsukngem have been Sexually Harassing 6 out of the 8 female Employee members on numerous occasions, by inappropriately touching their buttocks, trying to kiss them and also Body Shaming a number of Employee eg: Calling Chutima “Fat”. This is a very serious form of Misconduct and I will not allow this to happen in Choc Dee. You have on a number of occasions refused to sit down and talk and I have reluctantly sent you 2 letters, 1 – A warning letter to stop Bullying and name calling. 2 – Information letter on the pending sale of Choc Dee to Kanokwan, reply back that you do not accept them and that you reject the letters. Your termination of employment with Choc Dee will be effective immediately. All monies owed to you will be paid within the next 10 days. There may be a waiting period if you wish to access any Centrelink Payments*

*Craig McGilvery  
Business Owner.”  
(emphasis added)*

[8] The Respondent stated he had relied on the Employee responses to the survey he conducted to form the ‘belief on reasonable grounds’ that the termination was justified. He had asked several female Employees if the Applicant had engaged in sexual harassment. Based on these survey responses (that the Respondent required Employees to return within 24 hours), the Respondent considered the answers established the Employer’s ‘belief on reasonable grounds’ at the time of termination that the dismissal was fair. If this is demonstrated, the Code provides a jurisdictional bar to the application proceeding, to an assessment pursuant to section 387.

[9] Under the Code, there are two categories of terminations: ‘Summary Dismissal’, or ‘Other Dismissal’. The category of termination under consideration in the current matter is Summary Dismissal. The Applicant was dismissed for serious misconduct with immediate effect. No wages were paid in lieu of notice. The Respondent agreed that the Applicant was notified of the reason, for the first time in the termination of employment letter (dated 12 February 2023) emailed to him on 14 February 2023.

#### *Protection from Unfair Dismissal Provisions*

[10] Section 390 of the Act provides that the Commission may order a remedy if satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed and the Applicant has been unfairly dismissed.

[11] Section 382 of the 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.

[12] The Applicant was employed by the Respondent as the Head Chef (for approximately three years and five months), under the *Restaurant Industry Award 2020* (the Award) and his annual earnings at the time of dismissal were approximately \$93,860.00.<sup>4</sup>

[13] In accordance with section 396 of the Act, it must next be determined:

- (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; and
- (d) whether the dismissal was a case of genuine redundancy.”  
(*emphasis added*)

[14] The parties agreed that the application was filed, within the statutory 21-day period. The parties did not dispute that the Respondent was a small business Employer and that this dismissal was a termination of employment, and not a case of genuine redundancy. I am satisfied that the Applicant was a person protected in terms of the unfair dismissal provisions.

[15] As referred to, the Respondent made a jurisdictional objection on the basis that he had followed the SBFDC under section 388 of the Act.

#### *Permission to appear*

[16] The Respondent sought to be legally represented before the Commission in this matter. The Applicant was represented by his support person Mr Christopher Wall. The Respondent sought to be legally represented and directions were set on the issue of representation. The Applicant had filed further substantive witness evidence in his reply to submissions. The late addition of further witnesses, the assessment of the evidence, the jurisdictional test related to the SBFDC and allegations of sexual harassment contributed to the complexity of the matter. Accordingly, it was submitted that the matter would be dealt with more efficiently and effectively if legal representation was granted. Pursuant to section 596 (2)(a), permission was granted for the Respondent to be legally represented, as this would enable the matter to be dealt with more efficiently, considering the complexity of the matter,<sup>5</sup> and the evidence related issues as set out.

[17] At the Hearing conducted in Cairns, the Applicant was represented by Mr Wall, a friend of the Applicant who also operated a Thai restaurant in Cairns. An appearance was entered for the first time at the Hearing by Mr Eylander, Counsel, instructed by Mr McAlister, solicitor of WGC Lawyers, who continued his appearance. Mr Wall stated that the Applicant parties were unaware of Mr Eylander's attendance, as neither the Commission nor the Applicant were notified prior.<sup>6</sup> The Respondent, in line with the grant of legal representation, was able to be further represented by legal counsel in accordance with the decision of *New South Wales Bar*

*Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Tax Office.*<sup>7</sup>

## RELEVANT LEGISLATIVE PROVISIONS

[18] Section 394 of the Act sets out:

“A person has been unfairly dismissed if the FWC is satisfied that:

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

...

[19] Section 388 of the Act requires a determination as to whether a dismissal is consistent with the Small Business Fair Dismissal Code:

- “(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.
- (2) 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.”

[20] The Small Business Fair Dismissal Code relevantly sets out:

*“The Code*

*Summary Dismissal*

*It is fair for an Employer to dismiss an Employee without notice or warning when the Employer believes on reasonable grounds that the Employee’s conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the Employer must have reasonable grounds for making the report.*

*At the time of termination, the Employer must hold a reasonable belief in relation to the conduct.*

*Other Dismissal*

*In other cases, the small business Employer must give the Employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the Employee's conduct or capacity to do the job.*

*The Employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.*

*The small business Employer must provide the Employee with an opportunity to respond to the warning and give the Employee a reasonable chance to rectify the problem, having regard to the Employee's response. Rectifying the problem might involve the Employer providing additional training and ensuring the Employee knows the Employer's job expectations.*

#### *Procedural Matters*

*In discussions with an Employee in circumstances where dismissal is possible, the Employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.*

*A small business Employer will be required to provide evidence of compliance with the Code if the Employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."*

**[21]** The Explanatory Memorandum for the Small Business Fair Dismissal Code sets out the following regarding its implementation:

*"211. There will also be a Small Business Fair Dismissal Code (the Code) for businesses with fewer than 15 Employees (small business Employers). The Code will set out the steps a small business Employer needs to take in order for the dismissal to be fair. If an Employee of a small business Employer makes an unfair dismissal claim, FWA will first determine if the Employer has complied with the Code. If so the dismissal will be considered fair. If the Employer has not complied with the Code, the claim will be treated in the same way as any other unfair dismissal claim, and FWA will go on to determine whether the dismissal was harsh, unjust or unreasonable.*

...

*1545. If a person's dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair and the other factors relating to unfair dismissal do not need to be considered. This arises because clause 396 provides that whether a dismissal is consistent with the Code is an initial matter that FWA must consider before considering the merits of the application. If the Employer has not complied with the Code, the claim will be treated the same way as any other unfair dismissal claim."*

[22] Regulation 1.07 of the *Fair Work Regulations 2009* provides the definition for serious misconduct, stating:

**“Meaning of serious misconduct**

- (a) For the definition of *serious misconduct* in section 12 of the Act, serious misconduct has its ordinary meaning.
- (b) For subregulation (1), conduct that is serious misconduct includes both of the following:
  - (a) wilful or deliberate behaviour by an Employee that is inconsistent with the continuation of the contract of employment;
  - (b) conduct that causes serious and imminent risk to:
    - (i) the health or safety of a person; or
    - (ii) the reputation, viability or profitability of the Employer’s business.
- (c) For subregulation (1), conduct that is serious misconduct includes each of the following:
  - (a) the Employee, in the course of the Employee’s employment, engaging in:
    - (i) theft; or
    - (ii) fraud; or
    - (iii) assault; or
    - (iv) sexual harassment;

...

[23] Section 394 of the Act sets out:

*“394 Application for unfair dismissal remedy  
A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.*

...

[24] If the matter is not considered to be consistent with the Code, the matter is examined pursuant to section 387 as follows:

**“387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other Employees); and
- b) whether the person was notified of that reason; and
- c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- d) any unreasonable refusal by the Employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

- e) if the dismissal related to unsatisfactory performance by the person— whether the person had been warned about that unsatisfactory performance before the dismissal; and
  - f) the degree to which the size of the Employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
  - g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that the FWC considers relevant.

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:

- (a) the person sexually harasses another person; and
- (b) the person does so in connection with the person’s employment.”

[25] Section 12 of the Act gives meaning to the term ‘sexually harass’ by reference to Section 28A of the Sex Discrimination Act 1984 (Cth) which sets out:

**“Meaning of sexual harassment**

(1) For the purposes of this Act, a person sexually harasses another person (the *person harassed* ) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstance.

(2) In this section:

**“conduct of a sexual nature”** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.”

**BACKGROUND**



[26] In summary terms, the Applicant had injured his back at work and provided Workers Compensation medical certificates from 17 August 2022. He was undertaking treatment for his back, along with ‘psychology sessions’. On his doctor’s advice, he was not able to work more than 2 days of 8 hours daily each week. The medical certificates covered the period until the commencement of the annual end of year shutdown at the restaurant in January 2023. The Applicant commenced pre-approved annual leave, during which he travelled to Thailand. The Applicant submitted that the Respondent and Business Manager of the restaurant required him to work more than the hours as identified by his medical practitioner<sup>8</sup>. The Applicant alleged that the Business Manager (the Respondent’s de facto partner) had bullied him by requiring him to work additional hours.

### *Warning*

[27] The Applicant stated on 1 January 2023, he wrote a letter to the Respondent alleging that Mr McGilvery’s de facto partner (the Business Manager, Ms Kanokwan Saenkaew) was Bullying him. He outlined several of the Bullying incidents which had led him to seek psychological assistance.<sup>9</sup>

[28] The Applicant referred to a verbal disagreement which had occurred in the restaurant kitchen and had arisen between himself and, Ms Kanokwan Saenkaew. The Applicant stated that the exchange related to how to make chilli jam. Ms Kanokwan Saenkaew gave evidence, alleging that during the interaction the Applicant called her ‘a dog.’ However, during an adjournment of the Hearing, CCTV footage (from the Respondent’s restaurant) of this incident was shown to the Applicant and his support person who was proficient in Thai language. He translated the Applicant’s comments differently as: *“If you can do it like this then the dog can do it like that too.”*<sup>10</sup> The Applicant submitted that the phrase could be more correctly understood as meaning *“so easy a dog could do it.”*<sup>11</sup> His representative submitted that in Thai culture, the phrase is an idiom and not directed at a person in a Bullying or belligerent manner.<sup>12</sup> A copy of the video was provided by consent, to the Commission after the Hearing for independent translation, however no translation could be made due to the poor quality of the audio. The Applicant submitted that Ms Kanokwan Saenkaew had told him to ‘stop barking’: further stating *“[t]he first time she told her husband, ‘I tell “Stop barking”.’ When the story, the true story, she put in her statement she told me, ‘Stop barking.’”*<sup>13</sup> As a result of the exchange, the Respondent issued a formal letter of warning to the Applicant only, demanding that the verbal abuse stop.

[29] The Respondent alleged that the Applicant instigated the arguments and had no respect for management, suggesting that the Chef did not like being told what to do by a younger person (it was submitted that the Applicant was aged 57 and Ms Kanokwan Saenkaew was aged 30).<sup>14</sup> The Applicant refuted this.

[30] The Respondent’s evidence was that he gave both Employees the same disciplinary treatment for the exchange.<sup>15</sup> However, Ms Saenkaew’s evidence was given immediately after, the Respondent’s evidence, in contrast she stated the incident only formed part of the ordinary end of day discussions between her and the Respondent. No verbal or written warning was provided for her involvement in the exchange.<sup>16</sup> However, the applicant received a written warning.

[31] Having regard to the vision in the CCTV recording and the low audio, there was nothing evident in the exchange whereby the Applicant should have received a different disciplinary outcome to Ms Saenkaew. Nothing in the footage indicates that the Applicant said the phrase at Ms Saenkaew's face or demonstrated hostility or volatility in the exchange. The phrase is not deemed to be insulting. If the Respondent wanted to afford a fair disciplinary response, nothing in the exchange suggests a reasonable basis for the disciplinary response to have been different between parties. The Applicant's explanation is the evidence of the exchange correlates with the footage and is preferred.

[32] The Applicant's warning letter of 4 January 2023 was as follows:

*"Mr Ratchapol Pewsukngem*

*Letter No 1 of Warning.*

*As per the Small Business Fair Dismissal Code (2009), I Craig McGilvery (Business Owner of Choc Dee Thai Restaurant) hereby issue to you, Ratchapol Pewsukngem with a written warning to immediately stop abusing any or all of the Employee at Choc Dee, especially the Business Manager Kanokwan Saenkaew. You have previously been verbally told to stop arguing and fighting with the Employee on a number of occasions, but you continue to abuse your fellow workers. At approximately 5pm on Thursday 29<sup>th</sup> December, you instigated a loud verbal discussion with Kanokwan Saenkaew (Business Manager) and abused her in front of other Employee members, Nongyay, Supattra & Daniel, this has to stop.*

*I will not permit in this business any bad behaviour from anyone, you as Head Chef should have enough experience with people to speak to other Employee members in an appropriate manner.*

*We hope sincerely that this matter is finished, and that everyone can work together as a team, we are all here to help all members of the Choc Dee Family."*

*Sale of business*

[33] The Respondent also sent a letter to all Employees dated 30 January 2023, regarding the Sale of Business to his de facto partner, Ms Kanokwan Saenkaew:

*"30th, January. 2023*

***Letter of Intent to all Employee in the selling of Choc Dee.***

*As all of you know, I just had my 70th Birthday on the 12th January, 2023. Due to old age and many aches and pains with my body, after 12 years and over 210,000 customers, I have decided to sell this business as I can no longer put in the 100% effort it takes to keep this business going. The sale of the business won't occur overnight, as there are many legal hurdles that must be sorted out before anyone can take possession.*

*Over the past few years, I have had a few enquires about selling the restaurant from a*

*Sydney Thai connection and also just recently from another person wanting a 50% share of Choc Dee, this is not my intention.*

*Kanokwan Saenkaew (Jaoui) has over the last few months shown a keen interest in buying Choc Dee, and running the business by herself. Jaoui has over the last 6 years managed to learn everything that is needed to run this business and I believe that she is the right person to take over Choc Dee.*

*From 14th March, 2023 when Choc Dee re-opens for business, I will not be in attendance at Choc Dee, Jaoui will be in charge and control with all the requirements necessary in running Choc Dee.*

*I would like to thank everyone for their dedication and hard work, we have had many Employee changes in 12 Years, many cooks, many kitchen hands, many wait Employee, everyone with a different personality, but they have all in many ways contributed to Choc Dee in what it is, one of the best restaurants in Palm Cove.*

*Thanking You all.  
Craig McGilvery”<sup>17</sup>*

#### *Employer’s Survey*

[34] On 1 February 2023, the Applicant filed an application seeking an order to stop Bullying pursuant to section 789FD in which he named Ms Kanokwan Saenkaew and alleged that she engaged in Bullying conduct towards him. The Applicant set out in that application: “the behaviour of her makes me very stressed. I had to go see psychology.”<sup>18</sup> The Applicant stated the outcome he sought regarding the application was for the Commission to talk to the manager to stop the Bullying and respect him.<sup>19</sup>

[35] On 10 February 2023, the Respondent issued a survey to the eight female Employees at the business to complete regarding the conduct of the Applicant. The covering email to the survey, as sent to Ms Supattra Songcharoen, who was an Employee of the Respondent, read:

*“Due to Ratchapol lodging a Fair Work Commission Application and Sexual Harassment and Bullying at Choc Dee, I need you to answer a couple of questions honestly. Please find attached the questionnaire and respond within 24 hours.”*  
(emphasis added)

[36] The survey contained three questions as follows:

***“1. Has anyone here that works at Choc Dee ever seen or heard of any sexual harassment towards Ratchapol (Tui).***

*[space for answer to be written]*

***2. Has anyone here that works at Choc Dee ever seen or heard any form of Bullying or Name Calling towards Ratchapol (Tui).***

*[space for answer to be written]*

**3. Has anyone here that works at Choc Dee ever seen or hear any form of Name Calling from Ratchapol (Tui) towards other Employee members.**

*[space for answer to be written].”*

[37] A copy of the survey or the results were not provided to the Applicant (also referred to as ‘Tui’) at any time prior to his dismissal.

[38] Seven out of the eight female Employees completed the survey. The survey responses were quite similar in wording, and were as follows:

[39] Ms Nongyao Anderson’s (best friend of the Respondent’s de facto mother-in-law) response to the survey questions was as follows:

1. *No*
2. *No*
3. *Yes, I’ve seen and heard Tui said bad words to Employee a few times and a few times he has touched me and tried to kiss other Employee including myself.*

[40] Ms Nuttida Penthiya’s response to the survey questions was as follows:

1. *No*
2. *No*
3. *Yes. I’ve seen and heard Rachapol (Tui) made sexual harassment with another Employee and he also touch my bottom many time and kissed my neck. He always make fun about personal information’s Employee too.*

[41] Ms Patsachol Kumpukheaw’s response to the survey questions was as follows:

1. *No*
2. *No*
3. *Yes, I have seen Tui touch other Employee’s body without their permission, ex: kissing cheek or touching bottoms. And honestly, I feel uncomfortable to work with him as I always heard he talking bad words or making joke with other Employee’s body (body shaming).*

[42] Ms Saruttaya Naiyana’s response to the survey questions was as follows:

1. *No*
2. *No*
3. *Yes, I used to seen and heard he said a lot of bad words to all Employee and touched my bottom.*

[43] Ms Chutima Pakdeerat’s response to the survey questions was as follows:

1. *No*
2. *No*
3. *Yes, I have seen and heard that Tui talking something bad a few times to Employee and Tui also touching bottom of many Employee including me. On 7 February at 5:00pm he call me fat and body shaming.*

[44] Ms Kanokwan Saenkew's (de facto partner of Respondent) response to the survey questions was as follows:

1. *No*
2. *No, just Kanokwan when him mentioned I was a dog and I said back to him, haven't you stopped barking yet?*
3. *Yes, I've heard Tui said not a good words to Employee including myself. And I've seen Tui tried to kiss my sister (Nantawan) and other Employee also he touched my sister's buttocks and other Employee too.*

[45] Ms Nantawan Saenkaew (de facto sister-in-law of Respondent) response to the survey questions was as follows:

1. *No*
2. *No*
3. *Yes, I have. I have seen and heard that Ratchapol (Tui) harassed other Employee. One of them was me. I used to face dirty jokes from Tui many times also be harassed by touching my buttocks. I tried to let it go because I know that's not the kind of person he is, but I should not.*

[46] Ms Supattra Songcharoen did not respond to the survey, and Ms Sudathip Saenkhamwang (Respondent's defacto mother-in-law) was not provided with the survey as she was in Thailand when the survey was conducted.<sup>20</sup> The Respondent's sister-in-law who had finished working at the restaurant in June 2022 was included in the survey recipients without explanation. The Respondent based the Applicant's termination on the survey responses for his 'belief' at the time of dismissal.

#### *Alleged Direction from FWC Case Manager to Dismiss Applicant*

[47] The Respondent filed a Form F73 in response to the Stop Order – Bullying application with annexed documents. The Respondent stated that a 'draft' termination letter was included with the documents. He later claimed to have been directed by the FWC Case Manager to serve the termination letter on the Applicant.<sup>21</sup> He submitted that this is why he emailed the letter to the Applicant. He referred to a handwritten note he completed to evidence a phone discussion with the Commission case manager.

[48] The Respondent argued that he had been directed by the FWC Case Manager (on the Applicant's Stop Order – Bullying application) to progress the termination of the Applicant's employment.

[49] Due to the Respondent's assertion that the FWC Case Manager directed him to send the Applicant the termination letter, the parties requested by consent for the Commission to conduct

a review for any relevant material on the Bullying file. The parties to the Bullying matter were the same parties who were the subject of this unfair dismissal matter. The file was no longer active. The review of the case manager's file notes by the Associate, at the Hearing, confirmed that the Bullying matter file had been closed on termination of the Applicant's employment. The Respondent referred to a telephone conversation with the FWC Case Manager, stating that the instruction to send the termination was repeated. By consent of the parties, the file note was reviewed and provided to the parties. Pursuant to section 590 (1), further consideration of the case note is given below (after receiving submissions on it from the parties) as deemed necessary by the Commission, to inform itself on any relevant matters.<sup>22</sup> The FWC Case Manager has been deidentified for the purposes of this decision.

[50] On 12 February 2023 at 11:58pm, the Respondent submitted a response to the bullying application; Form F73 with 14 attachments. The Respondent attached the survey responses which alleged sexual harassment by the Applicant. Mr McGilvery submitted that he was shocked by the survey responses in question three,<sup>23</sup> which included allegations that the Applicant had been sexually harassing, body shaming, inappropriately touching and attempting to kiss Employees.

[51] The Respondent's covering email on his response to the Bullying application was as follows:

*"Dear [case manager]  
Please find attached Form F73 plus additional information, due to what i have received back from my other female Employee members you will see a copy of a Termination Letter i have prepared, but not yet sent to Ratchapol as he is back in Thailand as far as i know. I will be trying to see Fair Work in Cairns to let them also know of his dismissal. Please feel free to ring me at your convenience once you have read all the attachments."*  
(emphasis added)

[52] The Respondent relied on the survey results and what he interpreted as a direction by the Case Manager to terminate the Applicant's employment without discussing the allegations.

[53] On 13 February 2023 at 12:57pm, the Case Manager responded, referring to the usual process of document exchange, asking the Respondent to serve the response documents to the Bullying application on the Applicant. The Respondent argued that he relied on this Case Manager's response as a direction to serve the dismissal letter on the Applicant.<sup>24</sup>

*"Dear Craig*

*Thank you for your email.*

*I confirm receipt of the completed F73 response form and confirm your email contained 14 attachments*

*If you have not already done so, you must now provide a copy of the completed response to the Applicant and also the other people named as allegedly engaging in Bullying behaviour. In accordance with Fair Work Commission Rules, this can be done by email, fax, or post.*

*Please confirm when this has been done by reply email and let me know if you have any questions.”*  
(emphasis added)

[54] In considering the above correspondence, the Respondent was directed by the Case Manager to send the Bullying Response documents to the Applicant, if he had not done so already. The direction did not explicitly instruct or infer that the Respondent should issue a termination letter to the Applicant. Consistent with usual practice, a copy of the Respondent’s documents filed with the Commission was to be provided to the other named parties to the application. It is noted that the Applicant had commenced pre-approved annual leave at the time.

[55] In regard to the process leading to the termination, on 13 February 2023 at 2:34pm via email the Respondent asked the Applicant to meet with him face to face regarding the Applicant’s continued employment. It is noted that the termination letter had been prepared on 12 February 2023.

*“Dear Ratchapol*

*Please at your earliest convenience, I require you to attend a face to face meeting regarding your continued employment at Choc Dee.*

*Many Thanks*

*Craig”<sup>25</sup>*

[56] On 13 February 2023 at 4:01pm, the Applicant responded by email stating he was unable to attend as he was at the airport to travel to Thailand and asked the meeting be held on his return:

*“Sorry Craig, I won’t be able to attend meeting. Now, I’m at airport about to boarding to Thailand. Can we have a meeting when I get back from Thailand?*

*Thank you very much”<sup>26</sup>*

[57] On 13 February 2023 at 2:53pm, the Respondent informed the Case Manager that he served the documents in response to the Applicant’s Bullying application on the Applicant:

*“Afternoon [case manager]*

*This afternoon i have emailed to both Kanokwan and Ratchapol The Form F73 as well as the attachments.*

*I have also requested an urgent meeting with Ratchapol to discuss face to face my response to his Sexual Harassment of the female Employee members at Choc Dee.*

*I removed the Termination letter from the attachments to Ratchapol, of which i will issue to him when he responds to my meeting request. As far as i know Ratchapol is either back in Thailand or currently in Transit.*

*I will let you know when my face to face meeting occurs and the outcome.”*  
(emphasis added)

**[58]** On 13 February 2023 at 11:24pm, the Respondent emailed the Case Manager regarding allegations that the Applicant had sexually harassed two Employees based on the survey responses. There is no evidence that the Applicant was provided the survey responses before the termination of his employment.

**[59]** The Respondent referred to a file note he took on 14 February 2023 at 1:06pm regarding a call with the Case Manager:

*“Monday 14.2.23 1:06pm [phone number]*

*Received a phone call from [case manager], telling me to send on the letter of termination to Ratchapol.”<sup>27</sup>*

**[60]** The Commission records show that the Case Manager entered a file note on 14 February 2023 at 1:18pm of the call with the Respondent:

*“O/B call to EP - F73 was received with an email advising that the A had been terminated and that the EP had sent to A Minus the termination letter. I advised that correspondence sent to the commission should be sent to the Applicant, we cannot accept docs if they have not been served on all parties. - The EP Craig advised he will send the Applicant his termination letter today and will copy in the FWC. - I advised that I would call the Applicant after he has received the additional document. EP was concerned that he shouldn't terminated his Employee while he is on leave. I gave him the number for the FWO. - TB 14/02”*  
(emphasis added)

**[61]** There are differences in the communication summarised in file notes recorded by the Respondent and the Case Manager. The latter reflects the Commission's usual practice and process, which generally requires parties to serve the response documents filed with the Commission, also on the Applicant. The Respondent improperly interpreted this as a direction by the Case Manager, that the letter of termination specifically, should at that point be served on the Applicant. The Respondent was not told to send the termination letter to the Applicant, but to forward the response materials to the Bullying application to the Applicant.

**[62]** On 14 February 2023 at 3:44pm, the Respondent had not discussed the allegations of sexual harassment arising from the employer's survey with the Applicant but proceeded to send a termination letter which recorded an earlier date being 12 February 2023. The letter of termination lodged with the Form F73 had no signature. The termination letter was sent to the Applicant in the knowledge that he had commenced annual leave and was in transit to Thailand. The termination letter sent to the Commission (in relation to the Bullying application) was dated



12 February 2023 and was unsigned.<sup>28</sup> On 14 February 2023, an identical unsigned termination letter was provided to the Applicant by the Respondent.<sup>29</sup>

[63] The Respondent had included a copy of the completed SBFDC checklist that the jurisdictional objection was based on, in his evidence. The copy of this completed checklist was dated 13 February 2023 (prepared after the termination letter). The Code checklist included the reason for dismissal as:

*“sexual harassment of 5 female Employees, molesting them and trying to kiss them” and serious misconduct in the form of “sexual harassment of 6 female Employees after sending questionnaire to all female Employees. 5 responses back by saying Ratchapol had molested them.”<sup>30</sup>*

[64] On 15 February 2023, the Applicant withdrew his Stop Bullying application due to a lack of jurisdiction, as he had been dismissed and on the 6 March 2023 he lodged the Unfair Dismissal application.

#### *Witness Evidence*

[65] The Applicant provided evidence along with Mr Lanak Saengtes and Ms Rawirat Sanohphin, previous Employees of the Respondent. The Respondent’s witnesses were Mr Craig McGilvery, Business Owner, Ms Kanokwan Saenkaew, Business Manager and de facto partner of Mr McGilvery, Ms Nantawan Saenkaew, ex-Employee and Mr McGilvery’s de facto sister-in-law, Ms Sudathip Saenkhamwang, Employee and Mr McGilvery’s de facto mother-in-law, Ms Nongyao Anderson, Employee and best friend of Mr McGilvery’s mother-in-law, Ms Saruttaya Naiyana and Ms Patsachol Kumpukheaw Employees on working holiday visas.

[66] All witnesses were cross examined at the Hearing. It was set out by the applicant’s representative that all of the witnesses that made allegations of sexual harassment against the Applicant worked for the Respondent, or in the case of Ms Nantawan Saenkaew, had worked for the Respondent more than six months ago at the time of the survey. A number of the Respondent’s witnesses resided at Mr McGilvery’s home with him and were reliant on him for both accommodation and employment. There was also a familial connection between the Respondent and several Employees, as set out above.

[67] The survey was not sent to the Applicant at the same time as the other Employees. He was later shown a copy by Ms Songcharoen, an Employee of the Respondent, who was on holiday with the Applicant.<sup>31</sup>

[68] The Applicant’s representative stated that Ms Songcharoen was not called in support of the Applicant as she was grateful to the Respondent for giving her the first job in Australia. Therefore, despite being in support of the Applicant, she did not want to speak against the Respondent,<sup>32</sup> as like several of the witnesses, she was indebted to him, for the employment.

#### *Directions*

[69] Directions had been set for the filing of evidence and submissions and accordingly, parties filed their material. Material was filed in relation to the jurisdictional objection regarding

compliance with the Code and also the merits of the case pursuant to s387 due to its interrelated nature with the compliance with the Code. Submissions were also filed on the issue of remedy.

[70] English was not the first language of the Applicant and a range of the witnesses, and accordingly a Thai interpreter was made available by the Commission and frequently used during the Hearing proceedings held in the Cairns courthouse. Following the Hearing, the parties provided closing submissions at a further Hearing held via Microsoft Teams.

## **SUMMARY OF THE EVIDENCE AND SUBMISSIONS**

### **Summary of Applicant's submissions and evidence**

[71] The Applicant alleged his dismissal was procedurally and substantively unfair. It was submitted that the termination was not for a valid reason, and instead based on the untested allegations of sexual harassment that the applicant refuted. There was no opportunity provided to him by the employer to respond to the allegations. The Applicant also submitted the termination was not based on reasonable grounds and was inconsistent with the Code. The Applicant argued that the Respondent developed the survey in response to the Applicant's Bullying application, and that the Respondent provided a tightly controlled survey process and timeframe for the return of the surveys.

[72] The Applicant argued that the Respondent and a number of Employees stood to gain an advantage or benefit from his termination. The Respondent intended to sell the business in the new year, to his de facto partner, Ms Kanokwan Saenkaew as per his correspondence sent in the fortnight prior to the dismissal.<sup>33</sup> Therefore, the Applicant's salary of approximately \$93,860.00 would not form part of the wages bill due to his abrupt dismissal.

[73] Ms Kanokwan Saenkaew stated that she performed the role of head chef after the Applicant's dismissal and submitted that it was on a temporary basis while recruitment for a replacement took place. At the time of the Hearing, no replacement had been found. The Applicant stated that Ms Kanokwan Saenkaew learnt a lot of Thai cooking from him.<sup>34</sup> Additionally, the Applicant said that he had loaned on request a total of \$1,000.00, in two \$500.00 payments to Ms Nongyao Anderson for her to gamble,<sup>35</sup> which had not been (on the evidence) repaid at the time of termination.<sup>36</sup> The Applicant provided evidence of loaning \$1000.00 to this witness. The witness could not confirm that she had repaid this money. This had to be taken into account in evaluating the evidence of her allegation against the Applicant.

[74] In addition to the background matters detailed above, the Applicant stated that the survey responses and the witness statements submitted by the Respondent contained false evidence. It was submitted that the survey was developed by the Respondent in direct retaliation to his Bullying application that notified Mr McGilverly of the alleged Bullying behaviour by his de facto partner (and the restaurant manager) Ms Kanokwan Saenkaew.<sup>37</sup>

[75] The Applicant outlined the Respondent's relationship to each of his accusers in support of his position that the allegations were false and unreliable. The Applicant set out in his evidence that his friendships with a range of them were in contrast to the allegations.

[76] The Applicant stated he was provided permission to take annual leave, and he had booked flights accordingly. He became aware that a sexual harassment claim had been made against him after leaving on holidays when in receipt of the termination letter.

[77] The Applicant stated that the claims were false. The Applicant argued that four of the Employees who had made the allegations were on working holiday visas and were encouraged by the Respondent and his de facto partner, Ms Kanokwan Saenkaew, to make these false claims against him.<sup>38</sup> He alleged that these working visa Employees were beholden to the Respondent for work, in one case also for accommodation and were seeking permanent work. He submitted there was no factual basis for the allegations on which the termination of employment was based.

[78] The Applicant stated that since being on WorkCover due to a workplace injury, the Respondent and some Employees had made his life very difficult, and he believed this was the reason he was dismissed.<sup>39</sup>

[79] The Applicant was the Head Chef at the restaurant. He complained that the primary issues leading to the Bullying application included the relationship dynamic between the Respondent and Ms Kanokwan Saenkaew. He stated that Ms Kanokwan Saenkaew pressured him to work more hours despite it being contrary to the medical certificate issued for his workplace injury. He stated she also subjected him to disrespectful behaviour and undermined his status as the Head Chef. He alleged that the Respondent did not address his partner's behaviour and Bullying attitude. He stated he was experiencing negative health effects from this conduct, feared losing existing friendships developed at work, and was concerned about feeling excluded and isolated due to the conduct he was subjected to.<sup>40</sup>

[80] The Applicant stated he received a warning letter on 4 January 2023 from the Respondent, directing him to immediately stop abusing any or all of the Employees, in particular the Business Manager. The warning set out that the verbal arguments were to stop. The Respondent stated in the warning letter, that he considered that as head chef, the Applicant should have the experience to address other Employees in an appropriate manner and to get them all to work together as a team. The Applicant stated on the evidence, that the Respondent should have equally provided a warning to Ms Kanokwan Saenkaew.

[81] The Applicant refuted the sexual harassment allegations and provided evidence of his friendships with a number of the Employees (who had answered the survey) to demonstrate inconsistency with the allegations in the survey responses. The Applicant included evidence where he prepaid for plane tickets for himself and another Employee from Cairns to Brisbane and Singapore for flights.

[82] The Applicant submitted an email that was sent to him by the Respondent on 14 February 2023 at 3:44pm, it attached a letter of termination which had immediate effect, and the Respondent further suggested that the Commission will be speaking with the Applicant "very shortly", and that the Fair Work Ombudsman and "Lucas from Workers Compensation" will be notified of the termination.

[83] The Applicant included a statement of Ms Suppatra Songcharoen in support of his application, it provides an explanation for why she did not respond to the survey issued by the

Respondent, and later refuted the claims of sexual harassment made against the Applicant. The statement also emphasised concerns arising from the connections between the witnesses (Employees) and the Respondent:

*“I, Suppatra Soncharoen, was one of the colleagues of Rachapol at Choc Dee Thai Restaurant. I have known him since 2019. I confirmed that I have never seen Rachapol do sexual harassment with the Employee of Cho Dee Thai Restaurant since I started working there until I left there. I also confirmed that he’s gay and sometimes he dresses like a woman. I have known Kanokwan, one of the witnesses that blamed Ratchapol. She is Craig’s wife. I also know other witnesses, one is Craig’s wife sister, one of them used to borrow Ratchapol’s money for gambling, many of them are working and holiday visa holders who want pay-slip to complete their visa extension, so they’re controlled by the owner of Choc Dee Thai Restaurant.*

*I got the email from Craig, the owner of Choc Dee Thai Restaurant. He wanted me to be a witness, in order to blame Rachapol for sexual harassment but I couldn’t write that because there was nothing like that happened in the restaurant by Rachapol. The reason that I didn’t write the letter for protecting him at that time is that I didn’t want to lose my job but now I am not the Employee of Choc Dee Thai Restaurant anymore, so I’m writing this letter to confirm that Ratchapol is innocent for those accusations.”<sup>41</sup>*

**[84]** The statement of Ms Songcharoen provides an insight into the pressure she felt to answer the survey. She further raised considerations of the power imbalance present between the Employer and Employees.

**[85]** The Applicant provided several character references attesting to his work ethic, reliability and expressions of support. The statements contend that the Applicant is not a person who engages or would engage in harassment of Employees, which was to the Applicant’s detriment.

**[86]** The Applicant’s representative, Mr Wall, argued that the sexual orientation of the Applicant was relevant to the assessment of the sexual harassment allegations. He set out that the Applicant identified as a ‘gay man’ and therefore had no reason to sexually harass the female Employees as alleged:

*“...I’m gay. I don’t like woman.”<sup>42</sup>*

*“...normally it’s not that a gay man would have sexual desires for a woman, and even if I met a guy with - that looks attractive, but I don’t like him, so there’s no way, so let alone a woman”<sup>43</sup>*

**[87]** The Applicant could not understand the sexual harassment allegations, stating that he identified as homosexual, and was not interested in women.<sup>44</sup> He stated being hurt by these allegations, and shocked, given all the indications he referred to (detailed later) that he had a friendship with these Employees. He provided evidence of these friendships, which included trips to Thailand together, gifts exchanged and money lent.

[88] Further, it was argued that none of these complaints of sexual harassment had ever been raised with the Applicant prior to his termination of employment. He had no opportunity to respond. The Applicant referred to himself as ‘Tui’ or ‘Jenny’, which appeared in the evidence. He emphasised that he had not engaged in the conduct. Also, he stated that despite having close friendships with a range of these Employees from the survey, none of them had discussed the alleged conduct with him. He indicated this on the basis that the conduct has not occurred.

[89] The Applicant commented on the credibility of the witness evidence, which is detailed later. The survey responses are distinguished from the witness evidence on the allegations of sexual harassment that were filed for the Hearing. It was noted that the nature of the allegations available at the time of the dismissal differ to the witness evidence which was later available in the witness statements, provided for the Hearing.

### **Summary of the Respondent’s submissions and evidence**

[90] Further to the matters set out in the background above, the Respondent submitted that, in line with the Small Business Fair Dismissal Code he completed at the time of the dismissal, the Applicant has engaged in sexual harassment of Employees. The Respondent stated that the termination was based on his belief formed on reasonable grounds, that the Applicant had engaged in the alleged conduct.

[91] It was asserted on behalf of the Respondent, that the termination of employment was consistent with the Code (despite the procedural flaws of the termination.) Several allegations of sexual harassment from female Employees provided a valid reason for dismissal. Further, the conduct was sufficient to form a belief on reasonable grounds to warrant the Employer, taking the step to terminate the Applicant’s employment for alleged serious misconduct at that time.<sup>45</sup> The Respondent also submitted that as a small business Employer, that his compliance with the Code, was relied on when terminating the Applicant’s employment.<sup>46</sup>

[92] The Respondent submitted that the dismissal of the Applicant was consistent with its positive duty pursuant to the *Sex Discrimination Act 1984* (Cth) to take reasonable and proportionate measures to eliminate sexual harassment.<sup>47</sup> The Respondent considered the Applicant’s conduct was serious misconduct of such a nature, that warranted immediate termination.

[93] In the Form F3, the Respondent provided copies of the survey issued to Employees on 10 February 2023, along with the responses to the survey questions. The Respondent submitted that female Employees had advised the Respondent that they had observed and/or experienced Bullying or sexual harassment by the Applicant, and on that basis summary dismissal for serious misconduct was appropriate.<sup>48</sup> The survey results relied on by the Respondent to form a belief on reasonable grounds were

[94]

- Ms Saruttaya Naiyana (working holiday visa)
- Ms Patsachol Kumpukheaw (working holiday visa)
- Ms Kanokwan Saenkaew (Respondent’s de facto partner)
- Ms Nantawan Saenkaew (Respondent’s sister-in-law)
- Ms Nongyao Anderson (best friend of the Respondent’s mother-in-law)
- Ms Chuttima Pakdeerat (working holiday visa) – not called at Hearing

- Ms Nuttida Penthiya (working holiday visa) – not called at Hearing
- Ms Sudathip Saenkhamwang (Respondent’s mother-in-law) – did not provide a survey response but was called at Hearing.

[95] The Respondent’s belief as per the Code can only be formed on the survey results available at the time of dismissal, rather than relying on some of the markedly different sexual harassment allegations made in evidence at the Hearing.

[96] The Respondent enclosed the Small Business Fair Dismissal Code Checklist with his materials, indicating that it had less than 15 Employees and that the Applicant had been dismissed for the sexual harassment allegations. The Respondent also, contrary to any other evidence, indicated on the checklist that the Applicant was provided with a period of 24 hours to improve his performance or conduct. The checklist having been completed after the termination letter.

[97] The Respondent’s representative did not seek for the witnesses to be deidentified, in relation to the sexual harassment allegations.

## CONSIDERATION

### Small Business Fair Dismissal Code (SBFDC/ the Code)

[98] The Code, for cases of Summary Dismissal as set about above, requires the Respondent to hold a belief on reasonable grounds at the time of dismissal that the Employee’s conduct is sufficiently serious to justify immediate dismissal. The Code requires an assessment of the basis of the ‘belief’ held by the Employer in relation to the summary dismissal. If the jurisdictional objection at the time of dismissal, in terms of compliance with the Code is upheld,<sup>49</sup> an assessment pursuant to section 387 is not permitted.

#### *The tests for a belief on reasonable grounds*

[99] The Full Bench decision in *Pinawin* referring to the below cases, set out the elements to be considered when determining Summary Dismissal in SBFDC matters and the necessity to assess the reasonable grounds the Employer’s belief was based on, in determining to dismiss an Employee:

“[27] Deputy President Bartel in *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café*<sup>50</sup> said:

*“[60] At the outset it is appropriate to note that unlike a consideration of the dismissal of an Employee of a business that is not a small business Employer, the function of FWA is not to determine on the evidence whether there was a valid reason for dismissal. That is, the exercise in the present matter does not involve a finding on the evidence as to whether the Applicant did or did not steal the money. The application of the Small Business Fair Dismissal Code involves a determination as to whether there were reasonable grounds on which the Respondent reached the view that the Applicant’s conduct was serious enough to justify immediate dismissal. As such, the determination is to be based on the*

knowledge available to the Employer at the time of the dismissal, and necessarily involves an assessment of the reasonableness of the steps taken by the Employer to gather relevant information on which the decision to dismiss was based.”“

[28] Senior Deputy President O’Callaghan in *Harley v Rosecrest Asset Pty Ltd T/A Can Do International*<sup>51</sup> said:

“[8] For an Employer to believe on reasonable grounds that the Employee’s conduct is sufficiently serious to justify immediate dismissal, it is firstly necessary for the Employer to establish that the Employer did in fact hold the belief that as a matter of fact that (i) the conduct was by the Employee; (ii) the conduct was serious; and (iii) that the conduct justified immediate dismissal. This is to be contrasted to the provisions of s.387(a) where FWA, in determining whether there was a valid reason for the dismissal, must find whether the conduct in fact occurred.

...

[9] Secondly, it is necessary for the Employer to establish that there are reasonable grounds for the Employer holding the belief. It is thus necessary for the Employer to establish a basis for the belief held which is reasonable. In this regard it would usually be necessary for the Employer to establish what inquiries or investigations were made to support a basis for holding the belief. It would also ordinarily be expected that the belief held be put to the Employee, even though the grounds for holding it may not be. Failure to make sufficient inquiries or to put the accusation to the Employee in many circumstances might lead to a view that there were no reasonable grounds for the belief to be held.”

...

[29] We believe that the approach and observations in these two decisions are correct. There are two steps in the process of determining whether this aspect of the Small Business Fair Dismissal Code is satisfied. First, there needs to be a consideration whether, at the time of dismissal, the Employer held a belief that the Employee’s conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the Employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the Employer was correct in the belief that it held.

[30] Acting reasonably does not require a single course of action. Different Employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular Employer, in determining its course of action in relation to the Employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business Employer concerned.”

(emphasis added)

### *Sexual harassment – survey responses*

[100] An assessment of the ‘reasonable grounds’ involves an assessment of whether the belief held was reasonable. It does not have to be a correct belief, as set out in the case extract above, but it does need to be held on reasonable grounds, based on the appropriately ‘gathered’ information available to the Respondent at the time. How and why was the survey developed and implemented and a review of the responses and an accompanying investigation into information to review whether it represents ‘reasonable grounds’ for a belief that the Applicant sexually harassed other employees.

[101] In line with the Full Bench principles above, a two-step process is required considering, whether at the time of dismissal, the belief, the Employer held of the Employee’s conduct was sufficiently serious to warrant summary dismissal. Further, whether that belief was based on reasonable grounds, considering, whether reasonable inquiries, were made and put to the Employee for response, that is whether there was a reasonable investigation into the matter at hand.

### *Sufficiently serious conduct to warrant summary dismissal – assessment of the evidence*

[102] In the SBFDC case of *Cole v Roy Hill Station Pty Limited*,<sup>52</sup> it was set out that serious misconduct takes its meaning from Regulation 1.07, and in doing so includes wilful or deliberate behaviour by an Employee, that is inconsistent with the continuation of the employment contract. The notion of wilful or deliberate behaviour amounting to serious misconduct, is conduct which strikes at the heart of the employment relationship.<sup>53</sup> Against this ‘notion’ whilst not conclusive, none of the Employees (who had completed the survey) had reported the conduct, which was alleged to have occurred some time ago. The Employees had continued to work together, and some had continued their further friendship with him, during this time. At the time of the Applicant’s dismissal, unlike at the Hearing where further allegations of sexual harassment were provided in the witness’ statements, the Respondent had the survey responses only on which to base his belief on reasonable grounds:<sup>54,55,56,57,58,60,61</sup> This evidence had not been reviewed by the Respondent or put to the Applicant.

[103] With regard to the definition of serious misconduct under Regulation 1.07(3)(a)(iv) which includes sexual harassment, and where that conduct may also be inconsistent with the continuation of the Applicant’s employment. In this case, on the evidence there was no reported, related deterioration of the relationships between these Employees, as a result the alleged sexual harassment conduct. In accordance with the definition in Regulation 1.07(3)(a)(iv), such conduct is to have caused a serious and imminent risk to the health and safety of a person or the reputation, profitability or viability of the Employer’s business. Damage to reputation, profitability or viability of the business was not argued by the Respondent. However, the Respondent placed great weight on the fact that sexual harassment was named in the Fair Work legislation and on the stop order Bullying Form. He stated this caused him to include sexual harassment on his survey form. Contrary to this definition in Regulation 107(3)(a)(iv), no further submissions (against the legislative test for serious misconduct) were made by the Respondent on the impact on the health and safety of Employees, to support his belief or to meet the Regulation 1.07 test.



[104] For a matter to be ‘sufficiently serious’, the Code suggests that a referral to the police may be appropriate in serious matters.<sup>59</sup> In this case, the Respondent gave evidence that he made a complaint to the Queensland Police Service in May 2023,<sup>60</sup> some 3 months after the events and after the Applicant had lodged his unfair dismissal application. The Respondent’s representative stated that the Respondent was not the complainant in the matters and therefore he understood, this was why he could not be provided with a police complaint file number.<sup>61</sup>

[105] The Applicant agreed that sexual harassment was serious, and if genuine it should’ve been promptly reported to the police.<sup>62</sup> He agreed that purely based on the words in the surveys and later witness statements, his case looked poor.<sup>63</sup> However, he went on to clarify that if the Respondent really believed the matters were so serious, he could have reported it to the police immediately, or raised the allegations with him on 10 February 2023, when the surveys were filled out or prior to him going on leave to allow him to respond.<sup>64</sup>

*Belief of conduct must be made on reasonable grounds – sexual harassment consideration*

[106] In the matter of *Steri-Flow Filtration Systems (Aust) Pty Ltd v Craig Erskine*,<sup>65</sup> the Full Bench was of the view that the termination letter provides the best evidence of the Respondent’s belief at the time and the grounds for that belief, as the letter is contemporaneous with the dismissal.<sup>66</sup>

[107] The termination letter set out that the Respondent’s grounds for the termination of the Applicant’s employment was his reliance on the results obtained from the survey, he designed and implemented, (in response to the Bullying application).

[108] It is noted that in accordance with *Hart v Forex 1 Pty Ltd ATF Trading Rental Trust*,<sup>67</sup> the legislative intent of the Small Business Unfair Dismissal Code is to provide a simpler procedure for small businesses to navigate the unfair dismissal jurisdiction and for dismissal decisions by small business to not be subject to the same degree of review by the Commission if the Code has been complied with at the workplace level. However, the Code does not afford the protection or the opportunity for an Employer to dismiss an Employee, where the Employer has taken the required steps in manufacturing a set of circumstance deliberately designed to terminate an Employee. In a range of the other SBFDC decisions the reason for termination, was in the majority, an issue known between the parties, that had initiated the Employer’s belief. The Employer had then investigated the issue, sought a response from the Employee and the reasonable grounds in line with the process and were known between the parties. The current circumstances differed from this, neither party had any knowledge of the alleged sexual harassment prior to the Employer’s survey and no process equivalent to the required steps in forming reasonable grounds was followed. There were no related inquiries of the survey results.

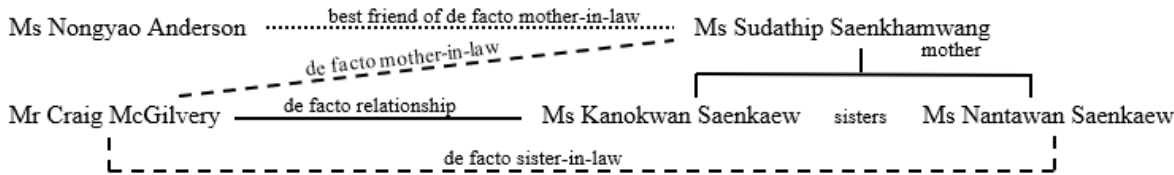
[109] Mr McGilvery volunteered in his evidence that prior to conducting the restaurant for more than a decade, he had a history of business involvement. He had conducted businesses as a building engineer and an electrician.<sup>68</sup> His evidence in relation to sending the termination letter to the Applicant was that he had just acted in response to a direction by the Commission’s case manager to send the termination letter. He endeavoured to convey that he was simply being compliant and that he had some naivete in relation to these processes. However, he also set out that he had conducted research in relation to these SBFDC matters<sup>69</sup> and made reference to his understanding of the legislative requirements for him to act quickly, in response to the alleged

sexual harassment.<sup>70</sup> The evidence was that the Respondent formulated the survey of Employees for bullying and sexual harassment in direct response to the Applicant’s Bullying application,<sup>71</sup> and set this out to the employees that was the reason for the survey and their required responses. The Employer’s evidence was that the survey was prepared to include sexual harassment, as he stated that the Commission’s Bullying application Form includes sexual harassment and Bullying.<sup>72</sup> The Respondent submitted that he was not aware of the alleged conduct, that had been occurring, but he had gained an awareness the sexual harassment required an urgent response. He stated this was the basis for termination without a due process.

[110] The submission on behalf of the Applicant was that the survey had been organised to orchestrate a situation where Employees provided false responses of sexual harassment and later false evidence against the Applicant.<sup>73</sup> The Applicant was not asked by the Employer to respond but he strongly protested against the allegations and that the evidence did not reconcile with his previously, friendly interactions with these Employees. Further, the termination of the Applicant’s employment had proximity to the verbal exchange with Ms Kanokwan Saenkaew for which the Applicant was blamed and the Applicant filing the Bullying application against the Employer and her. In addition, the Respondent intended to sell the restaurant to Ms Kanokwan Saenkaew prior to March 2023. The Applicant rejected all of the allegations of sexual harassment,<sup>74</sup> and Mr Wall on his behalf, stated that these false allegations had brought significant distress and shame on the Applicant.<sup>75</sup> The Applicant also emphasised the timing of the allegations in his submissions stating that the alleged incidents were produced as a result of the survey, which had been prepared and devised in response to the Bullying application and the Applicant’s limited work capacity after his WorkCover claim.<sup>76</sup>

*The survey*

[111] The assessment of sexual harassment allegations can be complex. This matter is also problematic as the Employees in this matter are not applicants, but survey, respondents. Accordingly, their allegations do not receive the direct attention initially in relation to the dismissal. The small-business fair dismissal code tests are firstly being applied in this dismissal matter at this stage. The employers, reasonable grounds are being tested in the way the information from the survey was gathered the survey results, and then the further alleged sexual harassment allegations that form the witness statement evidence for the hearing. Under the small business fair dismissal code tests. It is not necessary to make a finding as to whether the conduct occurred. However, it is relevant given the dismissal by the employer was activated based on the survey results to look at the nature of the responses. It is relevant to note the familial and friendship connections between the employees who answered the survey and the Respondent owner. The following table presents the connections:



[112] On the evidence, there were compelling reasons for the Employees to complete the survey in the manner they did. The Respondent had been annoyed at the Applicant for filing his Bullying application, with his partner as the named person. He had set out in the introduction

to the survey that it was developed in response to the Applicant's Bullying application, the Employees had an awareness of why he was doing the survey and that it was only provided to current female Employees. The survey and the responses were completely at odds with the evidence of the close workplace relationships and friendships the Respondent was also part of. The Applicant and a number of the Employees conceded to these ongoing friendships. Further, the Respondent did not test the allegations with the Applicant, taking these interrelationships into consideration and the Applicant's sexual orientation.

[113] Ms Kanokwan Saenkaew (the Respondent's de facto partner), Ms Nantawan Saenkaew (the Respondent's de facto sister-in-law) and Ms Patsachol Kumpukheaw (working holiday visa Employee) also reside at the same address with the Respondent.<sup>77</sup> Four of the Respondent witnesses/survey Respondents were working holiday visa Employees, reliant on the Respondent for continuing employment:

- Ms Saruttaya Naiyana
- Ms Patsachol Kumpukheaw
- Ms Ms Chutima Pakdeerat (not called at Hearing)
- Ms Nuttida Penthiya (not called at Hearing)

[114] Further, Ms Nantawan Saenkaew (the Respondent's de facto sister-in-law) who completed the survey on 10 February 2023, set out in her witness statement that she had not been employed by the Respondent since June 2022.<sup>78</sup> It is improper that a survey was sent to her. Ms Sudathip Saenkhamwang (the Respondent's de facto mother-in-law), who gave evidence at the Hearing, she was employed at the time of the survey but did not complete it at the time, as she was away on leave.<sup>79</sup> The Applicant's evidence was that there was also a young male Employee, employed at the time, who did not receive a survey.<sup>80</sup> It was inferred by the Applicant's representative that the Respondent did not have influence over him, as he was not Thai and was not subject to a visa or a familial connection.<sup>81</sup>

[115] The evidence was that the Respondent expected the survey responses to be returned within 24 hours. Chronologically, this was prior to the Applicant going on leave. The Respondent's evidence was that there was limited contact in providing the survey,<sup>82</sup> however the influence he had over several of the Employees, set out above for their employment and accommodation must be considered when evaluating this evidence.

[116] The allegations are not diminished or dismissed, however as the Applicant assessed it is difficult to obtain additional verification evidence, due to the passage of time for the alleged incidents of sexual harassment (for example, Nantawan no longer being employed by the Respondent for over 8 months), the evidence was that there was no available CCTV footage now for the alleged incidents. However, as set out earlier, the CCTV footage was obtained for the verbal exchange between the Applicant and Ms Kanokwan Saenkaew in December 2022. However, when Ms Kanokwan Saenkaew was asked if there was any footage of the alleged sexual harassment incidents, she stated she had not seen any. She did not indicate whether any footage had been searched for. None of the sexual harassment allegations had been previously reported by the Employees, of the Respondent.<sup>83</sup> It is emphasised that no weight is placed on the delay in reporting as often occurs in matters of sexual harassment. The Respondent also stated that he had sought out and retained a copy of the footage 'barking' incident from December 2022 which he stated he considered minor, and provided the Applicant only a warning for this.<sup>84</sup> It is difficult to reconcile then, that upon learning of the alleged sexual

harassment against some of his Employees, which he considered so serious,<sup>85</sup> that he did not press the Employees for when it occurred or take the same step to review the footage for substantiation of the incidents. Further, if the sexual harassment was as frequent as Ms Nantawan Saenkaew and Ms Nongyao Anderson alleged, there may have been a likelihood of some video evidence. It is inconsistent that if Ms Nantawan Saenkaew informed her sister, Ms Kanokwan Saenkaew of the harassment at the time, that neither of them thought to retrieve or review the footage as evidence at the time or at the time of Hearing or to tell the owner or partner. Though no ‘actual evidence’ is required in order for a reasonable belief to be formed prior to termination, where a process is conducted, this is relevant to assessing the allegations and the evidence and to the objective assessment of the reasonable grounds, for the belief.

[117] The following extract from the case authority of *Pinawin T/A Rose.Vi.Hair.Face.Body v Domingo*<sup>86</sup> (‘*Pinawin*’) was sent to the parties to ensure there was clarity in relation to the Small Business Fair Dismissal Code statutory test that needs to be applied in relation to a termination of employment, and its assessment:

*“Normally in order to hold a belief on reasonable grounds it will be necessary to have a discussion with the Employee about the perceived serious misconduct and pay regard to the explanations and views given by the Employee.”*<sup>87</sup>

*No investigation of alleged conduct prior to dismissal*

[118] On the evidence, the Respondent did not set out that any investigation or discussion were undertaken. The only further steps taken, other than collating the survey responses, in forming his ‘belief on reasonable grounds’ that the Applicant had done the alleged acts.

[119] However, the conclusion must be drawn on the tests applied to the SBFDC; that the belief was held on reasonable grounds. To establish reasonable grounds requires the tests of gathering the information and investigating and relevantly notifying the parties of the reasons and seeking relevant responses. None of those steps were taken.

[120] The Respondent representative’s submission was that the survey responses were sufficient for the Respondent to have formed the reasonable belief.<sup>88</sup> In his witness statement, Mr McGilvery set out his research:

*“I researched what action I should take, and I found that if the Bullying and sexual harassment was sufficiently serious, the offending Employee’s employment could be terminated immediately without a Notice of Termination. I kept a copy of the page on the website that I relied upon.”*<sup>89</sup>

*“The website indicated that I could terminate Tui’s employment by following the Small Business Fair Dismissal Code Checklist. I used the checklist to determine whether Tui’s employment could or should be terminated.”*<sup>90</sup>

*“...At no stage did [case manager] or anyone else suggest to me that I needed to provide Tui with an opportunity to respond. I genuinely understood that, due to the volume of uncontradicted evidence from multiple sources which appeared to me to be genuine, I could terminate Tui’s employment immediately.”*<sup>91</sup>

*“Even if I had met with Tui before his employment was terminated or upon his return from Thailand, I still felt compelled to terminate his employment because of the multiple serious allegations of Bullying and sexual harassment made against him and my obligation to protect my Employee.”<sup>92</sup>*

*“I made a decision that the behavior reported to me by my Employee was serious misconduct. Even if Mr Saengtes or Ms Sanohpin were employed by me at the time of the questionnaire and even if they responded advising they hadn’t observed any Bullying or sexual harassment by Tui, there was sufficient complaints that I would still have to proceed with the course I took. I genuinely believed that I was required by law to act in the way in which I did.”<sup>93</sup>*

[121] This evidence of the Respondent demonstrates that the test of the Employer holding a belief on reasonable grounds cannot be made out. He researched his plan, activated the survey and on an arguably a pre-meditated basis, he did not investigate or test the allegations, with the Applicant. He then stated, he was directed by the case manager to send the termination letter to the Applicant. Given the way in which he gathered the allegations and did not investigate them or seek the Applicant’s response, the Respondent’s belief therefore cannot be considered to be held on reasonable grounds.

[122] The implementation of the survey is not a regular course for an Employer responding to a Bullying application. The Respondent did not assess or investigate the Bullying allegations that the Applicant made against his defacto partner. Instead, on the evidence the survey was for the explicit purpose of gathering new evidence in a targeted manner, directly about the Applicant in response to his Bullying application. It contravenes the right of an Applicant to bring an application and to have it properly considered by the Commission and the Respondent.

[123] The measures taken were in the circumstances of an application being filed regarding alleged Bullying behavior by the Respondent’s partner against the Applicant. The Respondent had set out to investigate more broadly potential Bullying, name calling and sexual harassment at the business, but also by the Applicant.

[124] The survey questions disproportionately focused on the Applicant. The survey failed to name Ms Kanokwan Saenkaew who was at the time, subject to Bullying allegations. The Respondent chose to include a former Employee (the manager’s sister, as a survey recipient) who had left the business several months earlier. The Respondent chose not to provide the survey to the Applicant and one male Employee. The Respondent stated that the reason for the survey was to make further enquiries triggered by the Applicant alleging Bullying by Ms Kanokwan Saenkaew against him.

[125] Further noted is the consistent similarity between the survey responses. In considering the responses, it is observed that there are social and familial connections, and a dependance for either employment, accommodation both or continued visa sponsorship, present between the Respondent and the survey recipients.

[126] Further, in considering the lack of investigation, the circumstances at the time were that Ms Kanokwan Saenkaew was in a defacto relationship with the Respondent, and it was

announced on 30 January 2023 that she would be taking control of the business and that the Respondent received the bullying application from the Applicant with Ms Saenkaew as the named person. He had also recently been given comparatively different disciplinary responses to the Applicant and his partner for similar conduct in an exchange at work. He had given the Applicant a warning.

[127] In assessing whether the Respondent conducted a reasonable investigation in the matter, of the workplace issue between the Applicant and Ms Kanokwan Saenkaew stated no investigation was undertaken prior to the warning.

[128] Part of the importance of referring to this distinction in the evidence is that the test under the Code is at the time of the dismissal, whether the Respondent held a belief on reasonable grounds in relation to the sexual harassment allegations, based on the available information from the survey at that time of the dismissal. (The evidence later provided in witness statements, prepared for the Hearing, refer to separate allegations of sexual harassment by the Applicant. These statements could not be relied on by the Employer in forming his belief, as that evidence was not available at the time of termination.)

[129] The Respondent did not engage in any further discussions with the Employees or the Applicant regarding testing the sexual harassment allegations, prior to the dismissal. Accordingly, the dismissal decision was made based on only those responses to the survey.

#### *Evidence of Sexual Harassment*

[130] Sexual orientation is a matter included in the sexual harassment definition and is to be considered with a range of other matters pertinent to circumstances such as a possible power imbalance. The Applicant made it clear he was called ‘Tui’ and ‘Jenny’ and was an openly ‘gay’ man.<sup>94</sup> This material is only referenced because the sexual harassment definition requires sexual orientation to be taken into account and it was argued as a significant part of the Applicant’s defence. The Applicant’s case was that his sexual orientation, contradicted the conduct alleged by the women. It would not be considered reasonable to make a determination as to whether an Employee had engaged in sexual harassment, without notifying the Applicant of the allegations and receiving their response and to test the allegations and the circumstances against the legislative definition of sexual harassment.

[131] The Respondent received survey responses alleging undated incidents of sexual harassment. From these responses, on the Respondent’s evidence he did not seek further information or perform any form of investigation including speaking to the Employees, reviewing CCTV footage or asking his partner, Ms Kanokwan Saenkaew, the Business Manager, about the alleged harassment of any of the other female Employees.

#### *No requirement for immediacy of action – procedural fairness required*

[132] In the case of *Chen v Australian Catering Solutions Pty Ltd T/A Hearty Health*<sup>95</sup> it was found in relation to the requirement of immediacy in a summary dismissal, that:

“[62] I do not consider that the Code’s ‘summary dismissal’ stream requires an Employer to dismiss an Employee ‘immediately’. The relevant provisions of the Code refer first

to the dismissal, which must be without notice or warning; and then to the Employer's reasonable belief, which is that the conduct is serious enough to justify immediate dismissal. The Code does not state that the dismissal will only be fair if it is effected immediately."

"[63] In my view, the Code contemplates some period between the conduct justifying immediate dismissal and the dismissal. It requires that the Employer must have a reasonable basis to believe that the conduct is sufficiently serious. It may take the Employer some time to satisfy itself that there is a reasonable basis for immediate dismissal. It may be necessary to conduct an investigation into the relevant conduct. Where an Employer does not dismiss an Employee immediately once it has investigated the relevant conduct, doubt might in some cases be cast on whether the Employer truly believed (on reasonable grounds) that the conduct was serious enough to justify summary dismissal."

[133] The Respondent did not put any of the allegations to the Applicant, prior to terminating his employment. A range of SBFDC case authorities set out the necessity, in defending that the Respondent held a belief on reasonable grounds, at the time of termination, that it was necessary to put those allegations to the Applicant for their response prior to the dismissal.<sup>96</sup> Given that the Applicant was on annual leave in Thailand for the restaurant shut down until March 2023, and none of the Employees would be working together during the shutdown period, there was no risk of Bullying conduct or sexual harassment occurring and nothing to necessitate the urgency to terminate the Applicant's employment. The Respondent could have either after the survey responses were received, and prior to, or on the Applicant's return, sought the Applicant's response to these allegations. The Respondent bears the onus to demonstrate the basis for their belief on reasonable grounds at the time of termination.

[134] The case clearly sets out, that the process can accommodate steps to assess the conduct such as some form of investigation to take place in order that the belief held can be on reasonable grounds. In the case of *Chen*, it was found that a 17-day period between the misconduct and the date of dismissal did not call into question the Employer's belief. Without an investigation the Employer's belief cannot be regarded as reasonable, or that the alleged conduct justified immediate dismissal. The evidence in the current matter was that there was no reasonable investigation, no notification to the Applicant or response sought, which negates those reasonable grounds existing for the Respondent's belief. The Respondent's claim that he was directed by the Commission to serve the termination letter early without providing the opportunity for the Applicant to respond, is not persuasive.

#### *Conclusion – SBFDC – jurisdictional objection*

[135] In all of the above circumstances and on the evidence, the conclusion that the Respondent held a belief on reasonable grounds at the time of termination, was not demonstrated against the SBFDC tests as set out in the Full Bench decisions *Piniwan*. The Respondent did not present sufficient supporting evidence of the reasonable grounds for his belief. It is necessary for the Employer to establish that there are reasonable grounds for its belief which would include a reasonable investigation and a reasonable opportunity for the Applicant to respond. However, in accordance with the Code the function of the Commission *it is not to determine on the evidence whether there was a valid reason for the dismissal.*<sup>97</sup> In

considering the application of the SBF Code to the current circumstances, no finding is made or required in relation to the veracity of the sexual harassment allegations. The conclusion reached on the application of the tests in accordance with the Code should not be interpreted as diminishing the seriousness of the sexual harassment allegations. It is not relevant whether the belief held is correct or not, the test is whether reasonable grounds associated with the belief can be demonstrated.

[136] In all of the circumstances of this matter, including the Employer’s communication to the Employees of the inappropriate reasons for conducting the survey; (to collect information on the Applicant in response to the Bullying application), the resulting allegations of sexual harassment against the Applicant and the Respondent’s reliance on them only, did not meet the tests for ‘reasonable grounds.’ In addition, the preparation of the termination letter prior to the completion of the Code checklist and the inclusion on the checklist by the Respondent that he provided a 24-hour period for the Applicant to improve his performance was deliberately disingenuous. A determination that the Respondent held a belief on reasonable grounds cannot be made out. The jurisdictional objection that the Respondent terminated the Applicant’s employment in accordance with the Code is not upheld.

## **SECTION 387**

[137] The jurisdictional objection of compliance with the Code, is dismissed therefore it is necessary to consider the termination of employment against the criteria of section 387.

### **Was the dismissal harsh, unjust or unreasonable?**

[138] It is necessary in considering whether the dismissal is harsh, unjust or unreasonable, to have regard to the matters in s.387 of the Act:

**“(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);”**

[139] A valid reason, for the dismissal should be “sound, defensible or well founded”<sup>98</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>99</sup>

[140] Section 387(a) contains a note with regard to sexual harassment conduct. Reference to sexual harassment has also been included in Regulation 1.07. The initial test for a valid reason, is the determination of whether in fact the alleged conduct occurred. Where a dismissal relates to an Employee’s conduct, the Commission must be satisfied that the conduct occurred and justified the termination.<sup>100</sup> The question of whether the alleged conduct took place and what it involved is to be determined on the basis of the evidence at the time of the termination. Accordingly in this matter, this would involve a consideration of the dismissal on the survey responses only, unless the post termination evidence of further allegation of sexual harassment is accepted.

### *Post-termination evidence – the test*



[141] The Respondent also relied on the additional evidence of alleged sexual harassment in the witness statements filed for the Hearing. The Respondent’s representative, however, made no application for admission of additional post-termination evidence to be considered. It is first necessary to determine whether the additional witness evidence, of alleged sexual harassment allegations provided for the Hearing should be admitted. While it is noted that the appropriate time for assessing the reasons for termination is at the time of dismissal, consideration of evidence obtained post-termination may be permitted to support findings, in relation to whether a valid reason existed at termination. This new evidence maybe admitted subject to certain tests<sup>101</sup> as set out below.

“[116] The appropriate time for assessing the reasons for termination is at the time of dismissal (17 March 2022). This was addressed in *CSL Ltd t/as CSL Behring v Chris Papaioannou*,<sup>27</sup> where the Full Bench of the Fair Work Commission found that:

“The tension between *Lion Dairy* and *Jetstar* is to be resolved by the adoption of the approach in *Jetstar*. In a dismissal related to the person’s capacity, s.387(a) requires the Commission to consider and make findings as to whether, at the time of dismissal, the Applicant suffered from the alleged incapacity. Such findings are to be based on the relevant medical and other evidence before the Commission.”

[142] In considering whether post termination evidence should be considered the Full Bench case extract is relevant to matters of Employee capacity being appropriately, assessed at the time of termination, however this principle of determining matters at the time of termination is also relevant to the consideration of conduct matters.

[143] In circumstances, where an Employer, as in the current situation is seeking to have admitted further evidence, that is to rely on details of conduct acquired after the dismissal, to justify the termination, this will depend on how the dismissal has been undertaken and whether the new material was available to the Employer at the time of termination.

[144] The Employer’s opportunity ‘to act now and defend later’ in a dismissal process is limited. That is an Employer will have challenges in later endeavouring to adopt or rely on post termination conduct that may have been available at the time of the termination, but for the fact that the Employer did not undertake an appropriate investigation or make sufficient inquiries of the Employee/s at that time of termination.

[145] The reliance on post termination conduct cannot be made simply on the basis of remedying a deficient process at the time of termination. That is, the Employee has the procedural right to be notified of the alleged misconduct, and to be afforded the opportunity to respond to it, prior to the termination taking affect. In the current circumstances, the evidence the Employer now seeks to rely on is, in terms of the additional evidence, recounted by Employees in their witness statements, prepared for the Hearing. The Employee responses provided to the survey, was the only evidence available at the time of termination. The additional evidence that forms the witness statements for the hearing may not have been available at the time of termination. That is, a reason that it may be considered as new evidence is that the Employer did not undertake an investigation or any discussions with Employees at

the time of termination. The Employer did not investigate the allegations of sexual harassment after the survey.

[146] This is the case where the Respondent has raised further evidence of sexual harassment allegations which may support the reason for termination, but it must be questioned whether the evidence was available at the time of dismissal, if the Employer had made the appropriate inquiries at that time with the Employees, and then the Applicant whose employment was terminated. The additional allegations of sexual harassment may have been made, however, that opportunity to test the availability of the evidence at the time of termination was not taken by the employer.

[147] Having said that sexual harassment evidence often requires the Commission to consider this carefully, given the complicated nature of allegations for individuals providing this evidence. The regular assessment of the evidence generally may not be applicable to sexual harassment evidence. The evidence is often traumatic for witnesses to recall or volunteer, often resulting in delay in doing so. Often false feelings of shame, embarrassment or associated anxiety effect or prevent the timely production of this evidence. Routine treatment or tests of the validity of this evidence should be exercised with caution.

[148] In the consideration of the post termination evidence, the circumstances of this case contrast to that of *Lane v Arrowcrest Group* which involved facts related to an accountant who was found to be engaged in embezzling at the time of termination. Post termination, further information came to light that supported the misconduct engaged in at the time of termination. The conduct had not come to the Employer's knowledge at the time of termination due to the accountant concealing the information.

[149] His Honour van Doussa J provides an illustration of this in that case. That is, it is open to the Employer to rely on circumstances as they existed at the time of termination to justify the termination, if the embezzlement by the accountant existed at the time of termination, but had it not come to light as the dishonesty of the Employee had contributed to concealing further evidence at the time of the termination this will be relevant.

[150] However, if the Employer had simply failed to make reasonable inquiries at the time of termination, this weighs against the reliance on the post dismissal evidence.

[151] In the current matter, relying on the further witness statements would provide evidence of sexual harassment that may support the dismissal if raised with the Employee at the time of termination. What must be taken into account is that the Employee, was not allowed an opportunity to respond to the new reasons for termination then, and further, there is no satisfactory evidence that this new material of other allegations of sexual harassment may not have existed at the time of dismissal.

[152] There is, however, satisfactory evidence in the current matter, that the Employer did not make relevant inquiries of those Employees, who answered the survey and who later make the allegations in the witness statements. To rely on more significant evidence now for the dismissal, deprives the Applicant of the necessary procedural fairness to have been notified of the conduct, and given an appropriate opportunity to respond prior to the dismissal.

[153] It would also be necessary to press the complainant's as to why they did not raise these more serious allegations of sexual harassment in the initial response to the Employer, or at the time of termination rather than three months later.

#### *Evidentiary Tests*

[154] Since the dismissal, the Respondent in the current matter gathered additional evidence and some of the witnesses at Hearing were different to those who completed the original survey. The further allegations of sexual harassment (in the witness statements for the Hearing) were more detailed and different, than the material provided in the survey responses. Importantly, at the time of dismissal, the Respondent had not conducted an investigation on the allegations in the survey. Accordingly, no further information was available at that time. Some allegations provided broad timeframes of when the conduct allegedly occurred, while others were undated. It is recognised that in examining sexual harassment allegations delay in reporting allegations is often a feature of this evidence and should not alone be relied on to discount this evidence.

[155] The allegations of sexual harassment are considered against the tests s28A and the relevant case law. In the first instance the following steps through the evidence and a range of the Applicants objections to the allegations. The allegations of sexual harassment in the post termination evidence as well as the original survey responses are considered against s28A (repeated for convenience below) and against the elements set out in *Beesley and Hughes Lawyers v Hill*<sup>102</sup> below.

#### **“s 28A Meaning of sexual harassment**

(1) For the purposes of this Act, a person sexually harasses another person (the *person harassed* ) if:

- (c) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (d) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (e) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (f) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (g) any disability of the person harassed;
- (h) any other relevant circumstance.

(2) In this section:

**“conduct of a sexual nature”** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.”

### *Sexual harassment – consideration*

[156] In *Beesley and Hughes Lawyers v Hill*,<sup>103</sup> the Full Court of the Federal Court of Australia observed three elements of unlawful sexual harassment for the purposes of section 28A. These are summarised below:

1. The first being that the Court was to decide whether there has been any sexual advance, request for sexual favours, or other conduct of a sexual nature (as defined in section 28A(2) of the *Sexual Discrimination Act 1984*. This is a question of fact for the Court to decide for itself.
2. If there has been relevant conduct of a sexual nature, the Court must then decide if the conduct was unwelcome to the person allegedly harassed. This is a question of subjective fact, which turns only on the attitude of the person to the conduct at the time; their actual state of mind. Conduct will not be sexual harassment if it was not actually unwelcome in this sense. Ordinarily this will be proved by the recipient of the conduct giving evidence that the conduct was unwelcome, although this evidence may be available by a variety of means and in some cases, may be painfully obvious.
3. Once it is established that there was unwelcome conduct of a sexual nature towards another, an objective limit is applied within the scope of section 28A. This objective standard does not relate to the first two issues (whether conduct of a sexual nature occurred, or whether it was unwelcome). The ‘circumstances’, which are defined broadly but not exhaustively in s.28A(1A), must be such that a reasonable person would have anticipated the possibility that the person allegedly harassed would be offended, humiliated or intimidated by the conduct. The reasonable person is assumed to have some knowledge of the personal qualities of the person harassed, and the extent of their knowledge is a function of the circumstances in s.28A(1A) that must be taken into account.

[157] In terms of s28A and the tests in the above case, the alleged conduct complained of in the survey responses and the witness statements would, in assessing the conduct as allegations meet the first 2 tests being conduct of a sexual nature. However, it is then necessary to look at the objective standard as to whether a reasonable person would be offended, humiliated or intimidated by the conduct taking into account the personal qualities, the group of women, any power imbalances, the sexual orientation and the friendships.

[158] The witnesses gave several reasons in their statements for not informing the Respondent of the conduct at the time of the survey in February 2023, as follows:

“Nantawan stopped working at the Choc Dee in June 2022. She told me [Kanokwan] it was because she could not work with Tui any longer. As she had arranged to take up another job, I did not say anything to Tui or Craig.”<sup>104</sup>

“While inappropriate touching is not acceptable in Thai culture, we are also taught to respect our elders. It was a combination of these reasons why I [Nantawan] did not tell the owner, Craig about Tui’s poor conduct.”<sup>105</sup>

“Tui’s poor behaviour was a common topic of conversation with the female Employee of Choc Dee, but I [Patsachol] never told the owner, Craig McGilvery because I didn’t want to get into trouble, and I wanted to avoid conflict or confrontation. It is also a requirement of my visa that I be employed, and I didn’t want to jeopardise that.”<sup>106</sup>

(emphasis added)

[159] The Applicant’s representative was critical of the truthfulness of the witness’ evidence. None of this above information was available to the Respondent at the time of the dismissal, as the Respondent did not investigate the allegations. The evidence from the Respondent is that apart from the termination of the Applicant’s employment, he did not do anything other than act on the untested survey results procured from his survey and he then drafted the termination letter immediately and sent it to the Applicant. The Respondent stated in relation to the reluctance of the employees to communicate the sexual harassment allegations:

*“No one told me because they didn’t want to create a problem at work apparently, and this is what they’re - this is what they’re saying now. I’ve asked them, ‘Why didn’t you tell me before?’ And they knew how important Ratchapol was to the business. So that is why they preferred, especially in Nantawan’s and Nongyao’s case, to leave the employment of Choc Dee, rather than stay and put up with his harassment.”<sup>107</sup>*

*“and they were reticent about doing anything like that. They didn’t want to start any more problems. Both Nantawan and Nongyao left Choc Dee’s employment due to problems with Ratchapol, of what he was saying and doing. I did not know at that stage any of those previous consequences, why they actually decided to leave. They just said they can’t work with Tui any more, so they actually left. Even though Nantawan was living in my house at (address supplied) and even though Nongyao Anderson had been a long-term Employee - she basically started the first year I bought the restaurant, 2011 - but no one at any stage instigated to me or informed me that Tui had been sticking a spoon up someone’s backside, groping them on the behind, touching their groin, (indistinct) - I did not know any of that until the questionnaires come back.”<sup>108</sup>*

[160] In weighing the evidence set out previously, there were various indicators of the Respondent’s control or influence over several of the Employees that completed the survey, and also those that later gave evidence. As such, I do not consider the Respondent’s evidence in accepting the reasons why the witnesses did not come forward earlier, is the only reasonable consideration in the circumstances. The employer also makes reference to information that was not available at the time of the dismissal and was prepared after the termination for the Hearing. The employees were aware that the Hearing was in relation to Applicant contesting the termination and that the Employer was defending his case based on the employee’s evidence.

[161] All of the Employee witnesses were Thai speaking, and at various times relied on the interpreter. Mr Wall in his knowledge and daily interactions with Thai people generally indicated:

*“...they don’t understand, you know, to say that they’re going to tell the truth doesn’t mean that they’re always going to tell the truth. I think they need to be made aware of the repercussions of that.”<sup>109</sup>*

[162] Mr Wall reminded the Employees who were on working visas and who required ongoing work from the Employer to be truthful in their evidence. This issue of witness credibility is taken into account, but all of the witnesses' allegations are considered against all of the evidence available of the personal qualities and dynamics of the relationships, in terms of considering the objective standard as to in circumstances where the conduct occurred, whether a reasonable person would be offended, considering as well as other matters including the Applicant's friendships and interactions with the other employees. Those assessments are undertaken below. The evidence is not diminished on the basis of Mr Wall's remarks as set out. I do not place weight on that ground assessment of the post termination evidence in the witness statements should not be accepted in a finding as to whether the termination is unfair. The Employer failed to undertake an investigation from which the information may have been produced at the relevant time of termination. However, if I am wrong on that determination, given the volume of further evidence provided an analysis of this post termination evidence from the witness statements and also taking into account the survey responses is undertaken below for completeness.

*Nantawan Saekaew*

[163] Ms Nantawan Saekaew was questioned at Hearing about the alleged sexual harassment, noting the significant difference between her survey response and her witness statement. Her allegations in the evidence for Hearing showed the starkest difference to her survey response. On her survey, which is again noted to have been provided to her despite her not being employed by the Respondent for over 8 months, set out the following:

*"Yes, I have. I have seen and heard that Ratchapol (Tui) harassed other Employee. One of them was me. I used to face dirty jokes from Tui many times also be harassed by touching my buttocks. I tried to let it go because I know that's not the kind of person he is, but I should not."<sup>110</sup>*

(emphasis added)

[164] At Hearing however, her allegations were significantly more detailed and graphic as follows:

*"I usually just ignored his comments and didn't respond to him but after a while, about the middle of 2021, he started touching me inappropriately. He would usually touch me on my bottom but once touched me in the groin area. I told him repeatedly not to touch me. I think he was trying to be funny as he would laugh when he did it and it was if he was just trying to get a reaction from me or make me feel uncomfortable. It would happen once or twice a week."<sup>111</sup>*

*'I knew he was gay, but he would often say loudly to me and other Employee that he was "going to fuck" us'. Regardless of sexuality she says 'I still did not like it'.*<sup>112</sup>

*"He said he would grab me and fuck me and make me his wife."<sup>113</sup>*  
(emphasis added)

[165] Lesser weight can be attributed to this witness' evidence in answering the survey as an employee as she had not worked there for 8 months, she was connected to the Respondent's de facto partner, being her sister. She had been deliberately asked to complete the survey, despite no longer being an employee. In understanding the objective standard in relation to these allegations, the Applicant raised that Ms Nantawan Saekaew had travelled with him in February 2022 to Thailand for a holiday.<sup>114</sup> The evidence was that Ms Nantawan Saekaew had booked the flights for the two of them with the Applicant's credit card, repaying him later and that they sat next to each other on the flight.<sup>115</sup> In response to the allegation that he had used poor language with her, the Applicant refuted this, stating he was always positive and that he believed her motivation for providing a witness statement (providing allegations and evidence against him) was to maintain the 'family' business given her sister was about to take this over as the Respondent was retiring. In addition to support her sister, Mr Nantawan Saekaew's sister in preserving her employment and rebutting the bullying application and to also support her mother (another witness, Ms Sudathip Saenkhamwang), to retain her employment.<sup>116</sup>

[166] Ms Nantawan Saekaew submitted that she informed her sister, Ms Kanokwan Saekaew, who was also the Business Manager, of the harassment, and that she had stated that she had advised her not to say anything to the Applicant or her de facto partner, the Respondent.<sup>117</sup> It is recognised that this is often a response in sexual harassment matters and should not uniformly discredit the evidence.

[167] Ms Nantawan Saekaew and her sister Ms Kanokwan Saekaew, who had familial connections and lived with the Respondent. If this conduct had been going on for up to 18 months as the Respondent suggested,<sup>118</sup> it seems remote that based on the strong, and articulate manner in which the sisters gave evidence, that they would not have informed the Respondent earlier, or taken a response to the conduct. As such, I consider that this witness has not provided sufficiently reliable evidence, given that she was no longer an Employee but sought to be involved and given her connection to the Respondent and sister as Business Manager to support a conclusion that this conduct occurred on the balance of probabilities.

#### *Kanokwan Saekaew*

[168] In response to the survey, Ms Kanokwan Saekaew (the Business Manager) stated:

*"Yes, I've heard Tui said not a good words to Employee including myself. And I've seen Tui tried to kiss my sister (Nantawan) and other Employee also he touched my sister's buttocks and other Employee too."*<sup>119</sup>

(emphasis added)

[169] In her witness statement, she stated:

*"in the first half of 2022 I saw him touch Nantawan's bottom on a few occasions, and I saw him try and kiss the back of her neck."*<sup>120</sup>

*"in 2022 I saw him poke Nongyao, the second chef in the bottom with a large curry spoon. She told him to leave her alone."*<sup>121</sup>

(emphasis added)

[170] The Applicant set out that limited weight can be placed on this evidence, given her close relationship to the Respondent, as his de facto partner, her dissatisfaction with the Applicant's ability to work only limited hours while on WorkCover, and due to him standing up for Employees who were allegedly not given their required minimum hours on casual shifts.<sup>122</sup> Regarding the sexual harassment of her sister Ms Nantawan Saekaew she allegedly witnessed, the Applicant asked why Ms Kanokwan Saekaew would not have raised it with him, told the Respondent, or taken it to the police,

[171] With regard to the reliability of the evidence, when asked about whether the Respondent was selling the business to her, as per his letter to Employees on 30 January 2023 and her follow up letter on 14 March 2023, she stated there were no actual plans to transfer the business, they were merely preparing for the future if required.<sup>123</sup> This is in direct contrast to the Respondent's evidence and the dates the Respondent set out in his letter dated 30 January 2023 to Employees that Ms Kanokwan Saekaew would be taking over as of March 2023 and which notes several months of interest in purchasing the business.<sup>124</sup>

[172] Ms Kanokwan Saekaew was emphatic in her denial that the Respondent had not hired a new male Employee in the kitchen since the Applicant's departure,<sup>125</sup> despite evidence of the Applicant's representative that there was a further male Employee employed.<sup>126</sup> The Applicant's representative sought Employee records to confirm this,<sup>127</sup> which were provided prior to closing submissions. These records showed that there was a new male Employee who was employed by the Respondent as a kitchen hand. However, the Respondent's representative sought to clarify that Ms Kanokwan Saekaew had been responding in the negative to the male Employee being a younger male replacement of the Applicant's head chef role, not that there were no male Employees at all.<sup>128</sup> No reliance is placed against the evidence of Ms Sakaew on this matter. Her explanation recognised with the evidence given.

[173] Further in relation to the different disciplinary outcomes afforded by the Respondent to the Applicant and his partner, the preferred evidence contrary to the Respondent's evidence was that Ms Kanokwan Saekaew had not received a warning as the Applicant had for the 'barking incident', and as the Respondent suggested in his earlier evidence.<sup>129</sup> This discredited her evidence that she had not received a warning.<sup>130</sup> Due to her giving a conflicting answer to the same question, (put to the Respondent) even with the clarification of the translator, this led to a conclusion that her credibility as a witness in this matter and in turn as a witness of the alleged sexual harassment of her sister, was considered to be unsatisfactory. As such, I consider that this witness has not provided evidence to the standard required for the serious allegations, to support a conclusion that the alleged conduct occurred on the balance of probabilities.

*Sudathip Saenkhamwang*

[174] Ms Sudathip Saenkhamwang was not surveyed in February 2023 as she was in Thailand at the time,<sup>131</sup> but provided a witness statement alleging sexual harassment as follows:

*"He would also touch me inappropriately. This started in about the second week of my return to work in July 2022. He liked to slap my bottom when I was bending over the sink. I gave a little scream and moved away from him when he did this because I did not like it."<sup>132</sup>*



*“I also saw him touch or poke Nongyao on the bottom a few times...”<sup>133</sup>  
(emphasis added)*

[175] The following questioning was undertaken by the Applicant’s representative also at the Hearing. The Applicant’s representative emphasised that this evidence was never raised in her witness statement and he indicated that the evidence was evolving and untruthful:

“MR WALL: *Where? Where he touch you? On the breast? On the bum?*

WITNESS: *Okay. He came behind my back while I was packing up and washing wet bowls, packing things. He used to put his finger – how do I put it? He used to put his fingers each other and put it behind my back.*

MR WALL: *I don’t quite understand. Crossed finger? Did you say crossed?*

WITNESS: *Yes.*

MR WALL: *Go like this? (Mr Wall demonstrated a gesture)*

WITNESS: *Yes. (The witness demonstrated a gesture)*

MR WALL: *Where he put the finger? In your back? Or your bottom?*

WITNESS: *In my bottom*

MR WALL: *In your bottom?*

WITNESS: *Yes.*”<sup>134</sup>

[176] It is noted that Mr Wall, in closing submissions raised the following general remarks regarding the above exchange and the nature of the evidence:

*“...that witness had her fingers crossed behind her back. What she failed to do when she brought her hand out to the front of the court is that those fingers were still crossed which means for Thai people to do that it means they’re usually lying. She forgot to uncross them when she brought her fingers out to the front.”<sup>135</sup>*

[177] No inference or weight is attributed to this pejorative assessment by the Applicant’s representative of the evidence. However, more weight is assigned to the changing; evidence the continually developing allegations, a number of the witnesses provided.

[178] In response, the Applicant also suggested that little reliance should be placed on her allegations of sexual harassment due to several reasons:

- the witness’ personal relationship to the Respondent as the mother-in-law of his partner;
- that she had lied in her statement that she had only met the Applicant when she commenced work at the Respondent’s business in July 2022, when they had actually met before this;

- the Applicant had lent her money for her gambling problem.<sup>136</sup> The Applicant provided several bank records from 2021 to prove this prior relationship, and that the money had not been repaid.<sup>137</sup>

[179] The Applicant submitted that he believed Ms Sudathip Saenkhamwang had provided a witness statement against him so that she didn't have to pay back her debts and to avoid her daughters finding out about her gambling.<sup>138</sup> In her oral evidence, Sudathip Saenkhamwang conceded that she had incorrectly stated that she had only met the Applicant in 2022,<sup>139</sup> but submitted she had repaid all money owed to the Applicant. Her evidence on this was hesitant and no supporting evidence on the particulars of repayment was presented.<sup>140</sup>

[180] The Applicant questioned why Ms Sudathip Saenkhamwang would not have informed her daughter Ms Kanokwan Saenkaew as the business manager, or the Respondent, as a close family member if she had experienced or witnessed the Applicant touching her best friend (Ms Nongyao Anderson). These questions are relevant. In the circumstances, I place reduced reliance on the evidence of this witness due to the factors set out above.

*Nongyao Anderson*

[181] Ms Nongyao Anderson was questioned at the Hearing about the alleged sexual harassment she had been subject to. In her survey response she set out:

*“Yes, I’ve seen and heard Tui said bad words to Employee a few times and a few times he has touchd me and tried to kiss other Employee including myself.”<sup>141</sup>  
(emphasis added)*

[182] At Hearing however, she set out in much more detail, what the Applicant was alleged to have done:

*“I can recall that he touchd me inappropriately on at least three occasions. It may have been more than three because I just tried to ignore him and get on with my job. I specifically recall the three occasions because I objected very strongly to his actions.”<sup>142</sup>*

*“In early 2022, I was working at my bench and when he passed behind me, he thrust his groin up against my backside. I don’t know if he was trying to make a joke, but I did not appreciate it and told him so.”<sup>143</sup>*

*“On at least one occasion during 2022, he poked a spatula into my bottom. This made me feel annoyed and I told him to get away from me.”<sup>144</sup>*

*“In January 2023, he was in a happy mood. I think he had won some money or something like that. He kissed me on the back of my neck twice from behind. I told him that I didn’t like it, to not do it again...”<sup>145</sup>*

*“Tui would inappropriately touch other Employee more than me because I would very strongly react to his approaches. He would often harass Nantawan by touching her bottom her arm and once, I saw him touch her groin area.”<sup>146</sup>  
(emphasis added)*

[183] The allegations in her witness statement were a significant departure from her survey response, as with Ms Nantawan Saenkaew. The most significant being that the Applicant assaulted her with a kitchen implement, which had never been raised before, and that the Applicant had not had the opportunity to refute prior to the Hearing. In response, the Applicant noted this witness's close relationship to Ms Sudathip Saenkhamwang, the Respondent's de facto mother-in-law, and cited this as a reason for her providing a statement against him. The Applicant submitted that Ms Nongyao Anderson was also in debt to him, and that if had she actually witnessed him sexually harass Nantawan Saekaew as she alleged, she would have told Ms Sudathip Saenkhamwang (Nantawan's mother) who would have taken action. He also submitted that it was against his culture to disrespect his elders, including Ms Nongyao Anderson, who was similar in age to his mother. He stated he loved his Thai mother and would not disrespect a woman.<sup>147</sup>

[184] All of the evidence apart from these allegations, was that the Applicant and the witnesses were friends and interacted accordingly. In circumstances where the witness had said his alleged behaviour was appalling and unwanted, it was also submitted that at the same time she had dropped him home from work some nights,<sup>148</sup> he gave her his Buddha necklace<sup>149</sup> and she gave him towels as a gift.<sup>150</sup> Additionally, the Applicant submitted he regularly lent her money for gambling, which he stated would not be paid back now he no longer worked with her.<sup>151</sup> The Applicant at the Hearing, brought the towels she had given to him during their relationship as co-workers at the restaurant, and he seemed greatly aggrieved that someone who could provide such a gift to him would then be able to accuse him of sexual harassment.

[185] Ms Nongyao Anderson when giving her evidence was quite upbeat, for having accused the Applicant of sexually harassing her on multiple occasions. Though it is not assumed that all witnesses will present the same, was and it is acknowledged that providing evidence is difficult and can bring varied reactions for witnesses particularly in relation to sexual harassment allegations. It is not always that a witness will appear with some fear or deference for their alleged perpetrator, there were no indications in her demeanour of concern or a wariness of him, to match the alleged acts, she accused the Applicant of. I prefer the Applicant's genuinely concerned evidence, including that he had great respect for his elders, including Ms Nongyao Anderson.<sup>152</sup> The Applicant went on to submit that in Thai culture, respect for elders is very important and to suggest that he would sexually harass Ms Anderson would be a great breach of this,<sup>153</sup> and he stated he felt great shame from the allegations. It was submitted on behalf of the Applicant that the other witnesses' evidence seemed to become more varied and severe, the more time the witnesses had (between the survey in February 2023, their witness statements in May 2023 and the Hearing in June 2023). Taking into account all those matters as set out, based on the evidence, it does not support a conclusion that this conduct occurred on the balance of probabilities.

*Sarattaya Naiyana and Patsachol Kumpukheaw*

[186] Both Ms Sarattaya Naiyana and Ms Patsachol Kumpukheaw were cross examined at the Hearing. It is noted that they were seeking support from the Respondent, to gain permanent residency,<sup>154</sup> requiring a good employment history. The Applicant's representative suggested that this was why they had accused the Applicant on behalf of the Respondent of sexual harassment.

[187] In their surveys, the witnesses alleged:

Ms Saruttaya Naiyana

*“Yes, I used to seen and heard he said a lot of bad words to all Employee and touched my bottom.”<sup>155</sup>*

Ms Patsachol Kumpukheaw

*“Yes, I have seen Tui touch other Employee’s body without their permission, ex: kissing cheek or touching bottoms. And honestly, I feel uncomfortable to work with him as I always heard he talking bad words or making joke with other Employee’s body (body shaming).”<sup>156</sup>*

(emphasis added)

[188] The evidence of these witnesses is similar, this does not provide grounds to dismiss it but the link to the owner, and the basis on which he required answers to the survey and then further the evidence at the Hearing, has to be taken into account in examining the evidence.

[189] At Hearing, the witnesses’ evidence was:

*“Between July 2022 and October 2022, he touched me [Saratuttaya] inappropriately on the bottom about ten times. This often involved his hand brushing against my bottom when I was unpacking the dishwasher. At the end of my shift when the restaurant is quieter, I would dry and polish the dishes in the dishwasher and put them away. I face the dishwasher when I do this and when Tui walks past, he would brush his hand against my bottom.”<sup>157</sup>*

*“I [Saratuttaya] saw him touch other Employee on the bottom when I delivered order dockets to the kitchen. When I had just started in June 2022, I saw him touch Nantawan on the bottom regularly. I also saw him touch Nongyao on the bottom with a curry spoon. When he poked her in the bottom with the spoon she gave a little scream and moved away.”<sup>158</sup>*

*“I [Patsachol] saw him touch [Nantawan] on the bottom at least once a week as she worked in the kitchen with him. Sometimes he would squeeze her bottom and on other occasions he would quickly pat or brush against her bottom and move on”<sup>159</sup>*

*“I [Pataschol] also saw him touch Nongyao on the bottom a few times...”<sup>160</sup>*  
(emphasis added)

[190] In response, the Applicant submitted that reduced reliance should be placed on their evidence. It is discredited as they were on working holiday visas and therefore beholden to the Respondent and Ms Kanonkwan Saenkaew for continued employment.<sup>161</sup> The Applicants representative submitted that they gave false evidence as they didn’t want to lose their jobs.<sup>162</sup>

[191] In support of the Applicant’s contention of a lack of validity of the evidence of the witnesses on working holiday visas, one of his own witnesses (as set out) also declined to give evidence in the proceedings as per the statement due to the gratitude to the Respondent for being

her first Employer in Australia.<sup>163</sup> It was submitted that a negative inference can be drawn that the Respondent held a position of influence and power as the Employer of the two witnesses on working visas. It was submitted that in giving their evidence in the proceedings, that they had witnessed or experienced sexual harassment by the Applicant and this should be viewed as wanting to support the Respondent's case.

[192] The circumstances with the witness evidence of these employees was also that their allegations changed between the survey and at the Hearing. It is significantly reinforced that this is not determinative of the efficacy of their evidence but the circumstances that these witnesses were dependent on the Respondent for ongoing work necessary to their working visas. This has to be taken into account in the reliance that can be placed on their changed evidence. The evidence developed in line with the Respondents required outcome of the proceedings.

[193] The Applicant's termination was considered on the basis of the associated witness evidence, which the Respondent did not test the evidence prior to the termination. The evidence was often inconsistent and did not reconcile with the ongoing workplace relationships with the Applicant.

[194] The reasons for the termination were based on responses to a survey which the Respondent had initiated in reply to the Applicant's Bullying application, and the employer had advised the employees of the reason the survey was instituted. The further evidence of allegations of sexual harassment presented at Hearing was not available at the time of termination. The evidence collectively has been taken into account on a comparative basis to evaluate the original survey responses the termination was based on.

[195] Whilst sexual harassment in any form cannot be condoned, the Commission has an obligation to test the allegations in this matter. The Respondent clearly set out he had researched the small business dismissal Code and found that matters of sexual harassment could form the basis of a summary dismissal. He erroneously relied on a direction for the Bullying application responses to be served on the Applicant as a guise to send the termination letter to the Applicant. The survey responses had not been tested in an investigation or put to the Applicant for his response at the time of termination and the evidence of the Applicant in response to the allegations was genuinely conveyed at the Hearing.

#### *Consideration of the alleged conduct on the 3 limbs of the Beesley Test*

[196] Taking into account all of the matters as set out, it is determined that the alleged conduct is of a sexual in nature. However, it is also recognised that the reason relied on by the Respondent is that evidence was gathered in response to the targeted sexual harassment conduct survey questions, imposed directly in response to the Applicant's Bullying application before the Commission at the time. The survey question: *Has anyone here that works at Choc Dee ever seen or hear any form of Name Calling or Sexual Harassment from Ratchapol (Tui) towards other Employee members*, elicited responses which all commonly provided reference to conduct of a sexual nature and use of 'bad words' and 'touching' of the women. The survey responses were presented by the witnesses in the knowledge that the Applicant had commenced Bullying proceedings against their Employer and Manager.

[197] Whilst additional information became available to the Respondent after the dismissal occurred, there was a common escalation between the allegations in the Employee survey responses and the more significant examples of sexual harassment allegations provided in the evidence responses in contrast to matters set out in the witness statements for the Hearing. For example, in the survey, many Employees similarly referred to the Applicant making rude jokes and touching their bottoms. However, at the Hearing the allegations in the witness evidence were that the Applicant touched an Employee on the groin and poked another in the backside with a kitchen implement. The fuller comparison of examples are examined against the sexual harassment definition below repeated for convenience. The conduct complained of is considered to be conduct that is sexual in nature, which a reasonable person would consider to be unwelcome.

#### **“s 28A Meaning of sexual harassment**

(1) For the purposes of this Act, a person sexually harasses another person (the *person harassed*) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the *sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin*, of the person harassed;
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstance.

(2) In this section:

**“conduct of a sexual nature”** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.”

(emphasis added)

[198] However, the layer of other considerations in s28A(1A) places doubt on the evidence. I also emphasise that the case should not act as a deterrent to Applicants and complainants that the Commission would in any way dismiss sexual harassment conduct. In this case the allegations of sexual harassment arise from a collection of young employees and this group is aware that the Applicant has been judged unfairly by the employer for filing a stop order bullying application. As a consequence of the Applicant filing that, the employer has asked the group of women to complete a survey that asks them for responses in relation to sexual

harassment conduct by the Applicant. It is clear on the facts, the survey soliciting these responses was prepared by the employer as a result of the Applicant filing the bullying application against the employer and his partner and manager being the named person. It is relevant to note that the named person is also a sister, daughter, manager and friend respectively to the range of women drawn upon to answer the survey. When the dynamic of the relationship in this group of employees and the employer is considered there is a power imbalance between the Applicant and the Respondent, but also between the Respondent and the female employees coerced to complete the survey. Taking into account all of the matter referred to, the evidence presented and the seriousness of the allegations, I cannot be satisfied to the required standard that the conduct occurred or that a valid reason is made out.

***387(b) and 387(c) whether the person was notified of that reason and was given an opportunity to respond***

[199] A proper consideration of s.387(b) requires a finding to be made as to whether the Applicant “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).<sup>164</sup>

[200] As set out above, the Applicant was on approved annual leave when his employment was terminated without the Employer providing him the opportunity for him to respond. The Respondent sought a meeting with him on 13 February 2023 “at [his] earliest convenience” with no explanation as to what might need to be discussed at that meeting other than the subject line of “urgent meeting required.” The Respondent then served the Bullying application response documents on the Applicant on 13 February 2023 which included a termination letter and then separately sent the formal termination letter on 14 February 2023, both copies are dated 12 February 2023. The Applicant was only notified of the reason for his dismissal in the termination letter.

[201] Therefore, I find that the Applicant was not validly notified of the reason for his dismissal prior to the termination letter being provided and was not provided an opportunity to respond. This is also in circumstances where there was no continuing risk of any alleged conduct, as the restaurant was closed down during February and March, and the Respondent could have utilised that time to provide a fair process. The submission from the Respondent that he was acting under discretion from the FWC Bullying case managers to send off the termination letter was completely unsupported from the case managers file note requested and then shared with parties. This factor of the Respondent failing to notify the Applicant and failing to give the Applicant opportunity to respond weighs in favour of the Applicant.

***(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***

[202] The Respondent failed to put the allegations to the Applicant prior to sending the termination letter and therefore failed to provide the Applicant with a meeting or the opportunity to elect to have a support person present. I find this weighs in favour of the Applicant.

***(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal***

[203] With regard to the prior warning that the Applicant had been issued with on 4 January 2023, I find that minimum weight should be given to this. I accept the Applicant's evidence that this warning was provided in response to a verbal exchange with the Respondent's de facto partner, and that she did not similarly receive a comparative warning, despite the Respondent's evidence that she did. The Applicant submitted evidence that he had written to the Respondent on 1 January 2023, three days prior to the warning being issued to advise him of the bullying he was experiencing by Ms Kanokwan Saenkaew. The Respondent in his oral evidence stated he considered the exchange and the subject of the warning to be minor, but still provided a warning to the Applicant.

[204] There is no evidence of the employer taking any steps to respond to the employees about the allegations in any way except for the progress of this case. I also consider that the warning issued to the Applicant should not be given weight in consideration of it not being related to the alleged conduct that forms the reason for dismissal. In addition, the manager similarly engaged in the conduct and did not receive a warning. No pertinent or reliable evidence was led by the Respondent to suggest that there was a disciplinary history that can be relied on, in addition to his process for the production of the allegations of sexual harassment. Therefore, the Applicant cannot be considered previously warned on the same conduct he was dismissed for. I find this factor weighs in favour of the Applicant.

***(f) and (g) the degree to which the size of the Employer's enterprise and 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***

[205] The parties agreed the Respondent was a small business as per the definition in the Act. It is noted that in accordance with *Hart v Forex 1 Pty Ltd ATF Trading Rental Trust*,<sup>165</sup> the legislative intent of the Small Business Fair Dismissal Code is to provide a simpler procedure for small businesses to navigate the unfair dismissal jurisdiction and for dismissal decisions by small business to not be subject to the same degree of review by the Commission if the Code has been complied with at the workplace level.<sup>166</sup> However, a fair process is still required and the findings in relation to the SBFDC demonstrated that the Employer for the reason set out had not genuinely approached the termination of the Applicant.

[206] In all the circumstances, I recognise that the Respondent was a small business Employer with an absence of dedicated human resource management specialists in their enterprise. However, the process undertaken was predetermined, flawed and not based on valid reason. On the evidence, I find that there was lack of substantive and procedural fairness in the process adopted by the Employer in effecting the Applicant's dismissal.<sup>167</sup>

[207] S387(a) imposes the requirement to make a finding of conduct. In this matter the survey responses and the further employee allegations of sexual harassment meet the test of conduct of a sexual nature that would be deemed to be unwelcome, which meets the initial elements of s 28A and *Beesley v Hughes*. In terms of the second element in deciding whether the conduct is unwelcome, that being a question of objective fact, a range of matters have been raised which require consideration. Those things go to the nature of the questions that were put on behalf of the Applicant to the witnesses against these tests. There was evidence inconsistent with the allegations of the individual complainants voluntarily booking a seat to travel beside the Applicant to Thailand, another driving him home after work and there was evidence of



friendship and exchanges of gifts and loans on money. Whilst these are not always an indicative feature to rule out that the conduct is sexual harassment, in this case the employees were a sideline feature in the Respondents plan that he had researched and indicated as such, to remove the Applicant.

*(h) any other matters that the FWC considers relevant.*

**[208]** This case raises the matter of the sexual orientation of the Applicant which is relevant to the definition of regulation 1.07, and the consideration of the sexual harassment evidence. The Respondent did not consider this factor in making the immediate determination of serious misconduct. Just as the intention of the party allegedly harassing is irrelevant, the consideration of sexual orientation does not lead to an automatic conclusion that sexual harassment could not have taken place. However, as set out, due to the matters in association with these allegations and the background to the implementation of the survey, the allegations were considered unreliable. Further, the manner in which the sexual harassment allegations evolved as demonstrated in the comparison of the survey responses and the witness statement material, also must be taken into account. What has been highlighted in this matter is the power imbalance which focused on the way in which the sexual harassment evidence emerged. This matter drew attention to the Respondents determination to remove the Applicant from the business in the most efficient way. The employer required the employees to respond to the survey within 24 hours, in the knowledge as he had set out to them that it was being undertaken due to the Applicants bullying application and the survey directly called for responses on whether the Applicant had engaged in sexual harassment, a matter until then that had never been evidenced as a feature at the workplace as known to the Employer, the Applicant or as refers to by the parties to the Employer. There was also evidence of a convivial relationship and shared friendships that existed at the time of termination between the range of these witnesses and the Applicant.

**[209]** Further, serious misconduct, while including sexual harassment specifically in Regulation 1.07(3)(a)(iv), must also include a serious and imminent risk to health and safety or the reputation, viability or profitability of the business. As set out in the discussion of sufficiently serious above, the evidence was that there was evidence of continuing workplace friendships between the Applicant and these Employees, and there was limited evidence of any detriment that was directly attributed to the alleged sexual harassment conduct. Further, there was no evidence of any impact on the profitability of the business submitted or, of an effect on the reputation of the business. With regard to an imminent risk to health and safety, as set out, there was no immediate continuing risk of any alleged sexual harassment while the business was closed, and the Applicant was on approved annual leave for at least 1 month. Taking all of these matters into account, the evidence and circumstances do not support the termination for serious misconduct.

**[210]** It is relevant that the tests under SBFDC Code and the criteria section 387 have been applied to this termination of employment. Neither of those tests confirm that the termination was fair. However, a range of the employees were willing to give evidence at the minimum of the difficulties for them in the employment relationships, this must be taken into account as, well as the Applicant lodging the bullying application to demonstrate the tensions in the workplace. The Employer, in his text messages with the Applicant in trying to run the restaurant and work around the Applicant's injury, but also his demeanor causing difficulty in managing

him. This was causing real concern in the future management of the relationship and staffing. Further, this had a real effect in the ongoing assessment of the continuing relationship that had limitations on lasting more than a couple of months on the evidence. If the conduct the employees complained of did not meet the reasonable person test to be offended the conduct was not conducive to ongoing longtime employment. This features in the estimation of the ongoing employment.

## CONCLUSION

[211] I recognise that the sexual harassment jurisdiction is a relatively new jurisdiction for the Commission and parties should not in referring to this matter with consideration that it is a precedent in terms of the evaluation of sexual harassment matters. The matter is more properly about the Respondents determination to remove the Applicant from his business in the most efficient way for him. The issue of sexual harassment and the resulting evidence arose from the plan of his. Taking into account all the facts and circumstances of this matter, it cannot be determined that the termination was consistent with the Small Business Fair Dismissal Code or was fair in accordance with section 387. It is concluded that the dismissal was harsh, unjust and unreasonable. This has been a complex matter given the research of the Employer, devising a plan to dismiss the Applicant and that employer's employees have featured collaterally in that. The Employer admitted on receipt of the bullying application to researching the matters of the SBFDC and the associated rights, if he formed a belief, he could dismiss an employee. He particularly referred to his research regarding allegations of sexual harassment which would form a basis for dismissal for reasons of serious misconduct. He prepared and controlled a survey in a very short space of time questioning his employees about whether the Applicant had engaged in sexual harassment. In doing so, he made it clear that he was implementing that in response to the bullying application he'd received from the Applicant, therefore influencing the employees' required responses. Further, he conveniently took a direction from the case manager to provide his material in response to the bullying application to the Applicant and took that as a direction to serve the termination letter on the Applicant. The Applicant in response, filed an unfair dismissal application. The employer in response filed a SBFDC jurisdictional objection, which he had also researched in the circumstances, and then also ensued the provision of additional employee evidence of sexual harassment to present at the hearing.

[212] The Respondent introduced the survey on Bullying and sexual harassment only after the Applicant alleged being bullied by the Respondent's partner. The Applicant alleged this survey was in retribution to him filing a Stop Order Bullying application with the Commission. The survey on its face does not seek to ascertain if the Applicant sexually harassed other Employees as its main objective. It appears more than coincidental that in circumstances where the Employer volunteered, he had researched that sexual harassment could form a basis of summary dismissal and that subsequently, those were the employee responses the Respondent received to the survey he controlled. He relied on those responses for the immediate termination of the Applicant's employment.

[213] It is also understood that had the Respondent allowed for the opportunity to put the allegations to the Applicant, they would have been unanimously rejected by him, as was his response at the Hearing. The relevant case authorities regarding the implementation of the Code refer to relevant procedurally fair discussions with the Employee to be held prior to dismissal

and reasonable investigation taking place. Similarly, section 387 provides for the same procedurally fair steps. In this matter no such discussions were held with the Employee prior to the termination, nor any investigation undertaken. The witness evidence of new sexual harassment allegations that was brought on behalf of the Respondent at Hearing, was not available or relied on by the Respondent at the time of the dismissal. No clear submission was made by Counsel on behalf of the Respondent to rely on this post termination evidence. The Applicant's representative responded to this and the responses to the survey to demonstrate how this evidence did not correlate with the actual associations between the parties. The markedly different evidence in the witness statements was found not to reach the satisfactory standard in the circumstances. Nothing in these findings relevant to these circumstances should be taken as generally dismissing or diminishing such allegations.

[214] The Respondent could not have held a reasonable belief at the time of the dismissal that the Applicant had engaged in the conduct, having not had any discussion with him or performing any investigation or consideration of the surrounding circumstances. The evidence of the witnesses was not credible as set out, due to the formulation of the survey, their personal relationships to the Applicant and the Respondent, and the similarity of their responses which cast doubt over the independence of the survey responses.

[215] In consideration of all of the circumstances and for the reasons set out above, the Respondent's jurisdictional objection on the basis of compliance with the Small Business Fair Dismissal Code was dismissed. The Applicant's termination has been found to be unfair due to the lack of procedural fairness and the lack of a valid reason for the dismissal. Accordingly, given this conclusion I now turn to consider a remedy.

## **REMEDY**

[216] In accordance with the directions set, submissions were also required in relation to circumstances where a remedy was awarded, and the parties provided submissions in this regard. Counsel for the Respondent also covered this in written submissions handed up at Hearing.<sup>168</sup>

[217] The Act sets out the following in consideration of a remedy:

### **“Division 4—Remedies for unfair dismissal**

390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  - (b) the person has been unfairly dismissed (see Division 3).
- (2) the FWC may make the order only if the person has made an application under section 394.
- (3) the FWC must not order the payment of compensation to the person unless:
  - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and

- (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

... ..

### **392 Remedy—compensation**

#### *Compensation*

- (1) An order for the payment of compensation to a person must be an order that the person's Employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

#### *Criteria for deciding amounts*

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

#### *Misconduct reduces amount*

- (3) If the FWC is satisfied that misconduct of a person contributed to the Employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

#### *Shock, distress etc. Disregarded*

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

#### *Compensation cap*

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
- (a) the amount worked out under subsection (6); and
  - (b) half the amount of the high income threshold immediately before the dismissal.
- (6) The amount is the total of the following amounts:
- (a) the total amount of remuneration:
    - (i) received by the person; or
    - (ii) to which the person was entitled;

(whichever is higher) for any period of employment with the Employer during the 26 weeks immediately before the dismissal; and

- (b) if the Employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the Employee for the period of leave in accordance with the regulations.”

**[218]** Section 390 of the Act makes it clear that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate and that compensation is appropriate in all the circumstances. The Applicant did not seek reinstatement and provided evidence of the effects on his health and personal wellbeing.<sup>169</sup> The full range of workplace relationships have been impacted for the Applicant by the associated events and survey responses and the termination. Neither party supports reinstatement. Accordingly, after taking into account the facts and circumstances as set out in this matter, reinstatement would be entirely inappropriate in these circumstances. There is no reasonable prospect of workable relationships being re-established, and this was not ultimately sought by the Applicant.

**[219]** The prerequisites of sections 390(1) and (2) have been met in this case. Section 392(2) of the 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.

**[220]** The Applicant sought 26 weeks compensation in lieu of reinstatement<sup>170</sup> which the Respondent rejected. The Respondent submitted that the highest threshold that should be owed, if the matter was found to have been an unfair dismissal, was the 4 weeks wages in lieu of notice for the Applicant’s length of service.<sup>171</sup> With reference to the elements of section 392 of the Act, the following is noted.

**[221]** The concept of “remuneration” in the present and related context has been held to include superannuation.<sup>172</sup>

**[222]** There is nothing in the material provided on behalf of the Respondent that indicates that an amount of remedy will affect the viability of the Respondent’s business, though limited evidence was presented on this factor. The evidence is that the Respondent business was the only provider of Thai cuisine in Palm Cove and was a profitable continuing business, as is evident in the letters in relation to the sale of the business to Ms Kanokwan Saenkaew.

**[223]** The Applicant had worked for the Respondent for approximately three and a half years. Had the Applicant not been dismissed, he submitted that he would have worked for 2 more years until his retirement, earning the amount in that period of approximately \$207,430.00.<sup>173</sup> The Applicant’s ordinary weekly time earnings, as agreed by the parties was \$1,805.00 gross.<sup>174</sup>

**[224]** The Applicant has provided some information about his efforts to obtain alternative employment. Since the termination, the Applicant has set out that he has not been mentally well enough to pursue proper alternative employment and instead has been working sporadically for his support person, Mr Wall, at his restaurant in Cairns. Mr Wall had also been providing food and accommodation for the Applicant, in endeavouring to assist him to move on from the dismissal which he considered was highly inappropriate. The salary did not match his prior

annual earnings with the Respondent. The Applicant set out that between 3 April 2023 to 11 June 2023 he had earned \$1,683.99 net total.<sup>175</sup>

[225] The Applicant's representative made reference to the Applicant's current medical status; in that he was not mentally fit to work due to stress. Further, he set out that this case and the allegations have had a significant negative impact on the Applicant's health and he referred to further medical certificates and psychology reports to support this.<sup>176177</sup> The Applicant's representative referred to, without objection by the Respondent, a report as consideration that the status of the medical evidence was consistent with what had already been raised and that the Applicant had not been in position to commence employment in the interim.

[226] The Applicant set out that he would have earned approximately \$23,465 net for the 13 weeks between 27 March 2023, when the restaurant was due to reopen, to 25 June 2023, being the week of the Hearing.<sup>178</sup>

[227] With regard to contingencies, it is noted that there was an emerging tension in the relationship between the Applicant, the owner, and Ms Kanokwan Saenkaew, which had already resulted in a warning for the Applicant. It is noted that the Applicant had also raised a Bullying application in February 2023 against Ms Kanokwan Saenkaew. Accordingly, it is unlikely that the relationship at the workplace would have lasted for longer than the anticipated period as set out.

[228] As set out earlier, there was a distinct lack of procedural fairness in this matter, including the manner in which the Respondent sought and relied on the employee allegations of sexual harassment as a result of the survey process the employer initiated, to a significant extent, the actions and influence of the employer (in regards to securing the employee allegations against the applicant), have had a bearing on how these allegations and must be viewed in the factual matrix of this matter. There was a lack of substantive and procedural fairness, and therefore there was not a valid reason for the dismissal.

#### *Calculation*

[229] The Applicant sought 26 weeks in compensation for the unfair dismissal, in circumstances where they had been summarily dismissed with no wages in lieu of notice. That calculation has presented as being \$23,465 gross inclusive of the four weeks wages in lieu of notice. The Applicant stated a period of 13 weeks had elapsed (between when the Restaurant closed, and him proceeded on annual leave and the date of reopening in March 2023 when he would return from his annual leave) and the date of the hearing in June 2023. The Applicant received his accrued annual leave on the date of dismissal.

[230] The period of 13 weeks, set out above, is a relevant period as referred to by the Applicant and the remuneration the employee would have received in that period if he had not been dismissed, is represented by a figure of 13 weeks at \$1805.00 gross per week. This represents the loss of earnings for the Applicant, in that period but also was referred to as a projected anticipated period of employment. For separate reasons as I have referred to in s387(h), there were increasing difficulties in the employment relationship between the applicant, the owner and the manager which have been taken into account in evaluating the projected anticipated period of employment. Whilst in this matter on the information before the Commission

regarding the reasons for termination, I have not found that a valid reason exists on the balance of probabilities. The reasons conveyed for the dismissal given that the conduct based on the balance of probabilities for all the reasons set out with this matter, the conduct has not met the objective standard. The relevant test to satisfy the third limb of *Beesley* has not been discharged to the satisfactory level. However, there were a range of additional issues that were rapidly emerging between the parties in relation to the Applicant's difficulty prior to taking annual leave in undertaking his duties due to his injury and also the relevant difficulties as evidenced by the Bullying application and the warnings. I therefore consider that the 13-week period was the reasonable projected period of employment, taking into account all of the circumstances. I consider the commensurate earnings of \$1805.00 gross per week also, inclusive of the four weeks' pay in lieu of notice, the Applicant would have received in deeming this an unfair dismissal.

[231] The Applicant's earnings in that period set out above in terms of the earnings received from Mr Wall, as set out as approximating, one week's wages had the Applicant worked for the Respondent. Mr Wall submitted that he had also been providing food and board as accommodation for the Applicant to assist him in overcoming the circumstances of the dismissal, the figure of \$1805.00 these earnings are deducted from the relevant period.

[232] In consideration of other contingencies, the issues already emerging between the Applicant and Mr McGilvery and his partner are relevant (reinforced by having observed the parties at Hearing) and would have resulted in a decreased period of employment. Accordingly, I consider in addition to the one week above, a deduction of three weeks (of the figure of \$5415.00) of earnings (and total deductions of \$7220.00 gross), a final calculation at \$16,245.00 gross is appropriate. I do not consider that any further deductions are necessary due to the reasons as set out above.

[233] Having applied the approach set out in *Sprigg v Pauls Licensed Festival Supermarkets*<sup>179</sup> in addition to section 392 of the Act, I have concluded that an amount of \$16,245.00 less tax, and with superannuation in addition, is appropriate in these circumstances.

[234] An Order reflecting this decision will be issued.



COMMISSIONER

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- <sup>1</sup> PN204.
- <sup>2</sup> Small Business Fair Dismissal Code.
- <sup>3</sup> [\[2012\] FWAFB 1359](#).
- <sup>4</sup> Form F3 – Employer Response - Question 1.5.
- <sup>5</sup> [\[2023\] FWC 1373](#).
- <sup>6</sup> PN30.
- <sup>7</sup> [\[2014\] FWCFB 1663](#) at [24].
- <sup>8</sup> PN599.
- <sup>9</sup> Applicant Submissions, Letter dated 1 January 2023.
- <sup>10</sup> Witness Statement of Kanokwan Saenkaew at [9].
- <sup>11</sup> PN1932.
- <sup>12</sup> PN1924, PN1956.
- <sup>13</sup> PN653.
- <sup>14</sup> Form F3 – Employer Response - question 18.
- <sup>15</sup> PN970.
- <sup>16</sup> PN1419.
- <sup>17</sup> Attached to Respondent’s Form F3.
- <sup>18</sup> Form F72 at question 13.
- <sup>19</sup> Form F72 at question 22.
- <sup>20</sup> PN1681-PN1682
- <sup>21</sup> PN1070, PN918.
- <sup>22</sup> Fair Work Act 2009 (Cth) section 590(1).
- <sup>23</sup> Witness Statement of Craig McGilvery at [9].
- <sup>24</sup> Witness statement of Craig McGilvery at [18]-[20].
- <sup>25</sup> Applicant Bundle of Submissions, email correspondence attachment dated 13 February 2023.
- <sup>26</sup> Applicant Bundle of Submissions, email correspondence attachment dated 13 February 2023.
- <sup>27</sup> Witness Statement of Craig McGilvery; CAM-03.
- <sup>28</sup> Witness Statement of Craig McGilvery at [14](c).
- <sup>29</sup> Witness Statement of Craig McGilvery, attachment CAM-06.
- <sup>30</sup> Witness Statement of Craig McGilvery; CAM-02.
- <sup>31</sup> PN1062; PN1068
- <sup>32</sup> PN1064.
- <sup>33</sup> Applicant Bundle of Submissions, letters dated 30 January 2023 and 7 February 2023.
- <sup>34</sup> Applicant Submissions in Reply, page 2; PN1231, PN1238.
- <sup>35</sup> PN629.
- <sup>36</sup> PN159.
- <sup>37</sup> Applicant Submissions in Reply.
- <sup>38</sup> Applicant Submissions in Reply.
- <sup>39</sup> Applicant Submissions in Reply at [40].
- <sup>40</sup> Applicant Reply Submissions dated 16 June 2023.
- <sup>41</sup> Applicant Bundle of Submissions, letter from Suppatra Soncharoen.
- <sup>42</sup> PN664.
- <sup>43</sup> PN730.
- <sup>44</sup> PN123.



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- <sup>45</sup> Respondent Outline of Submissions at [13].
- <sup>46</sup> Respondent Outline of Submissions at [14].
- <sup>47</sup> Respondent Outline of Submissions at [2]-[5].
- <sup>48</sup> Respondent Outline of Submissions at [8].
- <sup>49</sup> *Cole v Roy Hill Station Pty Ltd T/A Roy Hill Station* [\[2019\] FWC 5358](#) at [62].
- <sup>50</sup> [\[2010\] FWA 7891](#).
- <sup>51</sup> [\[2011\] FWA 3922](#)
- <sup>52</sup> [\[2019\] FWC 5358](#).
- <sup>53</sup> [\[2019\] FWC 5358](#) at [95].
- <sup>54</sup> Survey Response of Saruttaya Naiyana dated 10 February 2023;
- <sup>55</sup> Survey Response of Saruttaya Naiyana dated 10 February 2023.
- <sup>56</sup> Survey Response of Patsachol Kumpukheaw dated 10 February 2023.
- <sup>57</sup> Survey Response of Kanokwan Saenkew dated 10 February 2023.
- <sup>58</sup> Survey Response of Nantawan Saenkaew dated 10 February 2023.
- <sup>59</sup> Small Business Fair Dismissal Code.
- <sup>60</sup> PN1107.
- <sup>61</sup> PN1114, PN1116.
- <sup>62</sup> Applicant Submissions in Reply at [70].
- <sup>63</sup> Applicant Submissions in Reply at [75].
- <sup>64</sup> Applicant Submissions in Reply at [80] and [95].
- <sup>65</sup> [\[2013\] FWCFB 1943](#).
- <sup>66</sup> [\[2013\] FWCFB 1943](#) at [33].
- <sup>67</sup> [\[2018\] FWC 942](#).
- <sup>68</sup> PN906.
- <sup>69</sup> PN952.
- <sup>70</sup> Witness Statement of Craig McGilvery at [10]-[11] and Exhibit CAM-01; PN952, PN106, PN972
- <sup>71</sup> PN924, Survey of Employees dated 10 February 2023; email correspondence to Supattra Soncharoen dated 10 February 2023.
- <sup>72</sup> PN1322.
- <sup>73</sup> Applicant Submissions in Reply.
- <sup>74</sup> PN768, PN770, PN829, PN831-835.
- <sup>75</sup> PN1119, PN1129.
- <sup>76</sup> Applicant Reply Submissions dated 16 June 202.
- <sup>77</sup> Witness Statement of Craig McGilvery, Witness Statement of Nantawan Saenkaew and Witness Statement of Kanokwan Saenkaew; Witness Statement of Patsachol Kumpukheaw; PN1053.
- <sup>78</sup> Witness Statement of Nantawan Saenkaew at [1].
- <sup>79</sup> PN1681.
- <sup>80</sup> PN2103.
- <sup>81</sup> PN2195.
- <sup>82</sup> Witness Statement of Craig McGilvery at [8].
- <sup>83</sup> PN1255, PN1257.
- <sup>84</sup> PN967.
- <sup>85</sup> Witness Statement of Craig McGilvery at [11].
- <sup>86</sup> [\[2012\] FWAFB 1359](#).
- <sup>87</sup> [\[2012\] FWAFB 1359](#) at [38].

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- <sup>88</sup> PN2099, PN2093.
- <sup>89</sup> Witness Statement of Craig McGilvery at [11].
- <sup>90</sup> Witness Statement of Craig McGilvery at [13].
- <sup>91</sup> Witness Statement of Craig McGilvery at [18].
- <sup>92</sup> Witness Statement of Craig McGilvery at [21].
- <sup>93</sup> Witness Statement of Craig McGilvery at [26].
- <sup>94</sup> PN664, PN730, Applicant Bundle of Submissions, Applicant Submissions in Reply.
- <sup>95</sup> [\[2017\] FWC 3930](#).
- <sup>96</sup> *Pinawin T/A Rose.Vi.Hair.Face.Body v Domingo* [\[2012\] FWAFB 1359](#) at [30]; *Harley v Rosecrest Asset Pty Ltd T/A Can Do International* [\[2011\] FWA 3922](#) at [9]; *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- <sup>97</sup> [\[2010\] FWA 7891](#).
- <sup>98</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>99</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>100</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- <sup>101</sup> *Exeter-Grant v Village Roadshow Theme Parks Pty Ltd* [\[2022\] FWC 2027](#) at [116]; and upheld on appeal in [2023] FWCFB 75. See also the authorities referred to *CSL Ltd t/as CSL Behring v Chris Papaioannou* [\[2018\] FWCFB 1005](#).
- <sup>102</sup> [2020] FCAFC 126
- <sup>103</sup> *Ibid*, [22] – [24].
- <sup>104</sup> Witness Statement of Kanokwan Saenkaew at [12].
- <sup>105</sup> Witness Statement of Nantawan Saenkaew at [10].
- <sup>106</sup> Witness Statement of Pataschol Kumpukheaw at [8].
- <sup>107</sup> PN1045.
- <sup>108</sup> PN929.
- <sup>109</sup> PN286.
- <sup>110</sup> Survey Response of Nantawan Saenkaew dated 10 February 2023.
- <sup>111</sup> Witness Statement of Nantawan Saenkaew at [9].
- <sup>112</sup> Witness Statement of Nantawan Saenkaew at [9].
- <sup>113</sup> PN1486.
- <sup>114</sup> Applicant Submissions in Reply, page 3.
- <sup>115</sup> PN1464.
- <sup>116</sup> Applicant Submissions in Reply, page 3.
- <sup>117</sup> PN1481-1482.
- <sup>118</sup> PN1040.
- <sup>119</sup> Survey Response of Kanokwan Saenkew dated 10 February 2023.
- <sup>120</sup> Witness Statement of Kanokwan Saekaew at [12].
- <sup>121</sup> Witness Statement of Kanokwan Saekaew at [13].
- <sup>122</sup> Applicant Submissions in Reply, page 2.
- <sup>123</sup> PN1241.
- <sup>124</sup> Form F3 – Employer Response, attachment Letter to Employee dated 30 January 2023
- <sup>125</sup> PN1217-1221.
- <sup>126</sup> PN2103.
- <sup>127</sup> PN1222.
- <sup>128</sup> Email correspondence of Mr Jamie McAllister dated 5 July 2023.
- <sup>129</sup> PN970.

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- <sup>130</sup> PN1419.
- <sup>131</sup> PN1681-1682.
- <sup>132</sup> Witness Statement of Sudathip Saenkhamwang at [6].
- <sup>133</sup> Witness Statement of Sudathip Saenkhamwang at [9].
- <sup>134</sup> PN1708-1712.
- <sup>135</sup> PN1917.
- <sup>136</sup> Applicant Submissions in Reply, page 4.
- <sup>137</sup> Applicant Submissions in Reply, attachment of bank records dated 31 July 2021 and 15 August 2021.
- <sup>138</sup> Applicant Submissions in Reply, page 4.
- <sup>139</sup> PN1725.
- <sup>140</sup> PN1698.
- <sup>141</sup> Survey Response of Nongyao Anderson dated 10 February 2023.
- <sup>142</sup> Witness Statement of Nongyao Anderson at [9].
- <sup>143</sup> Witness Statement of Nongyao Anderson at [10].
- <sup>144</sup> Witness Statement of Nongyao Anderson at [11].
- <sup>145</sup> Witness Statement of Nongyao Anderson at [12].
- <sup>146</sup> Witness Statement of Nongyao Anderson at [13].
- <sup>147</sup> Applicant Submissions in Reply, page 6.
- <sup>148</sup> PN1775.
- <sup>149</sup> PN640.
- <sup>150</sup> PN1787, PN635.
- <sup>151</sup> Applicant Submissions in Reply, page 6.
- <sup>152</sup> Applicant Submissions in Reply, page 6; PN743, PN835.
- <sup>153</sup> Applicant Submissions in Reply, page 6
- <sup>154</sup> Applicant Submissions in Reply, page 7.
- <sup>155</sup> Survey Response of Saruttaya Naiyana dated 10 February 2023.
- <sup>156</sup> Survey Response of Patsachol Kumpukheaw dated 10 February 2023.
- <sup>157</sup> Witness Statement of Sarattutaya Naiyana at [6].
- <sup>158</sup> Witness Statement of Sarattutaya Naiyana at [8].
- <sup>159</sup> Witness Statement of Pataschol Kumpukheaw at [6].
- <sup>160</sup> Witness Statement of Pataschol Kumpukheaw at [7].
- <sup>161</sup> Applicant Submissions in Reply, page 7.
- <sup>162</sup> Applicant Submissions in Reply, page 7.
- <sup>163</sup> Applicant Bundle of Submissions, letter from Suppatra Soncharoen.
- <sup>164</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].
- <sup>165</sup> [\[2018\] FWC 942](#).
- <sup>166</sup> *Ibid* at [75].
- <sup>167</sup> *Williams v The Chuang Family Trust t/a Top Hair Design* [\[2012\] FWA 9517](#) at [40].
- <sup>168</sup> Closing submissions of the Respondent dated 22 June 2023.
- <sup>169</sup> PN2077.
- <sup>170</sup> PN2062.
- <sup>171</sup> PN2149.
- <sup>172</sup> *Tabro Meat Pty Ltd v Kevin Heffernan* [\[2011\] FWAFB 1080](#) [21]. See also the other authorities cited by Beaumont DP in *Atherton v Airmaster Australia Pty Ltd* [\[2018\] FWC 3109](#) at [158] – [162].

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<sup>173</sup> Applicant Additional Submissions dated 16 June 2023, page 2.

<sup>174</sup> Respondent Closing Submissions dated 22 June 2023 at [36].

<sup>175</sup> Applicant Additional Submissions dated 16 June 2023, payslips.

<sup>176</sup> PN2178.

<sup>177</sup> PN2172.

<sup>178</sup> Applicant Additional Submissions dated 16 June 2023, page 2.

<sup>179</sup> AIRC, Print R0235, (24 December 1998).