



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Naresh Kumar**

v

**RFMC Pty Ltd T/A Kingsway Bar and Bistro**  
(U2023/7378)

COMMISSIONER LIM

PERTH, 1 DECEMBER 2023

*Application for an unfair dismissal remedy – misconduct – application dismissed*

## Introduction

[1] On 9 August 2023, Mr Naresh Kumar (Applicant or Mr Kumar) applied to the Fair Work Commission alleging he was unfairly dismissed from his employment with RFMC Pty Ltd T/A Kingsway Bar and Bistro (Respondent).

[2] The Respondent operates the Kingsway Bar and Bistro, which is a hospitality venue in Kingsway, Western Australia. Mr Kumar was employed as a chef on a full-time basis from 9 October 2022 until he was dismissed for misconduct on 23 July 2023.

[3] I conducted a case management conference on 22 September 2023. Directions for the filing of material were subsequently issued. A hearing was conducted on 8 November 2023. At the hearing, Mr Kumar represented himself and the Respondent was represented by Mr Ron Emery, one of the owners of the business.

[4] Having considered the relevant evidence and submissions of the parties, I find that Mr Kumar was not unfairly dismissed. The application must accordingly be dismissed.

[5] My detailed reasons follow.

## Observations on the evidence

[6] Mr Kumar gave evidence for his case. I found that Mr Kumar gave his evidence openly, though he did downplay events where he acted poorly. English is not Mr Kumar's first language, which I have taken into consideration when assessing his evidence.

[7] The Respondent called the following witnesses:

- (a) Mr Edward Fry, Head Chef: Mr Fry made the decision to terminate Mr Kumar's employment. I found that Mr Fry gave his evidence honestly.

- (b) Mr Craig Emery, Venue Manager: Mr C Emery is a Director and Venue Manager for the Respondent. He is also Mr R Emery's son and Ms Barnaby's brother. Mr C Emery was present at the venue on 21 July 2023, though he was not in the kitchen. I found that Mr C Emery gave his evidence honestly.
- (c) Ms Michelle Burnaby, Venue Manager: Ms Barnaby is a Director and Venue Manager for the Respondent. She is also Mr R Emery's daughter and Mr C Emery's sister. Ms Barnaby was present for the events of 21 July 2023. I found that Ms Barnaby gave her evidence honestly.
- (d) Ms Nicola Pearce, Wait Staff: Ms Pearce is a waitress with the Respondent. Ms Pearce was present for the events of 21 July 2023. I found Ms Pearce gave her evidence honestly and openly.
- (e) Ms Linda Nordahl, Duty Manager: Ms Nordahl has worked for the Respondent for the last 18 years. Ms Nordahl was present for the meeting on 23 July 2023. I found Ms Nordahl to be an honest witness.
- (f) Mr Frank Scognomiglio, Sous Chef: Mr Scognamiglio has worked for the Respondent on and off over the last 10 years. Mr Scognamiglio was present during the events of 21 July 2023. Mr Scognamiglio also gave evidence regarding Mr Kumar's conduct in the workplace. I found Mr Scognamiglio to be an honest and credible witness.

[8] For the most part, Mr Kumar's evidence did not differ significantly from the bulk of the Respondent's witnesses. I found that most of the relevant factual disputes between the parties were more to do with different matters of interpretation of events or based upon each witness's understanding of the circumstances.

[9] The exception to this was Mr Scognomiglio's evidence regarding Mr Kumar's behaviour in the workplace. Mr Scognamiglio and Mr Kumar directly contradicted each other on what occurred. I detail later in this decision why I preferred Mr Scognomiglio's account.

[10] Where witnesses gave evidence on conversations or events they did not participate in or directly hear or see, I have not given that evidence weight.

[11] Where witnesses have expressed opinions on matters that are for the Commission to decide, I have treated such opinions as submissions.

### **The events that led to this application**

#### *The events of Friday, 21 July 2023*

[12] On the evening of 21 July 2023, Mr Kumar was in charge of organising function food prior to it being taken out by wait staff.

[13] According to all the witnesses, it was a particularly busy night. The fryer section of the kitchen started to fall behind, which had a flow on effect to the wait times for food service. In response, Mr Fry stopped the food service to allow the different sections to catch up.

[14] Mr Kumar, Mr Fry, Mr Scognamiglio, Ms Barnaby and Ms Pearce were in the kitchen. They all agreed that there was an argument between Mr Kumar and Mr Fry.

[15] Mr Fry's evidence was that when he tried to resume the kitchen service, Mr Kumar became abusive and tried to stop him. Mr Fry's further evidence is that they argued, and he told Mr Kumar to effectively shut up, stop arguing and get ready to work.<sup>1</sup>

[16] Mr Kumar's evidence was that he asked Mr Fry to call tables for food service slowly, so that his section would not be overwhelmed. Mr Kumar's further evidence was that Mr Fry said words to the effect of, "if you can't do service, if you want to cry, go outside and just cry outside".<sup>2</sup>

[17] Both agree that Mr Kumar then left the kitchen.

[18] Once outside, Mr Kumar called Mr C Emery and asked if they could speak outside, as he'd had heated words with Mr Fry. Mr C Emery was the Venue Manager in charge at the Kingsway Bar and Bistro that evening. At the time of Mr Kumar's call, Mr C Emery was at the front entrance of the venue greeting customers and seating them.<sup>3</sup>

[19] Outside the building, Mr Kumar explained to Mr C Emery that Mr Fry had raised his voice at him and had continued with the table service even though he did not think it was the right action to take.<sup>4</sup>

[20] Mr C Emery's evidence is that he explained to Mr Kumar that he knew what the venue is like when at its busiest. Mr C Emery asked Mr Kumar to return inside and finish the food service for the last hour.<sup>5</sup>

[21] Mr Kumar stated that he did not want to return. Mr C Emery acknowledged this and said words to the effect of, "ok, just come tomorrow".<sup>6</sup> Mr Kumar then went home.

[22] The food service finished at approximately 9:00pm. Mr Fry and Mr C Emery spoke about Mr Kumar. Mr Fry said to Mr C Emery that this would be the last time Mr Kumar would be allowed to answer back and throw his weight around the kitchen. Further, that other chefs had started following Mr Kumar's lack of accountability and avoidance of responsibilities.<sup>7</sup>

[23] At approximately 9:30pm, Ms Barnaby texted Mr Kumar to ask if he could work a shift at Full Flava Café the next day. Full Flava Café is a premise that is also operated by Respondent and Mr Kumar had previously worked there.<sup>8</sup> Mr Kumar accepted.

[24] Ms Barnaby's evidence is that at the time she texted Mr Kumar she was unaware that he had left during the shift.<sup>9</sup>

*Sunday, 23 July 2023*

[25] On the Sunday, Mr Kumar arrived at the Kingsway Bar Bistro for his shift at approximately 10am. Mr Fry asked him to go into the office to talk. Ms Nordahl was in the office. Mr Kumar did not have advance notice of the meeting.<sup>10</sup>

[26] Mr Fry's evidence is that he told Mr Kumar that his behaviour was unacceptable and that he already had a written warning for fighting and two verbal warnings. Mr Fry's evidence is that he told Mr Kumar he would receive a final warning for walking out mid shift. Mr Fry's further evidence was that this final warning also effectively doubled as a termination of Mr Kumar's employment.<sup>11</sup> Ms Nordahl's evidence corroborates Mr Fry's account.

[27] Mr Kumar's evidence is that Mr Fry told him that he no longer had any more work for him, and that he would no longer work at the Kingsway Bar and Bistro. Mr Kumar asked Mr Fry if he could give him at least one to two weeks' notice, but Mr Fry rejected this.<sup>12</sup>

[28] Mr Kumar, Mr Fry and Ms Nordahl all agree that this meeting took no more than 10-15 minutes. After the meeting, Mr Kumar left the premises.

[29] I find that:

- Mr Fry did tell Mr Kumar that he would be receiving a final warning for walking out during the shift on 21 July 2023.
- Mr Fry did refer to the prior written and verbal warnings.
- Mr Fry did tell Mr Kumar that he would no longer work at the Kingsway Bar and Bistro.
- Mr Kumar did ask for one to two weeks' notice and Mr Fry rejected this.

#### *The prior issues*

[30] Mr Scognamiglio and Mr Fry gave evidence that Mr Kumar would be physical in his interactions with other staff. Mr Scognamiglio's evidence was that a few months before Mr Kumar was dismissed, Mr Kumar bit him on his left shoulder hard enough to leave a bruise.<sup>13</sup> Further, that Mr Kumar slapped him on his buttocks even after he asked Mr Kumar not to joke around as he had recently undergone surgery on his back.<sup>14</sup>

[31] Mr Kumar refuted that this ever happened. Mr Kumar's evidence is that he looked up to Mr Scognomiglio and would not act in such a way towards him. On balance, given Mr Kumar's admission that he did bite other members of staff,<sup>15</sup> and the evidence from Mr Fry that Mr Kumar would regularly be physical with other staff,<sup>16</sup> I find Mr Scognamiglio's account more believable.

[32] In May 2023, Mr Fry gave Mr Kumar a verbal warning for biting a co-worker, Prahb. Mr Fry's evidence is that Mr Kumar and Prahb were arguing or messing around, and Mr Kumar bit Prahb on the shoulder.<sup>17</sup>

[33] Prahb went to Mr Fry to complain and showed Mr Fry the bite mark. Mr Fry's evidence was that the bite mark was red and bruised, even though Mr Kumar had bitten Prahb through

his shirt.<sup>18</sup> Mr Fry said that he tried to give Mr Kumar the benefit of the doubt as Mr Fry and Prahb are friends.

[34] Mr Fry's evidence is that he spoke immediately to Mr Kumar after Prahb showed him the bite mark. He told Mr Kumar to stop the behaviour and that he did not want to have to take the matter further.<sup>19</sup>

[35] Mr Fry gave further evidence that shortly after this incident, he gave Mr Kumar a further verbal warning for poor behaviour. Mr Fry's account is that the verbal warning was for Mr Kumar's poor attitude towards work, for arguing with people and being disruptive.<sup>20</sup> Mr Kumar denied that he had received any verbal warnings. I find Mr Fry's evidence more persuasive.

[36] On or around 3 July 2023, there was an incident in the kitchen between Mr Kumar and Prahb. Mr Kumar's evidence is that:<sup>21</sup>

- He and Prahb would regularly joke around.
- On 3 July 2023, Prahb slammed his leg into Mr Kumar's leg. This started an argument between the two.
- He tried to bite Prahb on the shoulder. The situation escalated and they grabbed each other.
- They let go of each other and Mr Fry then took them into an office to make an incident report.

[37] Mr Fry's evidence was that he was not in the kitchen at the time, but he heard a commotion. When Mr Fry walked into the kitchen, he saw that Ms Nordahl was in the kitchen and other staff had separated Mr Kumar and Prahb.<sup>22</sup>

[38] Ms Nordahl gave evidence that she entered the kitchen at the tail end of the fight. When she walked into the kitchen, four other staff were trying to de-escalate the situation and create space between Mr Kumar and Prahb.

[39] I find that Mr Kumar did bite Prahb and did engage in a fight with Prahb.

[40] Mr Fry took both Mr Kumar and Prahb into an office to sign documentation regarding the fight.

[41] Mr Fry tendered into evidence a personnel file note dated 3 July 2023.<sup>23</sup> The personnel file note says:

**PERSONNEL FILE NOTE**

Employee: Naresh

Date of Incident: 3/7/23, 12:30pm

Nature of Notice: Arguing, fighting, customers complained, nearly damaging new oven

Reported by: Edd, head chef

Signed by Dept Head/Supervisor:

Signed by Employee:

Date: 03-07-23

[42] The personnel file note was filled out by hand and has a signature in the employee signature field.

[43] The Respondent's position is that this was a written warning to Mr Kumar. Mr Kumar objected to the personnel file note on the basis that he had signed an incident report, not a personnel file note. Mr Kumar's position was that the personnel file note had been fabricated and that his signature on the file note had been forged.<sup>24</sup>

[44] When I questioned Mr Kumar about the incident report he did sign, his evidence is that it was in relation to the fight with Prahb. Mr Kumar's evidence is that he and Prahb went into an office and signed incident reports.

[45] Mr Fry's evidence is that the personnel file note is the document he witnessed Mr Kumar sign on 3 July 2023.<sup>25</sup>

[46] I find that the personnel file note is not a forgery and is the document Mr Kumar signed on 3 July 2023.

[47] The personnel file note is not a written warning in the sense that it does not warn Mr Kumar about his behaviour and does not warn him about the consequences of further misconduct.

[48] However, I find that Mr Kumar would have known that the personnel file note was a negative record of his behaviour.

### **Preliminary matters**

[49] There was no contest, and I find, that:

- Mr Kumar was dismissed and the employment relationship ended on 23 July 2023. His application was made within the statutory timeframe.
- Mr Kumar was protected from unfair dismissal pursuant to s 382 of the Act.
- The Respondent is not a small business.
- The dismissal does not involve consideration of genuine redundancy.

### **Legislation**

[50] Section 385 of the Act provides:

**“385 What is an unfair dismissal**

(1) A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal has 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.”

[51] Section 387 of the Act requires me to take into account the below matters in determining whether Mr Kumar’s dismissal was harsh unjust or unreasonable:

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

**Submissions and consideration**

[52] I must consider each of the criteria in s 387, to the extent that they are relevant to the facts of this matter. I set out my consideration of each below.

*Section 387(a) – was there a valid reason for the dismissal related to Mr Kumar’s capacity or conduct?*

**[53]** The Respondent’s position is that they terminated Mr Kumar for misconduct. The misconduct was a combination of Mr Kumar’s behaviour over the months leading up to 21 July 2023, with him walking out mid-shift on 21 July being the final straw.

**[54]** I find that Mr Kumar’s actions on 21 July 2023 on their own do not warrant termination. He did walk out during his shift, but it was in response to a heated argument with Mr Fry. Mr Fry’s own evidence is that he told Mr Kumar to shut up and get back to work, even though Mr Kumar was communicating that he could not keep up with the food service.

**[55]** Mr Kumar spoke with Mr C Emery before he left the venue and explained his side of the story. Mr C Emery’s account is that he did not approve Mr Kumar leaving. I find that Mr C Emery may not have explicitly approved it, but he did not warn Mr Kumar that if he left mid-shift he could face disciplinary action.

**[56]** However, I find that Mr Kumar’s actions in biting and slapping other employees and engaging in a fight at the workplace do constitute valid reasons for dismissal.

**[57]** Even in a robust and fast-paced work environment like a commercial kitchen, it is not acceptable to bite your co-workers, let alone bite them hard enough to leave marks and bruises.

**[58]** Mr Kumar’s submission that this was a part of friendly or joking behaviour with his co-workers cannot be accepted. Even if I accept that it was consensual behaviour, it does not make it appropriate workplace behaviour. In Mr Scognamiglio’s case, it was not consensual behaviour, and by Mr Fry’s evidence, Prahb also complained about Mr Kumar biting him.

**[59]** Mr Kumar conceded that he and Prahb grabbed each other on 3 July 2023, and I find that they did engage in a physical fight. This is also unacceptable workplace behaviour.

**[60]** I note that both Mr C Emery and Ms Barnaby gave evidence that they were not present for the incidents where Mr Kumar bit other co-workers or the fight on 3 July 2023, but that they did know about the incidents.<sup>26</sup> It is a poor reflection on the Respondent that two directors were aware of such behaviour occurring in the workplace and yet did not take further action to address it and ensure the safety of their employees.

*Section 387(b) and (c) – notification of valid reason and opportunity to respond*

**[61]** I must consider whether Mr Kumar was notified of the valid reason and given the opportunity to respond to any valid reason related to their capacity or conduct. Section 387(b) and (c) concern matters of procedural fairness.

**[62]** An applicant must be notified of the valid reason before the employer has made the decision to terminate.

**[63]** I find that Mr Fry did inform Mr Kumar that part of why he was being dismissed was because of his prior conduct and the warnings he had received. However, it is clear from the



evidence that Mr Fry had made the decision to terminate Mr Kumar before the meeting on 23 July. It follows that Mr Kumar was not given the opportunity to respond before a decision to terminate his employment was made.

*Section 387(d) – any unreasonable refusal by the Respondent to allow Mr Kumar a support person*

**[64]** The Respondent did not give Mr Kumar notice of the meeting on 23 July 2023 and accordingly Mr Kumar did not have the chance to request a support person.

*Section 387(e) – warnings concerning performance*

**[65]** I find that Mr Kumar was given one verbal warning regarding performance, with the other verbal warning and the personnel file note relating to misconduct.

*Section 387(f) and (g) – size of the Respondent’s enterprise and whether the absence of dedicated human resource management specialists or enterprise would be likely to impact on the procedures followed*

**[66]** The Respondent employs 69 people at the Kingsway Bar and Bistro.<sup>27</sup> Neither party made submissions on whether the size of the Respondent’s enterprise was likely to impact on the procedures followed in effecting the dismissal. I find that the size of the Respondent’s enterprise had no such impact.

**[67]** There was no evidence led on whether the Respondent has any dedicated human resources staff. Neither party advanced submissions on this point. Accordingly, I cannot make any finding with regards to s 387(g).

*Section 387(h) – any other matters the Commission considers relevant*

**[68]** I have taken into consideration Mr Kumar’s length of service. Mr Kumar initially commenced with the Respondent in 2014 and left in 2020. He resumed his employment with the Respondent in 2022.

**[69]** I have also taken into consideration Mr Kumar’s submission that other co-workers such as Prahb would bite him back and engage in physical contact in the kitchen.

**[70]** Lastly, I also take into account that Mr Kumar is currently unemployed.<sup>28</sup>

*Is the Commission satisfied that Mr Kumar’s dismissal was harsh, unjust or unreasonable?*

**[71]** In coming to this decision, I have had regard to the relevant evidence and submissions of the parties, even if they have not been expressly referred to in this decision.

**[72]** I find that the Respondent’s handling of Mr Kumar’s dismissal was procedurally inadequate. Mr Kumar was not given notice that the Respondent was considering terminating his employment and was not given the opportunity to respond.

[73] However, I find that there was a valid reason for Mr Kumar's dismissal. As outlined earlier in this decision, biting, physical contact such as slaps to the buttocks and physical fighting in the workplace is not acceptable behaviour. I do not accept that this behaviour can be justified as horseplay or friendly banter. Even where consensual, such physical contact in the workplace is inappropriate.

[74] I find that the procedural deficiencies in this case are outweighed by the valid reason for dismissal. Accordingly, Mr Kumar's dismissal was not harsh, unjust or unreasonable and his application must be dismissed.

[75] An order to this effect will issue separately.



COMMISSIONER

*Appearances:*

*N Kumar*, Applicant

*R Emery* for the Respondent

*Hearing details:*

November 8

Perth

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<sup>1</sup> Witness statement of Edward Fry.

<sup>2</sup> Transcript, 8 November 2023, PN72.

<sup>3</sup> Witness statement of Craig Gordon Peter Emery.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Transcript, 8 November 2023, PN74.

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<sup>7</sup> Witness statement of Craig Gordon Peter Emery.

<sup>8</sup> Witness statement of Michelle Tina Barnaby.

<sup>9</sup> Ibid.

<sup>10</sup> Transcript, 8 November 2023, PN84.

<sup>11</sup> Ibid, PN355 – PN359.

<sup>12</sup> Ibid, PN84, PN366.

<sup>13</sup> Transcript, 8 November 2023, PN651 – PN652.

<sup>14</sup> Ibid, PN658.

<sup>15</sup> Ibid, PN119, PN123.

<sup>16</sup> Ibid, PN401.

<sup>17</sup> Transcript, 8 November 2023, PN370 – PN372.

<sup>18</sup> Ibid, PN376.

<sup>19</sup> Ibid, PN377.

<sup>20</sup> Ibid, PN393 – PN398.

<sup>21</sup> Ibid, PN112 – PN114.

<sup>22</sup> Ibid, PN379.

<sup>23</sup> Digital Court Book, p. 23.

<sup>24</sup> Transcript, 8 November 2023, PN103 – PN109.

<sup>25</sup> Ibid, PN390.

<sup>26</sup> Ibid, PN752 – PN754, PN824 – PN827.

<sup>27</sup> Form F3, Question 1.7.

<sup>28</sup> Ibid, PN135.