



# DECISION

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

**Sean Bailey**

v

**TC TL VU Nguyen Pty Ltd T/A Nannup Family Bakery**  
(U2022/10905)

DEPUTY PRESIDENT BEAUMONT

PERTH, 6 APRIL 2023

*Application for an unfair dismissal remedy*

## 1 Issues in dispute and conclusion

[1] Mr Sean Bailey (the **Applicant**) made an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) having formed the view that he had been dismissed by TC TL VU Nguyen Pty Ltd T/A Nannup Family Bakery (the **Respondent**). It is uncontentious that the Respondent raised a jurisdictional objection to the application on the basis it did not dismiss Mr Bailey. Further, the parties agreed that the Respondent was a small business employer within the meaning of s 23 of the Act. Therefore, if the Applicant had been dismissed, compliance with the Small Business Fair Dismissal Code (the **Code**) was a relevant consideration. Of course, in circumstances where there had not been compliance, the question would turn to whether the Applicant’s dismissal was unfair.

[2] It is important to provide some context to this application. The Respondent is a family-owned business with all family members speaking predominately Vietnamese. As English is the family’s second language, all family members who provided evidence at hearing required the assistance of a Vietnamese interpreter. At some time after the application was allocated or perhaps before, the family had relocated to Vietnam from Nannup (a rural community in the South West of Western Australia). Purportedly, this was because of visa issues. None of the family members filed a witness statement. It became apparent that for a hearing to take place, witnesses for the Respondent would need to provide viva voce evidence over the telephone from Vietnam.

[3] Compounding matters further, on the day of the hearing, all but one of the Respondent’s witnesses provided their evidence via a telephone which had a maximum of 20 minutes credit. This in turn meant that every 20 minutes an adjournment was required to enable further credit to be uploaded on the phone.

[4] Most of the Respondent’s witnesses and Mr Thanh Cam Vu, an owner of the business who had opted to run the Respondent’s case, appeared to be located in the vicinity of a rather loud cockerel. Another of the Respondent’s witnesses, whom the Respondent initially declined

to call but then opted to change tact, was awaiting a flight. As events unfolded, it also became apparent that the interpreter was in transit and had opted to provide her services whilst competing with the machinations of the daily commute and thereafter children. The backdrop to the hearing was a cacophony of sounds – a rooster with a remarkable ability to crow for hours on end (presuming it was only the one), airport announcements, other transit announcements, the bustle of traffic, and generally noises that one might not otherwise expect during the course of a hearing, including of course the sound of children playing.

[5] To ensure that the Applicant, who had relocated to New Zealand prior to the hearing and who gave his evidence from that same location, was afforded procedural fairness, I permitted him to file responsive materials post hearing. He took up that opportunity.

[6] In light of the Respondent's jurisdictional objection to the application, several issues arose for consideration, namely:

- a) was the Applicant dismissed or did he abandon his employment;
- b) if the Applicant was dismissed, was there compliance with the Code on the basis the Respondent had reasonable grounds for forming the belief that the Applicant had engaged in misconduct of a serious nature which justified immediate dismissal; and
- c) if found that there was non-compliance with the Code, did it remain the case that the Applicant's dismissal was neither harsh, unjust nor unreasonable.

[7] Briefly stated, I have concluded that the Respondent dismissed the Applicant and when it did, it did not comply with the Code. However, for the reasons that follow, I have concluded that the Applicant's dismissal was not unfair.

## 2 Background

[8] The only witness called on behalf of the Applicant was the Applicant himself. However, the Respondent called the following witnesses to give evidence:

- a) Mrs Thi Kim Thuy Nguyen (aka Tina) – Director/Proprietor of the Respondent business;
- b) Ms Thu Viet Trang Thuy Vu (aka Rachel);
- c) Mr Phi Hoang Long Vu (aka Johnsan);
- d) Mr Paul Tanner – the Respondent's family friend; and
- e) Mr Phillip Power – the Respondent's Accountant and family friend.

[9] According to the Respondent, the Applicant became associated and involved with the Respondent's family business through a personal relationship with the son, Mr Phi Hoang Long Vu.<sup>1</sup> Through course of the hearing, it became apparent that Mr Phi Hoang Long Vu lived with the Applicant, in the Applicant's house.

[10] The Respondent notes that a business lease to operate the Nannup Family Bakery (**Nannup bakery**) was signed by the Respondent on 19 May 2021, around the time the Applicant commenced work for the Respondent.

### 2.1 The Applicant's evidence

[11] The Applicant said that he was employed on a full-time basis at the Respondent's business, the Nannup bakery, on 24 May 2021 as a bakery manager, barista and bookkeeper.<sup>2</sup>

[12] The Applicant outlined his duties in the following terms:

- a) opening and closing of the bakery;
- b) serving customers;
- c) barista made coffees;
- d) liaising with suppliers;
- e) confirming daily orders with clients;
- f) social media marketing;
- g) handling customer complaints and compliments;
- h) organising the roster;
- i) ensuring Shire/Council/food safety regulations were met;
- j) administration work;
- k) driving to Busselton/Bunbury for stock;
- l) driving in Perth to get stock; and
- m) paying invoices.

[13] The Applicant stated that his hours of work were specifically Monday to Friday between 6:00 AM to 4:00 PM, and they would change and include weekends should another employee be unavailable or call in sick.<sup>3</sup>

[14] The Applicant's pay rate was said to be \$28.0492 per hour or \$2,243.94 before tax per fortnight.<sup>4</sup>

[15] As the Applicant lived in Perth, he would commute to Nannup on a Monday (generally) and commute back to Perth on a Friday.<sup>5</sup> According to the Applicant, the commute took three hours each way.<sup>6</sup>

[16] On or about 29 July 2022, the Applicant said he discussed with the Respondent, Ms Thu Viet Trang Thuy Vu (Rachel), that he had noticed the sales had dropped significantly over the last few weeks, and it was thereafter agreed by both it would not be feasible to have him in the bakery Monday to Wednesday and therefore he would work from home.<sup>7</sup> The Applicant said that it was agreed that he would be at the bakery on Thursday and Friday.<sup>8</sup>

[17] The Applicant said that effectively this would mean that Monday to Wednesday, Ms Thu Viet Trang Thuy Vu would work alone, and he would work from home. Then on Thursday to Friday, he would work alone at the bakery whilst Ms Thu Viet Trang Thuy Vu was at TAFE.<sup>9</sup>

[18] The Applicant further said four weeks prior to his holiday on 13 August 2022, he had informed the Respondent that he would be unavailable for at least two weeks.<sup>10</sup> The Applicant noted that the Respondent's owner, Mrs Thi Kim Thuy Nguyen, had accepted his notice and wrote on the calendar, situated in the kitchen area above her workstation, the period of two weeks.<sup>11</sup> The Applicant gave evidence he was on holiday between 13 and 30 August 2022. The Applicant said that whilst he was officially on holiday, he was still communicating with clients and suppliers as requested by Ms Thu Viet Trang Thuy Vu.<sup>12</sup>

[19] The Applicant detailed that he returned to work following his leave – working from home Monday through to Wednesday, and at the bakery on Thursday and Friday.<sup>13</sup>

[20] At hearing, I asked the Applicant to explain how his work pattern of Monday to Friday in Nannup changed to working only Thursday and Friday in Nannup, whilst performing his duties in Perth, Monday to Wednesday. The Applicant stated:

So from when I was employed on 24 May 2021, from that point onwards for roughly one year and two months I was always working Monday to Friday every week, and around 29 July 2022 Rachel and I noticed that the sales had dropped significantly throughout the week through Monday and Friday. So Rachel and I agreed that it was not feasible for both of us to work Monday to Wednesday. So we came to the agreement that Rachel would work Monday to Wednesday by herself, and so for Thursdays and Fridays I would work as Rachel would go to TAFE/university in Bunbury. So even though it would only be Thursdays and Fridays I would be at the bakery, I would still work the Saturdays and Sundays if needed when a casual employee has called in sick.<sup>14</sup>

[21] Having received this evidence from the Applicant, I asked for clarification in respect of the duties he performed Monday to Wednesday. He replied:

So Monday to Wednesday I would still contact with suppliers. Rachel would send me a message with a picture of an order for me to place. Or I would call Rachel and Rachel would relay the order over the phone whilst I write it down. I would also do invoicing for client orders. I would also contact customers and clients. And during that time as well Rachel generally doesn't like answering the work phone, so when the - when someone is ringing she will let it go to voicemail. And when a voicemail is left it is sent to me by email where I would listen to the voicemail and respond to a customer inquiry or a client or supplier that's calling for anything in general in relation to the business. This would also include preparing catering orders as well that we had during that period.<sup>15</sup>

[22] The Applicant was also asked in cross examination why he was being paid as a full-time employee when he worked fewer days. The Applicant responded:

Well, it's not that I work less days. It's that I'm still working the same days but I'm also working extra days without being paid those extra days as I was theoretically a salaried employee. So my fortnightly pay was always the same regardless if I worked a Saturday and Sunday and regardless if I worked 12 hours, as again all the communication in relation to that business was generally directed to me because at that - obviously I can understand and comprehend English a lot better than Rachel, so in general regardless if I wasn't there at the business Monday to Wednesday I was still doing business-related activities up in Perth at home. As Cam and the family are well-aware, the office is situated in my home. And just to further add to that, if I was to work a Saturday or a Sunday, it was also agreed between myself and Rachel that I will have at least two days off in Perth. So if I worked a Saturday, then I would have, sorry, the Sunday and Monday off. So then, therefore, I would come down on the Tuesday and then it would just continue like that until Friday, if that makes sense.<sup>16</sup>

[23] The Applicant said that on 7 September 2022, he received a text message from Ms Thu Viet Trang Thuy Vu, advising him that Ms Sheridan Leverence would be working on Thursday and Friday, and on 14 September 2022, he received a text message from that same employee informing him that she normally worked Thursday and Friday.<sup>17</sup>

[24] The Applicant said on 11 September 2022, he sent a text message to Ms Thu Viet Trang Thuy Vu, informing her not to have Ms Leverence work on the Thursday and Friday, as he would work those days and it would save the Respondent money.<sup>18</sup>

[25] On 14 September 2022, the Applicant said he sent a text message to Ms Thu Viet Trang Thuy Vu, asking whether she had asked Ms Leverence to start at 7:00 AM every Thursday and Friday, to which Ms Thu Viet Trang Thuy Vu purportedly said, 'not yet'.<sup>19</sup> The Applicant included in his evidence the text message dialogue dated 14 September time stamped 6:50 PM, which read as follows:

Applicant: Have you told Sheridan to start 7am every Thursday and Friday?

Ms Vu: Not Yet

Applicant: Because she is telling me that she is doing 7am every Thursday and Friday

Ms Vu: When did you ask her?

Applicant: Just now

Ms Vu: I will let her know; Don't come tomorrow

Applicant: No it's fine; Just wait; I'm already discussing with her for her next shifts; I'll handle it<sup>20</sup>

[26] The Applicant said the inconsistent response from Ms Thu Viet Trang Thuy Vu (regarding the text message on 7 September 2022 and the one on 14 September 2022) led him to understand that the Respondent had rostered an employee to work the two days he was required by Ms Thu Viet Trang Thuy Vu to work on.<sup>21</sup>

[27] The Applicant included in his evidence the text message exchange between him and Ms Leverence on 14 September time stamped 6:16 PM; it read:

Applicant: Hey Sheridan. Is there any chance you would be able to start at 7am tomorrow?

Ms Leverence: Yeah I can

Applicant: Thanks. Give me a moment to confirm

Ms Leverence: I always start at 7 Thursday and Friday's

7:28 PM

Applicant: Tomorrow start at 7am please and Friday start at 10am. Thank you

Ms Leverence: U there friday

Applicant: Yes

Ms Leverence: Ok Friday till what rime; Time

Applicant: 10am to 1pm<sup>22</sup>

[28] During the hearing, the Applicant detailed the following with respect to Ms Leverence working on the Thursday and Friday:

And so with respect to saying that you stopped working on the Thursday and Friday or going to the bakery because Sheridan was there, can you explain that?---Yes. So because I was on holiday we decided to hire an employee to cover the days that I wouldn't be there, because obviously I'll be away for two weeks. The other two employees were weekend only because they go to school during the week, and so it was difficult to try and get them to obviously get off school to work at the bakery. And so she was hired the same week that I was to fly out on the 13th which was the Saturday, and so I had her come in on the Thursday and Friday which was 11 and 12 August so I could train her on the EFTPOS machine - sorry, the cash register and

train her on the coffee machine as well so then she had sort of - some sort of knowledge or the fair basics of how to use and how to make coffees.

All right. So did Sheridan continue to work the Thursday and the Friday?---She continued to work the Thursday and Friday of the two weeks that I was overseas, and then upon my return on 30 August because I suspected I might have COVID I advised Rachel, Rachel had Sheridan to cover the Thursday and Friday which was 1 and 2 September, and then the following week I returned to work on the Wednesday night and then Sheridan - just from memory Sheridan came into work anyway, which I had no understanding as to why, and she said to me that she was working because Rachel told her to work, even though I was to be there.<sup>23</sup>

**[29]** When asked to clarify whether the Applicant continued to work the Thursday and Friday each week in the bakery, up until November 2022, the Applicant replied:

And so up until November you continued to work at the bakery on the Thursday and the Friday?---Yes, and I believe from memory I did work, I believe it was a Saturday. I just don't remember the date.<sup>24</sup>

**[30]** The Applicant said that from July to September 2022, Ms Thu Viet Trang Thuy Vu would occasionally ask him to provide passwords and an email address to the Respondent's accountant, Mr Power.<sup>25</sup>

**[31]** The Applicant gave evidence that on 29 October 2022, Mr Thanh Cam Vu advised him, 'Sean, Phillip said he can't get into payroll to pay you because you are still the subscriber for Xero and you need to transfer to Phillip or Rachel so you can be paid. What is the amount you think is owed to you?'<sup>26</sup> According to the Applicant, Mr Thanh Cam Vu further said, 'Sean, Phillip will sort your wages out when you go see him. Can you please take all the paperwork for our business to Phillip everything please'.<sup>27</sup>

**[32]** Within that same chain of text messages of 29 October 2022, the Applicant had requested payment for monies purportedly owed, including wages for himself and workers.<sup>28</sup> The Applicant had sent the text stating:

Like I said I'm not asking for the entire amount of money. Pay me today and I'll provide the documents that is required for your visas today.<sup>29</sup>

**[33]** At hearing, the Applicant explained:

- - - it said, 'Like I said I'm not asking for the entire amount of money. Pay me today and I'll provide the documents that is required for your visas today.' Would you like to explain what you meant by that?---Yes. So the start of the business the respondent was wanting to apply for a business visa. So in order to apply for the business visa the business had to meet certain requirements each financial year, and so it was my job to ensure that we try and meet those requirements even though the requirements always changed every - every six months or every year. And so the documents that they required was the - so the - not payroll, the accounting information that was passed on to the accountant, and what else. No, I think it was just that, just the accounting information from the accountant software.

So in circumstances where you say you were closed off from having access in August to the accounting software how was it then that come that time when that text message was sent, on 29 October it appears to say, that you were going to be able to provide them with what they

required for the visas if that was in fact the accounting information?---Sorry, just to confirm the August wasn't the accounting software, it was actually the seller EFTPOS account that I lost access to in August.

And through the Zelle that EFTPOS account was the account that payment of wages occurred from?---Yes, that's correct.

All right. And so the account that then, or the account that you're seeking to access you said requiring accounting information, where was that obtained from?---The Xero accounting software of which myself, Rachel and the accountant and some associates of the accountant had access to.

And so why was it that you have put, 'Pay me today and I'll provide the documents', why wasn't it simply the case that you would just provide the accounting information from Xero to the respondent?---Well, because there was the fact that I had been requesting for payment of my wages over the - over the last few weeks prior to that encounter, and it wasn't getting anywhere and I just wanted to be paid because the fact that I was, you know, losing money unnecessarily every week for paying the wages of the employees and without being paid myself.<sup>30</sup>

**[34]** On 1 November 2022, the Applicant met with the Respondent's accountant, Mr Power, to provide some paperwork upon request by Mr Thanh Cam Vu and to produce his reimbursements.<sup>31</sup> The Applicant further noted that he provided passwords and an email address to Mr Power.<sup>32</sup>

**[35]** The Applicant said later that day, on 1 November 2022, he lost access to the Respondent's emails, Xero accounting software and many others, albeit he was not informed that he would lose access, nor was he informed of the reasons why.<sup>33</sup>

**[36]** It is observed that in cross examination, the Applicant was asked by the Respondent, why, if he looked after the bakery account, did he not pay salary to employees. The Applicant responded:

I did pay salary to employees. That's why I requested for my messages between myself and Cam, that's why I was asking for payment and so, therefore, I could pay the other employees because I had my access removed from the business accounts around the September - August/September 2022. So from that point onwards I've been paying employees using my own money which the respondent has evidence of - or, sorry, the respondent's accountant.<sup>34</sup>

**[37]** An email was sent by the Bakery Manager (Leanne Blackstone) to a client of the Respondent (Peter Jones – Servite College) on 4 November 2022, stating, '...I wish to inform you Sean is no longer employed by Nannup Bakery. Cheers Leanne...'.<sup>35</sup>

**[38]** On 8 December 2022, a further email was sent by Ms Thu Viet Trang Thuy Vu to clients, suppliers and community members stating, '[w]e have had an issue where our mail server has been compromised by a bad actor suspected to be a former employee'.<sup>35</sup>

## 2.2 The evidence of Mr Phi Hoang Long Vu (aka Johnsan)

[39] Mr Phi Hoang Long Vu gave evidence that he had lived in the same house as the Applicant from 2015 until 2021.<sup>36</sup> However, it is noted that the Applicant held the view that Mr Phi Hoang Long Vu had lived in the Forrestfield house with him since 2020.

[40] Mr Phi Hoang Long Vu stated that he is the son of Mr Thanh Cam Vu. He explained that he had no experience working in a bakery so when he (and the family) opened a new bakery, the Applicant came to assist with bookkeeping, orders, checking the money and paying wages to the employees.<sup>37</sup>

[41] Mr Phi Hoang Long Vu gave evidence that the Applicant had not issued payslips to staff, including his uncle.<sup>38</sup>

[42] Mr Phi Hoang Long Vu appeared concerned to provide evidence regarding the Respondent's 'Zelle' account. He stated:

When the business open, so I asked him to - told me the Zelle account, and then - and then after a couple of months he didn't told me, and then I asked him, he said it's not the inside - not (indistinct words), it's not (indistinct), but he didn't told me that account, but when I tried to log in he not let me - not letting me log in as well.

When I asked when did this occur are you able to provide an approximate date or time?---Okay. About during - during in 2021, but I can't remember the month. So that's just before - just before the Zelle account (indistinct). I can't remember the month, exactly the month, but it's during 2021.

Okay. All right. Is there anything else that you wish to add, Johnsan?---And also - and also - remember - and then also I asked him to transfer all the money from the Zelle account to the business account lender - lender, Bankwest - Bankwest open, but he didn't transfer all the money to that account. He said it got \$300,000 in that account, but he didn't transfer it all to the Bankwest account. But I didn't - I did ask him twice or many time. He said, yes, he will do it, he will do it, but he not.

And how did you know there was \$300,000 in the Zelle account?---He just say it, but I'm not too sure. He didn't show me or he didn't (indistinct) or he didn't show me the bank account. He just say it, like he said to me that - he said do we have a (indistinct) in the bank account, that he said to me, but he not show me anything to - like evidence.

And you say you asked him to do this in 2021?---Yes.

And when Mr Bailey did not show you what was in the bank account and when you found out that the \$300,000 had not been transferred, not all of it into the Bankwest account, what did you do?---Well, I'm just waiting, waiting, and then until my family found out that the money not in the Zelle account any more so we tried to open a Commonwealth account and from there all the money, to get all the money not transferred, not go into the (indistinct) any more and all the money income to go into the Commonwealth. So that's (indistinct) hard to do that. So therefore the money, all the money go into the Commonwealth.

And what about the \$300,000 that has gone missing apparently?---Well, he just said to me that only 300,000 in the Zelle account, but when we - we couldn't find out. We tried many times, we tried to do different ways to access to Zelle account, but it didn't work, and we thinking that



the 300 might be gone, like he's using for something, we don't know. And, yes, so we decide to not use the Zelle account any more and me, my mum, my dad and my sister to open - we had to open the Commonwealth.

When was the Commonwealth account opened?---I think in August.

In August what year?---In 2022 - yes, 22.<sup>39</sup>

**[43]** In cross examination, Mr Phi Hoang Long Vu was asked further about the Zelle account. The following dialogue unfolded:

MR BAILEY: Sorry, I will just repeat that. You were aware that between August 2022 up until the point that you moved out of the house last month that you were aware of the issue of why I couldn't access Zelle?---Yes.

And did you tell me as well after I advised you roughly how much money was left in the Zelle account which was approximately \$170,000 that you actually also advised me that you would pay this to your family with your own money?---No.

This is around October/November last year when we had multiple discussions. You don't recall it?---No, that's not correct.

You also said in your statements in regards to your mum and your sister coming to Perth. Would you be referring to the date 3 August 2022?---Yes.

And was this the time that your mum and your sister entered my home without permission from both myself or you?---Yes

And just to confirm you said that you set up a Commonwealth account to utilise the EFTPOS system from Commonwealth around August; is that correct?---Yes.<sup>40</sup>

### **2.3 The evidence of Mrs Thi Kim Thuy Nguyen**

**[44]** Mrs Thi Kim Thuy Nguyen provided the following evidence:

So my evidence is I knew Mr Sean Bailey to be - to my son. I wanted to open a business and I had no English. So because I have no English I wanted him to guide me through the business and control the business, but he over control our family. And so in the following steps of the business I delegated him to do whatever he want to do in the bakery business. So subsequently I requested him to let me know how much there was in Zelle account, but he did not give me any information. So the next question there was Wi-Fi internet, (indistinct) the register, telephone, he set it up for my family. We all ask information and he provided all wrong information. So following months before he stop working he didn't go to work, he didn't report to me that he would not go to work, and I didn't know anything. So after he came back from holiday he (indistinct words) my girl, my daughter when she studying on Friday. I came up there to see him, but he did not want to see me. So I stay in my friend's house. I tried to convince him to come down to work on Friday, because I have no (indistinct) for anyone else to work for me. Then after that he came down to work for two days and then he came back to Perth, he returned to Perth. So after that he stopped coming to work and I really needed someone to work because my daughter had to go to study. After that I came up there once more time and he did not let me come in, but one of my friend let me in. And then he tried to avoid seeing me and I slept in the car, and the next day he got in touch with my husband and we met in the car park. So

I wanted to ask him if he want to return to work. If he doesn't, he didn't, then he return all our - the files and transfer all money out, but he refused. So I asked him to go to Zelle to transfer money back, because I've been working for so long and I don't know how - what is my account number. I don't know how much I have. My - my idea was that if he did not want to work for us any more to hand over the business, and I treat him like my son. Until this minute I didn't know anything. This is a business that allow me to come in and out of the country, but I didn't - not - I don't know anything. So I did want the court to intervene him to return Zelle account to me to pay taxes, and also if he is saying that we didn't - did not pay him wages, then return the account so I can get the money to pay him the wages. So I said like the court intervene to help me to return to my business, because I didn't want to continue my business. Because of him now my business is suffering. So thank you, Deputy President, and thank you everyone to listen to my story.<sup>41</sup>

[45] In cross examination, the Applicant observed that Mrs Thi Kim Thuy Nguyen had mentioned that she wanted some sort of control (presumably over the daily operation of the business). She was asked whether at the end of each day, she would do the daily cash takings.<sup>42</sup> Mrs Thi Kim Thuy Nguyen answered, '[c]ash is a very small amount of the sale, the revenue each day'.<sup>43</sup>

[46] Mrs Thi Kim Thuy Nguyen confirmed at hearing that after the Applicant had returned from holiday, she had visited him at his house but he did not allow her stay or sleep there.<sup>44</sup>

#### **2.4 The evidence of Mr Phillip Power**

[47] Mr Power informed the Commission that he is an accountant, and he had become involved with the Respondent business through preparing its tax returns and ensuring its tax compliance.<sup>45</sup>

[48] Mr Power explained that it was necessary to obtain the Respondent's bank statements to enable the preparation of its BAS's and tax work.<sup>46</sup> Mr Power described struggling to get that information on several occasions but having eventually received it up until a certain date.<sup>47</sup> Mr Power commented that when the information came through there was no verification of the balances.<sup>48</sup> Mr Power noted that he had the transactions, but there was nothing there to ensure as an accountant that it was 'complete transactions'.<sup>49</sup> Mr Power said that when this came to light, he started to try to get access to the 'Zelle account'. Mr Power explained that this was an account which the Respondent was using for electronic payments and a lot of the Respondent's money was getting transferred into that account.<sup>50</sup> Essentially, that account was used for running the Respondent business.<sup>51</sup> Mr Power said that from an outsider looking in, it appeared that the Applicant was the only one who had access to that account.<sup>52</sup>

[49] Mr Power clarified that the Zelle account is where all the transactions for the Respondent business were going to, and hence all income was deposited into that account for a large portion of time.<sup>53</sup>

[50] Mr Power gave evidence that both he and Mr Phi Hoang Long Vu were attempting to access the Respondent's Zelle account. It was confirmed by Zelle that there was an active account controlled by the Applicant, but Zelle purportedly refused to provide further information about the account to Mr Power and Mr Phi Hoang Long Vu, said Mr Power.<sup>54</sup> Mr Power gave further evidence that there was an account in Zelle which Zelle had informed him and Mr Phi Hoang Long Vu was inactive.<sup>55</sup>

[51] Mr Power stated that ‘we’ (presumably Mr Phi Hoang Long Vu and him) were at their wits’ end – in respect of accessing the Respondent’s Zelle account.<sup>56</sup> Mr Power said the next day (1 November 2022),<sup>57</sup> they had organised for the Applicant to come in and drop off information and the receipts that the Applicant wished to claim, that is, to receive reimbursement for.<sup>58</sup> On that same day, said Mr Power, the Applicant transferred the Xero subscriber back to him, because at this stage he was getting a little concerned from a financial perspective that the business owners had limited access.<sup>59</sup> Mr Power said this meant he was able to control the bookkeeping or the Xero package on behalf of the client (the Respondent).<sup>60</sup> Mr Power further said that the subscriber was then subsequently reassigned to the Respondent (Ms Thu Viet Trang Thuy Vu).<sup>61</sup>

[52] In cross examination, Mr Power clarified that whilst he had access to the bookkeeping function in Xero at the inception of the business, he had never been allocated payroll access.<sup>62</sup>

[53] Mr Power said that they then called Zelle and ran through the emails and passwords provided by the Applicant.<sup>63</sup> Mr Power said none of those matched any of the Zelle accounts.<sup>64</sup>

[54] Mr Power said he asked the Zelle representative how to obtain information about the Zelle account and was informed that the only other people that Zelle could give the information to, other than to the Applicant, was the police.<sup>65</sup> Mr Power said he turned to the Applicant and said, ‘Sean, you understand the consequences of that’.<sup>66</sup>

[55] Mr Power said the Respondent still did not have the password to access the critical data, and that the reason that data was critical was because the Applicant was requesting reimbursement up to \$41,000.00.<sup>67</sup> Mr Power said the expenses covered a 12 month period, so wanted to check those expenses had not been reimbursed, hence why he was desperate to get access to the Zelle transactions on the account to verify whether those expenses had already been reimbursed to the Applicant or not.<sup>68</sup>

[56] Mr Power added when preparing the information that the Applicant had dropped off (on the aforementioned day), there was a three-month report in the Zelle account which showed there was \$170,873 of sales, but at the time it was showing in Xero only sales of about \$59,264. Mr Power said ‘things just weren’t gelling, I guess, and I was - I was trying to piece the puzzle together’.<sup>69</sup> Mr Power explained that this was why he was reluctant to let any more money go out to the Applicant.<sup>70</sup>

[57] Mr Power acknowledged that the Applicant had provided information from the Zelle account in August 2021.<sup>71</sup>

## **2.5 The evidence of Ms Thu Viet Trang Thuy Vu**

[58] Ms Thu Viet Trang Thuy Vu appeared to be providing her evidence from an airport. As a consequence, her oral testimony abruptly ended when she boarded her flight. This meant that whilst the Applicant was afforded the opportunity to cross examine Ms Thu Viet Trang Thuy Vu, such cross examination came to an end when the mobile phone connection to Ms Thu Viet Trang Thuy Vu was lost. Notwithstanding, the following could be gleaned from what was interpreted.

**[59]** Ms Thu Viet Trang Thuy Vu said that around September (presumably 2022), the Applicant had a holiday and then informed Ms Thu Viet Trang Thuy Vu's dad that he was exhausted, had a COVID infection, and could not work.<sup>72</sup> Ms Thu Viet Trang Thuy Vu said that after two weeks, the Applicant came down to work one or two days a week.<sup>73</sup> Ms Thu Viet Trang Thuy Vu added that the Applicant sent a text message to other workers to ask them to work for him or replace him, and the Applicant tried everything to avoid seeing her.<sup>74</sup>

**[60]** Ms Thu Viet Trang Thuy Vu continued:

Rachel said, 'I expected to see him, but he did not come down to work.' When was Mr Bailey supposed to be working, what day and when?---Approximately one week after the holiday.

And what were his hours of work?---So he worked two to three days which is 8 am to 2 pm, Saturday and Sunday, and his (indistinct) day off, so he come back to the city.

So is Rachel saying he was required to work three days, two to three days a week between 8 am and 2 pm?---I did told that he could work all days of the week, but he only worked two to three days, but I think - and the other day he come back to the city, but I think (indistinct) him full time work.

So, Rachel, Mr Bailey says that you and Mr Bailey had a discussion and thought that there was not much work from Monday to Wednesday and agreed that he would not drive down to Nannup for those days. Is that correct?---No, it's not right.

Well, what is it that Rachel says is right?

She says what does it mean?

THE DEPUTY PRESIDENT: So she says that that is not correct. So what is Rachel's version of what was said?---So he had to work from Monday to Friday because I paid him full-time work. So even though there is not enough work to do he still have to work.

**[61]** In cross examination, the Applicant asked Ms Thu Viet Trang Thuy Vu to confirm that when she attended TAFE in Bunbury every Thursday and Friday, she was unavailable to work and there was a requirement for the Applicant to work.<sup>75</sup> Ms Thu Viet Trang Thuy Vu replied:

So to replace me is right, because he had to work Monday to Friday, so he had to work those two days, Thursday and Friday. That's right.<sup>76</sup>

**[62]** Ms Thu Viet Trang Thuy Vu gave evidence that Ms Leverence sometimes worked on Thursday and Friday to help out, but she was not an 'official' employee and did not work on the weekends.<sup>77</sup> Ms Thu Viet Trang Thuy Vu confirmed that Ms Leverence would be unavailable to work sometimes on the weekend and therefore one or two times the Applicant would have to work.<sup>78</sup>

**[63]** Prior to the disconnection of Ms Thu Viet Trang Thuy Vu's phonenumber, she was asked to confirm that during the operation of the Respondent business she had access to certain accounts prior to 4 November 2022, specifically the Xero accounting software, security cameras and the POS system for the cash register. Ms Thu Viet Trang Thuy Vu was also asked

to confirm and that when asked, the Applicant would give Ms Thu Viet Trang Thuy Vu access straight away (presumably to those accounts). Ms Thu Viet Trang Thuy Vu responded:

So I did ask him about the password, but you didn't - because he didn't want to work for me, but you give me password, that none of them match. So I had to change the cameras, call people in to change the camera, security camera system as it will (indistinct) Zelle account.<sup>79</sup>

## **2.6 The Applicant's further evidence**

**[64]** Because the Respondent was permitted to rely upon its viva voce evidence presented at hearing, I afforded the Applicant the opportunity to file evidence in reply.

**[65]** For the most part, the Applicant's evidence in reply was either irrelevant or constituted opinion. In this respect, I refer to the Applicant's assertions concerning Mr Power's evidence, and the Applicant's evidence regarding the visa status of Ms Thu Viet Trang Thuy Vu and Mrs Thi Kim Thuy Nguyen. Hence, I considered the probative value of this evidence limited.

**[66]** However, the Applicant filed direct evidence of copies of text messages exchanged between him and Ms Thu Viet Trang Thuy Vu, and him and Mr Thanh Cam Vu. That evidence included a:

- a) text message exchange between him and Ms Thu Viet Trang Thuy Vu about an order, on 4 October 2022;
- b) text message exchange between him and Ms Thu Viet Trang Thuy Vu about a power outage and collection by Mr Jake Sharp and Ms Leverage, on 30 September 2022;
- c) text message exchange between him and Mr Thanh Cam Vu providing passwords for Xero, Staleys, email, Brownes, CCTV and requesting that they are forwarded to Ms Thu Viet Trang Thuy Vu, on 19 October 2022;
- d) text message exchange between him and Ms Thu Viet Trang Thuy Vu about an order for milk, on 22 September 2022;
- e) text message exchange between him and Ms Thu Viet Trang Thuy Vu about an order for milk, on 29 September 2022;
- f) text message exchange between him and Ms Thu Viet Trang Thuy Vu about an email from Hale School, on 7 September 2022;
- g) text message exchange between him and Mr Thanh Cam Vu regarding the purchase of food products, on 8 October 2022;
- h) text message exchange between him and Mr Thanh Cam Vu regarding not presenting for work on return to Australia, and the Applicant advising he had symptoms of COVID-19, on 1 September 2022; and
- i) text message exchange between him and Mr Thanh Cam Vu regarding an internet outage, on 2 September 2022.

**[67]** It can be safely assumed that the text messages were sent in 2022, as the day and date align with the 2022 calendar.

**[68]** The Applicant included a text message exchange within his reply documents, between him and Mr Phi Hoang Long Vu, dated 12 October 2022, in which Mr Phi Hoang Long Vu requested the password for an email address and the Applicant provided the same.

[69] Regarding assertions that the Applicant had not issued payslips, the Applicant included in his reply materials emails dated 12 January 2022 and 16 February 2022, where he sent Mr Sharp, an employee, his payslip.

### **3 The Applicant's submissions**

[70] The Applicant's submissions regarding the unfairness of his dismissal can be distilled into the following points. The Respondent:

- a) failed to follow procedural fairness as per the Code;
- b) failed to conduct any disciplinary meeting;
- c) failed to issue the Applicant with either a verbal or written warning about any issues it had with the Applicant's performance or attendance;
- d) notified another person, specifically a catering client, about the Applicant's dismissal from the business before affording that opportunity to the Applicant;
- e) had hired another employee on or before the Applicant's dismissal, which effectively demoted him in the current position he originally had; and
- f) removed the Applicant's access to all business accounts by 1 November 2022 without warning or notification of any issues the Respondent had with him.

[71] In respect of the procedural deficits of his dismissal, the Applicant pressed that the Respondent had not afforded him any opportunity to respond to any issue that they may have had with him at the time.

[72] The Applicant further submitted that the allegation that he had abandoned his employment could not be sustained when one considered the additional materials filed – noting that there was still 'contact between Rachel and Cam and I throughout this period up until my dismissal on 4 November 2022'.

### **4 Agreed matters**

[73] I am satisfied that the Applicant was protected from unfair dismissal,<sup>80</sup> such that his application was made within the required period as prescribed in s 394(2) of the Act and he earned less than the high income threshold. It was not contested by the parties that the dismissal was by way of genuine redundancy.<sup>81</sup>

[74] Further, I am satisfied that the Applicant was employed on a full-time basis and that his duties and responsibilities are as listed at paragraph [12] of this decision.

[75] Having considered the evidence, I am also satisfied that the Respondent is a small business employer as defined in s 23 of the Act, and that the Code applied to the dismissal. Neither party advanced an argument to the contrary.

### **5 Was Mr Bailey dismissed?**

[76] The Respondent initially argued that Mr Bailey abandoned his employment. However, on the evidence before me that contention cannot be sustained. For the following reasons, I have found that the Applicant was dismissed.

[77] Section 386(1) of the Act defines what constitutes a dismissal for the purpose of Part 3-2, which concerns unfair dismissal. The word ‘dismissed’ is defined in s 12 of the Act as having adopted the meaning in s 386. Section 386 reads:

(1) A person has been dismissed if:

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

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

[79] The definition of dismissal in s 386(1) of the Act has two elements, both of which have been subject to consideration. The first traverses ‘termination on the employer’s initiative’ and the second, ‘resignation in circumstances where the person was forced to do so because of conduct or a course of conduct’. This bifurcation was explained by the Full Bench in *Bupa Aged Care Australia Pty Ltd v Tavassoli (Bupa)*,<sup>82</sup> in the following terms:

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

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

(2) A resignation that is “forced” by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer’s conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.<sup>83</sup>

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

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

[11] Section 386(1)(a) seems plainly to be intended to capture the case law determining the meaning of termination (of the employment relationship) at the initiative of the employer. In *Mohazab* the Court considered that the expression “termination at the initiative of the employer” was:

“ . . . a reference to a termination that is brought about by an employer and which is not agreed to by the employee. Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression “termination of employment.”” (references omitted)<sup>84</sup>

[81] The Full Bench in *City of Sydney RSL* placed reliance on the decision of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd [No 2] (Mohazab)*.<sup>85</sup> This is unsurprising given the Full Court of the Federal Court in *Mahony v White* observed that the Act had retained the use of the phrase and that the judgment in *Mohazab* remained good authority as to the connotation of that formula.<sup>86</sup>

[82] While finding it unnecessary and undesirable to endeavour to formulate an exhaustive description of what constituted ‘termination at the initiative of the employer’, the Court in *Mohazab* identified that an important feature was that the act of the employer resulted directly or consequentially in the termination of the employment and the employment relationship was not voluntarily left by the employee.<sup>87</sup> Furthermore, while a termination of employment may involve more than one action, it is important to ask oneself what was the critical action or actions which constituted a termination of employment.

[83] In providing the closing submissions on behalf of the Respondent, Mr Thanh Cam Vu, appropriately in my view, conceded that ‘[w]e did not completely dismiss him at work’. At this point, it was the Respondent’s first acknowledgement that while it did not completely dismiss the Applicant, it still had some part to play in the cessation of the employment relationship. Mr Mr Thanh Cam Vu submitted:

MR CAM: I thank you, I thank the court for offering me to show this (indistinct) in this matter. We did not completely dismiss him at work. We’ve been expect of him to come back to work, but he did not come back to work. He obtains all accounts and all money in Zelle account. That’s why he tried to – try not to come to work any more. I call him to come back to work, requested him to provide all the account numbers and password, but all of them was (indistinct) wrong numbers. We always wanted him to come – I always wanted him to come back to work, but he did not want to work. I thank court for listening for our story, but we always welcome the people who needed work. Okay, that’s all.<sup>88</sup>

[84] It is apparent that the Applicant continued contact with the Respondent and performed some work on his return from an overseas holiday on 1 September 2022. However, the Respondent evidently held the view that the contact maintained and the work performed by the Applicant did not meet its expectations regarding the role the Applicant was employed to do. The Respondent’s view is perhaps best expressed in the words of Mrs Thi Kim Thuy Nguyen



who gave evidence that after the Applicant came back from holiday, he stopped coming to work in Nannup, apart from two days where he worked on the Thursday and the Friday.<sup>89</sup> However, Mrs Thi Kim Thuy Nguyen spoke of having to convince the Applicant to attend Nannup to work on those days.<sup>90</sup>

[85] Whilst the Xero data demonstrates that the Applicant was performing work for the Respondent up until 31 October 2022, and the text messages show that the Applicant remained in contact with the Respondent's owners up until 19 October 2022, the Applicant's employment drew towards an end when, on 1 November 2022, he was denied access to the Respondent's emails, Xero accounting software and other software packages.<sup>91</sup> As of that date, the Respondent took action to ensure that the Applicant was no longer able to perform some of the duties and responsibilities of his role. It was that critical action that ultimately brought the employment relationship to an end by email dated 4 November 2022, an email in which the Respondent's Bakery Manager confirmed to its client that the Applicant was no longer employed by the Respondent (the Applicant having received the email).

## **6 Was there compliance with the Code?**

### **6.1 Legislative framework**

[86] Section 396 of the Act provides that before considering the merits of an unfair dismissal application, the Commission must determine, amongst other matters, whether a dismissal was consistent with the Code. This is perhaps unsurprising given that s 385 of the Act sets out that a person has been unfairly dismissed if, in part, the Commission is satisfied that the dismissal was not consistent with the Code.<sup>92</sup>

[87] A person has *not* been unfairly dismissed where the dismissal is consistent with the Code. It is useful to set out s 388 of the Act:

#### **388 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.

[88] The Code is only relevant if the employer is a small business as defined in s 23 of the Act. That section provides that '[a] national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time'. It is not in dispute that the Respondent was a 'small business employer' at the time of the Applicant's dismissal.

[89] The Code provides:

### **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.

### **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.

[90] The 'Summary Dismissal' section of the Code clearly applies to dismissals that have 'immediate effect' as that term is understood by reference to the decision in *Chen v Australian Catering Solutions Pty Ltd*,<sup>93</sup> and are not dismissals on notice.<sup>94</sup> However, as explained in *Ryman v Thrash Pty Ltd (Ryman)*, an immediate dismissal may include a dismissal with a payment in lieu of notice which nevertheless is intended to have immediate effect.<sup>95</sup>

[91] In *Ryman*, the Full Bench provided a useful synopsis of the proper approach to the construction and application of the Summary Dismissal aspect of the Code and its interaction with reg 1.07 of the *Fair Work Regulations 2009 (Cth)* (the **Regulations**).<sup>96</sup> That decision has been subsequently followed in *Grandbridge Ltd v Wiburd*<sup>97</sup> and *TIOBE Pty Ltd v Chen*.<sup>98</sup>

[92] In *Ryman*, the Full Bench considered the meaning of 'summary dismissal' and said that it referred to a dismissal without notice arising from 'a breach of an essential term of the employment contract, a serious breach of a non-essential term of the contract, or conduct manifesting an intention not to be bound by the contract in the future on the part of the employee'.<sup>99</sup>

[93] However, it is not the case that under the Code the Commission must be satisfied that serious misconduct was the basis for the dismissal.<sup>100</sup> Rather, 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 and one must also consider whether that belief was based on *reasonable grounds*.<sup>101</sup> This element, which has been described as the second element,<sup>102</sup> incorporates the concept that the employer has carried out a reasonable investigation into the matter.<sup>103</sup> It is not necessary to determine whether the employer was correct in the belief that it held.<sup>104</sup> Whether the employer had 'reasonable grounds' for the relevant belief is of course to be determined objectively.<sup>105</sup>

[94] The focus on 'serious misconduct' must be taken as identifying the subject matter and it appears to be accepted that this term gleans its meaning from s 12 of the Act and thereafter reg 1.07 of the Regulations.<sup>106</sup>

[95] If an applicant's dismissal was consistent with the Code, it cannot be considered unfair within the meaning of the Act.

## 6.2 Consideration

[96] It is evident that the Respondent's primary argument is that the Applicant abandoned his employment. Albeit it also appears that the Respondent considers the Applicant concealed accurate passwords and had misappropriated the Respondent's monies. However, returning to the abandonment argument, whilst the evidence points to the Applicant having been dismissed and the Applicant not having abandoned his employment, essentially what the Respondent appears to contend is that the Applicant was employed to perform work at the Nannup bakery as a bakery manager, barista and bookkeeper,<sup>107</sup> and of his own volition he had changed his role to suit his purpose, absent the Respondent's consent. Meaning, he had reduced the days of work where he was present at the Nannup store.

[97] In a legal sense, Respondent's argument is premised upon the Applicant repudiating the terms of the employment contract – in this case an oral employment contract. The test for repudiation is whether the conduct of the employee is such as to convey to a reasonable person, in the position of the employer, renunciation either of the contract as a whole or of a fundamental obligation under it.<sup>108</sup> The issue turns upon the objective acts and omissions and not on uncommunicated intention.<sup>109</sup>

[98] The Applicant outlined that his duties on commencement included, amongst others, opening and closing of the bakery, serving customers, making barista-made coffees and liaising with suppliers. The performance of such duties, even that of liaising with suppliers, to a certain extent, would require the Applicant's physical presence in the store.

[99] The first question is whether the Applicant's change in work location was agreed to by the Respondent.

[100] Turning first to the Applicant's workdays of Thursday and Friday and the evidence of Mrs Thi Kim Thuy Nguyen.<sup>110</sup> One may recall that Mrs Thi Kim Thuy Nguyen identified that after the Applicant returned from holiday, her daughter had commenced studying on a Friday. Mrs Thi Kim Thuy Nguyen spoke of going up (presumably to the metropolitan area) to

convince the Applicant to work on a Friday as she did not have anyone else to work for her.<sup>111</sup> Mrs Thi Kim Thuy Nguyen said that the Applicant came down to work for two days and then returned to Perth.<sup>112</sup> Mrs Thi Kim Thuy Nguyen said that after that, the Applicant stopped coming to work.<sup>113</sup>

[101] On balance, I prefer the account of Mrs Thi Kim Thuy Nguyen, for the following reasons.

[102] One will recall the Applicant said that on 7 September 2022, he received a text message from Ms Thu Viet Trang Thuy Vu, advising him that Ms Leverence would be working on Thursday and Friday, and on 14 September 2022. It is of course the case that as of 1 September 2022, the Respondent had enquired why the Applicant had not presented for work, and the Applicant had advised the Respondent he had symptoms of COVID-19 and Thursday, 1 September 2022, and Friday, 2 September 2022, would need to be covered by Ms Leverence.

[103] The Applicant said on 11 September 2022, he sent a text message to Ms Thu Viet Trang Thuy Vu, informing her not to have Ms Leverence work on the Thursday and Friday as he would work those days and it would save the Respondent money.<sup>114</sup> However, whilst the Applicant levels at the Respondent that it had rostered an employee to work the two days he was required to work, the direct evidence shows it was not Ms Thu Viet Trang Thuy Vu who arranged for Ms Leverence to work on the Thursday and Friday on one of the occasions, but the Applicant himself.

[104] As observed, the Applicant included in his evidence text message dialogue dated 14 September 2022 time stamped 6:50 PM, which read as follows:

Applicant: Have you told Sheridan to start 7am every Thursday and Friday?

Rachel: Not Yet

Applicant: Because she is telling me that she is doing 7am every Thursday and Friday

Rachel: When did you ask her?

Applicant: Just now

Rachel: I will let her know Don't come tomorrow

Applicant: **No it's fine; Just wait; I'm already discussing with her for her next shifts; I'll handle it**<sup>115</sup>

[105] The Applicant said it was the inconsistent response from Ms Thu Viet Trang Thuy Vu (regarding the text messages on 7 September 2022 and 14 September 2022), which led him to understand that the Respondent had rostered an employee to work the two days he was required by Ms Thu Viet Trang Thuy Vu to work on.<sup>116</sup> However, in his text message to Ms Leverence on 14 September time stamped 6:16 PM, it is the Applicant who asks Ms Leverence to work on the Thursday and Friday.<sup>117</sup>

[106] I consider that the Applicant's own credibility in relation to the issue of whether he was required to work in Nannup on Thursday and Friday is undermined by the text message he sent to Ms Leverence on 14 September time stamped 6:16 PM, where the Applicant asks her to work on the Thursday and Friday.<sup>118</sup> This is notwithstanding having first informed the Respondent in the text message 11 September 2022 not to have Ms Leverence work on the Thursday and Friday to save money. Whilst the Respondent had arranged for Ms Leverence to work the

Thursday and Friday whilst the Applicant was absent on leave and when he had COVID-19 symptoms, it is apparent that the Respondent did not consider it a permanent arrangement.<sup>119</sup>

[107] Mrs Thi Kim Thuy Nguyen gave evidence of coming ‘up there to see him’, presumably visiting the Applicant in Perth, on two occasions. The purpose, to convince the Applicant to come down (to Nannup) to work. On one occasion, as recently observed, Mrs Thi Kim Thuy Nguyen acknowledged that the Applicant came down to work for two days.<sup>120</sup> Mrs Thi Kim Thuy Nguyen’s evidence of approaching the Applicant twice regarding working in Nannup was not challenged by the Applicant, albeit the Applicant asked Mrs Thi Kim Thuy Nguyen whether on 3 August she entered his property:

I don't remember the date, but after he came, returned from holiday I came up to his house, but he did not allow me to stay, to sleep there. I had to sleep in my friend's house.

Okay. So 3 August is when Tina came to my house and both myself and my partner at the time were in the home. Tina and Rachel did go and stay at someone's house that night and I picked up Tina at 3 am in the morning. Can Tina confirm that we drove to Nannup on Thursday morning which would have been 4 August at 3 am to Nannup to open the shop?<sup>121</sup>

[108] Mrs Thi Kim Thuy Nguyen responded ‘yes’.

[109] I consider that Mrs Thi Kim Thuy Nguyen provided a factually accurate account. This is notwithstanding admitting to having conducted herself in a manner that would not cast her in a favourable light, such as entering the Applicant’s house in early August (seemingly without consent).

[110] Turning now to the Applicant working from Perth on Monday to Wednesday, rather than in Nannup. At hearing, Ms Thu Viet Trang Thuy Vu was informed that the Applicant said that he had held a discussion with her and as there was not much work from Monday to Wednesday it was agreed that he would not drive down to Nannup for those days. When asked whether this was correct, Ms Thu Viet Trang Thuy Vu said ‘no’. Ms Thu Viet Trang Thuy Vu further said that the Applicant was required to work from Monday to Friday because she paid him for full-time work – this was the case even if there was not enough work to do.<sup>122</sup>

[111] The Applicant gave evidence that on or about 29 July 2022, he discussed with Ms Thu Viet Trang Thuy Vu the significant drop in sales over the last few weeks. During this time, Ms Thu Viet Trang Thuy Vu also had applied for TAFE in Bunbury, said the Applicant. The Applicant said:

...it was agreed between Rachel and him that it was not feasible for him to be at the business Monday until Wednesday. And so, therefore, Rachel would work by herself Monday to Wednesday and I would work Thursday and Friday in Nannup. It was also agreed between Rachel and I that I would work from home Monday to Wednesday, and that Rachel would go to TAFE/university Thursday and Friday, and so therefore I would be in Nannup to cover those two days.<sup>123</sup>

[112] As to the work performed by the Applicant when based in Perth, particularly on Monday to Wednesday, the Applicant explained:

So Monday to Wednesday I would still contact with suppliers. Rachel would send me a message with a picture of an order for me to place. Or I would call Rachel and Rachel would relay the order over the phone whilst I write it down. I would also do invoicing for client orders. I would also contact customers and clients. And during that time as well Rachel generally doesn't like answering the work phone, so when the - when someone is ringing she will let it go to voicemail. And when a voicemail is left it is sent to me by email where I would listen to the voicemail and respond to a customer inquiry or a client or supplier that's calling for anything in general in relation to the business. This would also include preparing catering orders as well that we had during that period.<sup>124</sup>

**[113]** Appreciating that between 13 and 30 August 2022, the Applicant was on an overseas holiday and on his return he reported symptoms of COVID-19, I have considered the direct evidence relied upon by the Applicant to support his contention that he worked on a full-time basis, notwithstanding having worked from home purportedly on Monday to Wednesday from July 2022 onward.

**[114]** The Applicant provided his timesheet details for the period 1 July 2022 to October 2022 (the **Timesheet**).<sup>125</sup> In the period of 7 August 2022 to the week ending 23 October 2022, the Timesheet shows that the Applicant worked 40 hours a week, eight hours a day, on Monday through to Friday.<sup>126</sup> The Timesheet does not evince any weekend work in that period.

**[115]** The Applicant tendered into evidence a document titled 'History and Notes Report – Nannup Family Baker Xero', dated and time stamped '10/01/2023 15:31' (**Xero data**). The document details a table, an extract of which is detailed below (amounting to 24 pages):

Q Search in results				
Date (Time zone AEDT) ↓	User	Item	Action	Detail
31 Oct 2022 20:30	Sean Bailey	<a href="#">Sales invoice</a>	Paid	Payment received from BlackWood Cafe - Nannup on 31 October 2022 for 1,188.70. This invoice ha...
31 Oct 2022 20:30	Sean Bailey	<a href="#">Bank transaction</a>	Created	
27 Oct 2022 19:37	Sean Bailey	<a href="#">Branding theme</a>	Edited	Terms & Payment Advice for Nannup Family Bakery 2 edited
27 Oct 2022 19:36	Sean Bailey	<a href="#">Sales invoice</a>	Invoice sent	This invoice has been sent.
27 Oct 2022 19:36	Sean Bailey	<a href="#">Sales invoice</a>	Paid	Payment received from Nicholas Connan on 27 October 2022 for 568.00. This invoice has been...
27 Oct 2022 19:36	Sean Bailey	<a href="#">Bank transaction</a>	Created	
27 Oct 2022 19:36	Sean Bailey	<a href="#">Sales invoice</a>	Approved	INV-0127 to Nicholas Connan for 568.00.
27 Oct 2022 19:36	Sean Bailey	<a href="#">Sales invoice</a>	Created	INV-0127 to Nicholas Connan for 568.00.
27 Oct 2022 19:36	Sean Bailey	<a href="#">Contact</a>	Created	Nicholas Connan has been created.
27 Oct 2022 19:33	Sean Bailey	<a href="#">Branding theme</a>	Edited	Terms & Payment Advice for Nannup Family Bakery 2 edited
17 Oct 2022 05:04	Sean Bailey	<a href="#">Bank transaction</a>	Reconciled	Debit payment on 3 October 2022 for -50.00.
17 Oct 2022 05:04	Sean Bailey	<a href="#">Bank transaction</a>	Created	
17 Oct 2022 05:04	Sean Bailey	<a href="#">Bank transaction</a>	Approved	
9 Oct 2022 20:50	Sean Bailey	<a href="#">Bank transaction</a>	Created	From Nannup Family Bakery for 2,023.38.
9 Oct 2022 20:50	Sean Bailey	<a href="#">Bank transaction</a>	Approved	From Nannup Family Bakery for 2,023.38.
9 Oct 2022 20:42	Sean Bailey	<a href="#">Bank transaction</a>	Created	From Nannup Family Bakery for 2,016.07.

**[116]** The following is evident from the Xero data:

- a) on 5 August 2022, ‘Sean Bailey’ made 18 entries between the period of 11:42 - 11:52;
- b) on 1 September 2022, ‘Sean Bailey’ made 9 entries between the period of 20:08 – 20:09;
- c) on 7 September 2022, ‘Sean Bailey’ made 22 entries between the period of 14:25 – 19:56;
- d) on 8 September 2022, ‘Sean Bailey’ made 6 entries between the period of 11:27 – 11:54;
- e) on 13 September 2022, ‘Sean Bailey’ made 7 entries between the period of 15:00 – 20:31;
- f) on 14 September 2022, ‘Sean Bailey’ made 1 entry at 16:16;
- g) on 16 September 2022, ‘Sean Bailey’ made 5 entries between the period of 14:39 – 14:41;
- h) on 29 September 2022, ‘Sean Bailey’ made 9 entries between the period of 14:53 – 14:53;
- i) on 2 October 2022, ‘Sean Bailey’ made 19 entries between the period of 20:41 – 22:18;
- j) on 5 October 2022, ‘Sean Bailey’ made 21 entries between the period of 14:40 – 14:49;
- k) on 7 October 2022, ‘Sean Bailey’ made 2 entries at 17:14;
- l) on 9 October 2022, ‘Sean Bailey’ made >65 entries between the period of 18:31 – 20:50;
- m) on 17 October 2022, ‘Sean Bailey’ made 3 entries at 5:04.
- n) on 27 October 2022, ‘Sean Bailey’ made 8 entries between the period of 19:33 – 19:37; and
- o) on 31 October 2022, ‘Sean Bailey’ made 2 entries at 20:30.

**[117]** The Applicant provided a payslip for the period of 26 September 2022 to 9 October 2022, in which he was paid for 80 hours at his ordinary rate of pay. During that period, the Applicant appears to have used Xero on eight days (as detailed above).

**[118]** If one considers the Applicant’s Timesheet and contrasts that to the Xero data, it can be seen that in the period of the week ending 7 August 2022 until the week ending 23 October 2022, the Applicant had recorded working 60 days. In that same period, there were 15 days where data entry was recorded on Xero. For part of the period, the Applicant was on holiday. However, it seems that in that period of mid to late August 2022, there were no entries in Xero made by the Applicant and the recording of receivable invoices had similarly ground to a halt.

**[119]** In respect of receivable invoices, the Applicant tendered into evidence a document titled ‘Payable Invoice Detail’. The document was categorised in alphabetical order according to vendor.<sup>127</sup> A further document tendered was the ‘Receivable Invoice Detail’ for the period of 1 July 2022 to 4 November 2022 – this document was chronologically ordered.<sup>128</sup> The Receivable Invoice Detail showed the following:

- a) 1 August 2022, five receivable invoices;

- b) 7 September 2022, 20 receivable invoices;
- c) 8 September 2022, four receivable invoices;
- d) 16 September 2022, one receivable invoice;
- e) 20 September 2022, one receivable invoice;
- f) 1 October 2022, four receivable invoices;
- g) 2 October 2022, 16 receivable invoices;
- h) 11 October 2022, six receivable invoices;
- i) 12 October 2022, five receivable invoices;
- j) 13 October 2022, five receivable invoices;
- k) 14 October 2022 to 18 October 2022, five to seven receivable invoices a day; and
- l) 21 October 2022 to 27 October 2022, five to eight receivable invoices a day.

[120] It is observed that on several days, the receivable invoices represented ‘POS Sales’, ‘POS – No Tax’, ‘Cash Received’, ‘Credit Card Received’, ‘Cash Variance’ and ‘Credit Account’.<sup>129</sup>

[121] I have compared the duties and responsibilities that the Applicant was employed to perform as the Bakery Manager, Barista and Bookkeeper to those performed in the latter months of his employment.<sup>130</sup> Briefly stated, it appears that the Applicant unilaterally decided to work from Perth rather than Nannup. Furthermore, the direct evidence (referred to in paragraphs [114] to [120]), considered together with the evidence of Mrs Thi Kim Thuy Nguyen and Ms Thu Viet Trang Thuy Vu, does not support the Applicant’s contention that notwithstanding working from Perth, he worked on a full-time basis.

[122] At this juncture, it proves timely to observe that in respect of Ms Thu Viet Trang Thuy Vu’s evidence, I have given weight to those evidential points she was cross examined in respect of.

[123] The test as to whether there is repudiatory conduct is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.<sup>131</sup>

[124] It is accepted that if a small business employer has dismissed an employee without notice – that is, with immediate effect – on the ground that the employee has committed serious misconduct that falls within the definition in reg 1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the ‘Summary Dismissal’ section of the Code. All other types of dismissals by small business employers are to be considered under the ‘Other Dismissal’ section of the Code.<sup>132</sup> The Applicant was dismissed absent notice and the dismissal had immediate effect.

[125] The question, therefore, is whether there was compliance with the Code. In respect of a summary dismissal, the Commission applies a two-stage test. 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.

[126] I have found that the Respondent held the view that the Applicant unilaterally changed his work location from Nannup to Perth. The Applicant understood his job was based in Nannup. The Respondent had unequivocally instructed the Applicant that he was needed to



perform his duties in the Nannup bakery. Those duties included opening and closing the bakery, serving, and performing the role of the barista. I have found that the Applicant did not comply with the instruction provided in the latter part of 2022. It is evident from the Respondent's evidence that it considered the Applicant's conduct constituted a repudiation of his oral employment contract (although the Respondent referred to his action as abandonment).

**[127]** The Code clearly focusses attention on the employer's belief which must be based on reasonable grounds, not on whether the employee's conduct as a matter of fact and law justified immediate dismissal.<sup>133</sup> However, for reasons that will become apparent, if it were necessary to do so, I would make the below mentioned findings that the Applicant had:

- a) unilaterally changed his work location from Nannup to Perth in circumstances where he understood his job was based in Nannup and he had been clearly instructed of the same;
- b) unilaterally changed the scope of his duties such that the in-person service at the Nannup bakery was significantly reduced;
- c) subsequently been unequivocally instructed he was needed in the Nannup bakery (at least on Thursday and Friday, if not Monday to Friday on an *ongoing* basis) and yet had not complied with such request; and
- d) received wages for full-time work, when evident from his own direct evidence (in this respect I refer to the documentation tendered and referred to at paragraphs [113] – [120]) and that of Mrs Thi Kim Thuy Nguyen and Ms Thu Viet Trang Thuy Vu, he was not working full-time.

**[128]** Secondly, it is necessary to consider whether the belief held by the Respondent was based on reasonable grounds.

**[129]** Mrs Thi Kim Thuy Nguyen and Ms Thu Viet Trang Thuy Vu were intimately involved in respect of who was working at the bakery. It is apparent that both were well positioned to determine whether the Applicant was working from Perth or Nannup, and both shared the view that the Applicant was required to work down in Nannup. In this respect, I refer to Mrs Thi Kim Thuy Nguyen's evidence of travelling to Perth in an attempt to have the Applicant perform his work in the Nannup bakery, rather than his home office. It follows that this second aspect of the Summary Dismissal part of the Code is satisfied.

**[130]** I am therefore satisfied that at the time of dismissal, the Respondent held a reasonable belief that the Applicant's conduct was sufficiently serious to justify immediate dismissal and the belief was based on reasonable grounds.

**[131]** Regarding assertions that the Applicant provided falsified or inaccurate passwords for the Respondent's critical information technology infrastructure, including payroll for the Zelle account, there was insufficient evidence before me to draw a conclusion that a belief held by the Respondent in this respect was reasonable.

**[132]** I have no doubt that Mr Power provided an accurate account regarding his interactions with the Zelle representative and the Applicant on 1 November 2022. This is notwithstanding the Applicant's challenge to Mr Power's evidence. The Applicant pressed that Mr Power mentioned that Zelle provided the name of an account holder. According to the Applicant, like

many banking institutions, Zelle would not release any information without the authentication of the person present with them on the phone with the asking of security questions. The Applicant drew the conclusion that it was therefore likely that Mr Power lied under oath that such an organisation would just say who owns an account to a stranger, without any authority on supposedly any accounts associated with Zelle EFTPOS.

**[133]** However, it is evident that in respect of the 1 November 2022 discussion with Zelle, the Applicant was present for Mr Power's telephone discussion with the Zelle representative:

...So I was almost pleading with - well, I was pleading and in the presence of Sean, pleading with the Zelle officer to send us an email, we needed access to it. I thought it was unfair that the own business and the owners did not have access to their own EFTPOS machine, and they replied that Sean was the only one that had access to it. Nothing could be changed, nothing could be done unless Sean gave approval to it. We ran around in circles for a significant time. I was getting frustrated at the time. We weren't getting answers. And then finally I said to Zelle, I said, 'Look, how can we get this information?' And they said the only other people we can give this information to other than to Sean is to the police. I turned to Sean and I said, 'Sean, you understand the consequences of that', and he said - well, I actually can't remember what Sean replied to that, and that was about the end of the conversation with Zelle.<sup>134</sup>

**[134]** The Applicant pressed that he had provided passwords for the Respondent's information technology infrastructure to Ms Thu Viet Trang Thuy Vu. However, when asked about this, Ms Thu Viet Trang Thuy Vu purportedly boarded her flight and her evidence abruptly ended:

So can you just confirm that obviously throughout the business, from opening the business till 4 November 2022 that you actually received passwords in relation to the Xero accounting software which you actually had access from day one, and the security cameras you actually had access to that again from day one. Can you confirm that you actually had those, and also can you confirm that you actually asked me in person at the shop for the user name and password for the cash register, which I provided to you there and then?---Sorry, I am at the airport, so if you give me a minute, please.<sup>135</sup>

**[135]** In the absence of hearing from Ms Thu Viet Trang Thuy Vu, I am unable to find that a belief held by the Respondent that the Applicant had falsified or otherwise provided incorrect passwords was a reasonable belief. Similarly, there is insufficient evidence before me to arrive at a finding that a belief held by the Respondent that the Applicant had misappropriated the Respondent's monies in the Zelle account was reasonable.

**[136]** Whilst Mr Paul Tanner was called to give evidence on behalf of the Respondent, the probative value of his evidence was questionable, with conclusionary and opinion evidence provided. I have attributed no weight to his account.

**[137]** Having found that the 'Summary Dismissal' aspect of the Code was complied with, it proves unnecessary to consider the 'Other Dismissal' aspect. However, the Code speaks of 'Procedural Matters' to the extent that in discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. What is, however, absent from both the 'Summary Dismissal' and 'Procedural Matters' aspects of the Code is consideration of whether the employee is directly informed or otherwise notified of her or his dismissal.

[138] The ‘Procedural Matters’ part of the Code does not present as prescriptive, such that an employer is required to inform the employee that she or he can have another person present to assist. Furthermore, it is unclear whether it pertains to circumstances of a ‘Summary Dismissal’. One might interpret the express reference to the exclusion of ‘Summary Dismissal’ in the second paragraph as rendering it applicable to both ‘Summary’ and ‘Other’ dismissals because of the lack of such exclusion in the first paragraph.

[139] While apparent that the Applicant was not advised of his dismissal until such time as the new Bakery Manager sent an email to a client of the Respondent (Peter Jones – Servite College) on 4 November 2022, stating, ‘...I wish to inform you Sean is no longer employed by Nannup Bakery. Cheers Leanne...’, the lack of direct communication to the Applicant that he had been dismissed may not render the dismissal non-compliant with the Code.

[140] However, s 388(2) refers to a dismissal being consistent with the Code if 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 complied with the Code. It is accepted that a dismissal does not take effect until such time as it is communicated to an employee. On this basis, perhaps the preferable approach is that compliance with the Code arises in circumstances where the employee’s dismissal has been directly communicated to that same employee – irrespective of whether the dismissal is a ‘Summary Dismissal’ or ‘Other Dismissal’.

[141] As the Applicant’s dismissal was not directly communicated to him, I have found that the Respondent was non-compliant with the Code. If, however, I am wrong on this point, it nevertheless remains that I consider that the Applicant was not unfairly dismissed. In reaching this conclusion, I have considered those factors in s 387 of the Act.

## **7 Unfair dismissal**

[142] The statutory requirement imposed by s 385(b) of the Act is that the Commission must reach a state of satisfaction that a dismissal was harsh, unjust, or unreasonable. The conduct which may fall within the phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd Ltd* by McHugh and Gummow JJ as follows:

.... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.<sup>136</sup>

[143] In considering whether a dismissal is unfair, the Commission must consider the matters specified in s 387, including whether there was a valid reason for dismissal and any other matters the Commission considers relevant.

**[144]** Section 387 of the Act contemplates that the Commission will undertake an overall assessment as to the nature of the dismissal and in so doing, the criteria in s 387 must, where relevant, be weighed up in totality.

**[145]** In respect of whether there was a valid reason for the Applicant's dismissal, by virtue of the findings reached at paragraph [127], I consider that there was. 'Valid' in this context generally refers to whether there was a sound, defensible or well-founded reason for the dismissal.<sup>137</sup> Such a reason is one that is valid in the sense that it was both sound and substantiated.

**[146]** A termination of employment may occur by way of a summary dismissal where there is the exercise of an election by the employer to terminate the employment contract in response to a repudiation of the employment contract by the employee, constituted by a breach of an essential term, a serious breach of a non-essential term, or conduct on the part of the employee manifesting an intention not to be bound by the contract in the future. In my view, the Applicant breached an essential term of his employment contract, placing the Respondent in a position to elect to terminate the contract effective 4 November 2022. It follows that I have considered poor performance was not in issue. Instead, the Applicant's conduct of unilaterally changing his place of work and scope of duties, and his reticence to work in the Nannup bakery notwithstanding instruction to do so, is better characterised as misconduct.

**[147]** It is however uncontroversial that the Applicant was not afforded procedural fairness in respect of having been informed of the reason for his dismissal and the opportunity to respond to the same. Clearly, the Applicant was not positioned to request the presence of a support person given it was not directly communicated to him that he was dismissed.

**[148]** The procedure adopted by the Respondent concerning the Applicant's dismissal was evidently affected by its size and lack of internal human resources specialists. I have found that the size of the Respondent business and the absence of human resource expertise in the workplace are contributing factors to the procedure adopted by the Respondent in effecting the Applicant's dismissal. These factors weigh heavily in favour of a finding that notwithstanding the procedural deficiencies in affecting the dismissal, in circumstances where the Respondent had a valid reason for dismissal, the deficiencies are not such that they detract from the dismissal having been fair.

**[149]** In respect of s 387(h) of the Act, the Respondent dismissed the Applicant without notice and without advising him personally. The Respondent had evidently formed a not insubstantial dependency on the Applicant to assist in running its business and, at the beginning of the employment relationship, that dependency appears not to have been misplaced. For the most part, the issues that formed the catalyst for dismissal appeared to have transpired in the last three to four months of the employment relationship.

**[150]** It is however important to appreciate the dynamic at play in this particular case. The Respondent business was established and thereafter run by a family who all spoke English as a second language. There appears to have been a significant language barrier for the owners of the Respondent – such that assistance was required from the Applicant in navigating most aspects of the business operations. Mrs Thi Kim Thuy Nguyen was also unfamiliar with running a business in Australia. It is clear that the Respondent was dependent on the Applicant

to run or manage its business, including being present to assist with service in the bakery. Whilst it might oft be observed that there is a power imbalance between employer and employee, with the employer predominately possessing authority, in the circumstances of this case that power imbalance was reversed. The Applicant was regnant within the business structure. This power imbalance manifested itself in the evidence of Mrs Thi Kim Thuy Nguyen – who attempted to ‘convince’ the Applicant to work in the Nannup bakery, notwithstanding he was required to do so.

[151] It is difficult to conceive how a dismissal in such circumstances could not be anything but unfair given the Applicant learned about his dismissal through an email dated 4 November 2022, addressed to a third person. Yet, I do not doubt the Respondent considered that the Applicant had abandoned his employment because of his failure to present for work and perform his work at the Nannup bakery. Whilst it is clear there was not an abandonment in the legal sense of the word, it is nonetheless evident that the Applicant repudiated the terms of his employment contract, and that conduct formed the basis for the Respondent’s view that the Applicant no longer wished to be bound by his contractual obligations. I am not, however, suggesting that the Applicant did not assist the Respondent by providing passwords when prompted, but I have found that he fundamentally altered the conditions of the employment relationship – absent consent to do so.

[152] Again, the Applicant learned of his dismissal through correspondence directed to someone else. Such conduct cannot be condoned as it is inappropriate. However, on balance, having considered all the evidence before me, I am unable to conclude that his dismissal was unfair when all the factors in s 387 of the Act are taken into account and weighed. I consider that the Applicant’s repudiation of his employment contract by unilaterally changing his work location and thereafter claiming a full-time wage for part-time work was, in the circumstances, exploitative. Any procedural deficiencies are outweighed by the gravity of the conduct engaged in.

## 8 Conclusion

[153] In light of the above reasoning, the Applicant’s unfair dismissal application is dismissed. An Order to that effect is published concurrently with this decision.<sup>138</sup>



DEPUTY PRESIDENT

*Appearances:*

*S Bailey*, Applicant.  
*T Vu*, for the Respondent.

*Hearing details:*

2023.

Perth (by video link and telephone):  
6 February.

Printed by authority of the Commonwealth Government Printer

<PR750234>

---

<sup>1</sup> Form F3 – Employer response to unfair dismissal application, [2.2].

<sup>2</sup> Witness Statement of Sean Bailey (**Bailey Statement**); Digital Hearing Book, 51 (**DHB**).

<sup>3</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>4</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>5</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>6</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>7</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>8</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>9</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>10</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>11</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>12</sup> Bailey Statement (n 2); DHB (n 2) 51.

<sup>13</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>14</sup> Transcript of Proceedings, *Bailey v TC TL VU Nguyen Pty Ltd* (Fair Work Commission, U2022/10905, Beaumont DP, 6 February 2023) [PN85] (**Transcript**).

<sup>15</sup> *Ibid* [PN86].

<sup>16</sup> *Ibid* [PN123].

<sup>17</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>18</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>19</sup> Bailey Statement (n 2); DHB (n 2) 52, 55.

<sup>20</sup> Bailey Statement (n 2); DHB (n 2) 55.

<sup>21</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>22</sup> Bailey Statement (n 2); DHB (n 2) 60.

<sup>23</sup> Transcript (n 14) [PN158] – [PN159].

<sup>24</sup> *Ibid* [PN160].

<sup>25</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>26</sup> Bailey Statement (n 2); DHB (n 2) 52, 58.

<sup>27</sup> Bailey Statement (n 2); DHB (n 2) 52, 59.

<sup>28</sup> Bailey Statement (n 2); DHB (n 2) 52, 57.

<sup>29</sup> Bailey Statement (n 2); DHB (n 2) 52, 58.

---

<sup>30</sup> Transcript (n 14) [PN170] – [PN174].

<sup>31</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>32</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>33</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>34</sup> Transcript (n 14) [PN97].

<sup>35</sup> Bailey Statement (n 2); DHB (n 2) 52.

<sup>36</sup> Transcript (n 14) [PN201].

<sup>37</sup> Ibid [PN208].

<sup>38</sup> Ibid [PN223].

<sup>39</sup> Ibid [PN214] – [PN222].

<sup>40</sup> Ibid [PN267] – [PN272].

<sup>41</sup> Ibid [PN306].

<sup>42</sup> Ibid [PN308] – [PN309].

<sup>43</sup> Ibid [PN309].

<sup>44</sup> Ibid [PN312].

<sup>45</sup> Ibid [PN358].

<sup>46</sup> Ibid [PN358].

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid [PN364].

<sup>54</sup> Ibid.

<sup>55</sup> Ibid [PN380].

<sup>56</sup> Ibid [PN364].

<sup>57</sup> Ibid [PN369].

<sup>58</sup> Ibid [PN364].

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid [PN370].

<sup>63</sup> Ibid [PN364].

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid [PN381].

<sup>72</sup> Ibid [PN455].

<sup>73</sup> Ibid.

- <sup>74</sup> Ibid.
- <sup>75</sup> Ibid [PN474].
- <sup>76</sup> Ibid.
- <sup>77</sup> Ibid [PN476].
- <sup>78</sup> Ibid.
- <sup>79</sup> Ibid [PN478].
- <sup>80</sup> Bailey Statement (n 2); DHB (n 2) 51; *Fair Work Act 2009* (Cth) s 382.
- <sup>81</sup> *Fair Work Act 2009* (Cth) s 382.
- <sup>82</sup> (2017) 271 IR 245.
- <sup>83</sup> Ibid 268–9 [47].
- <sup>84</sup> (2018) 273 IR 126, 129–30 [10] – [11].
- <sup>85</sup> (1995) 62 IR 200 (**Mohazab**).
- <sup>86</sup> (2016) 262 IR 221, 228 [23].
- <sup>87</sup> *Mohazab* (n 85) 205.
- <sup>88</sup> Transcript (n 14) [PN499].
- <sup>89</sup> Ibid [PN306].
- <sup>90</sup> Ibid.
- <sup>91</sup> Bailey Statement (n 2); DHB (n 2) 52.
- <sup>92</sup> *Fair Work Act 2009* (Cth) s 385(c).
- <sup>93</sup> [\[2017\] FWC 3930](#), [62] – [64].
- <sup>94</sup> *Ryman v Thrash Pty Ltd* (2015) 268 IR 1, 14 [36] (**Ryman**).
- <sup>95</sup> Ibid 13 [32].
- <sup>96</sup> Ibid 14 [37] – [38].
- <sup>97</sup> [\[2017\] FWC 6732](#) (**Grandbridge**).
- <sup>98</sup> (2018) 282 IR 1 (**TIOBE**).
- <sup>99</sup> *Ryman* (n 94) 11 [27].
- <sup>100</sup> Ibid [39]; *Grandbridge* (n 97) [28].
- <sup>101</sup> *Pinawin v Domingo* (2012) 219 IR 128, 135 [29] (**Pinawin**).
- <sup>102</sup> Ibid.
- <sup>103</sup> Ibid, cited in *Ryman* (n 94) 15 [39]. See also *Grandbridge* (n 97) [28].
- <sup>104</sup> *Pinawin* (n 101) 135 [29].
- <sup>105</sup> *Ryman* (n 94) 15 [40].
- <sup>106</sup> *Grandbridge* (n 97) [28]; *ibid* 14 [37].
- <sup>107</sup> Bailey Statement (n 2); DHB (n 2) 51.
- <sup>108</sup> *Gelagotis v Esso Australia Pty Ltd* [\[2018\] FWC 6092](#), [119].
- <sup>109</sup> Ibid.
- <sup>110</sup> Transcript (n 14) [PN306].
- <sup>111</sup> Ibid.
- <sup>112</sup> Ibid.
- <sup>113</sup> Ibid.
- <sup>114</sup> Bailey Statement (n 2); DHB (n 2) 52.
- <sup>115</sup> Bailey Statement (n 2); DHB (n 2) 55.
- <sup>116</sup> Bailey Statement (n 2); DHB (n 2) 52.
- <sup>117</sup> Bailey Statement (n 2); DHB (n 2) 60.



---

<sup>118</sup> Bailey Statement (n 2); DHB (n 2) 60.

<sup>119</sup> Transcript (n 14) [PN476].

<sup>120</sup> Ibid [PN306].

<sup>121</sup> Ibid [PN313].

<sup>122</sup> Ibid [PN470].

<sup>123</sup> Ibid [PN73].

<sup>124</sup> Ibid [PN86].

<sup>125</sup> DHB (n 2) 91.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 92.

<sup>128</sup> Ibid 107.

<sup>129</sup> Ibid 118–21.

<sup>130</sup> Transcript (n 14) [PN86].

<sup>131</sup> *Koompahtoo Local Aboriginal Land Council v Snapine Pty Ltd* (2007) 233 CLR 115, 135 [44].

<sup>132</sup> *Ryman* (n 99) 14–15, [39], [42], followed in *TIOBE* (n 98) 10–11 [30].

<sup>133</sup> *Grandbridge* (n 97) [14].

<sup>134</sup> Transcript (n 14) [PN364].

<sup>135</sup> Ibid [PN483] – [PN488].

<sup>136</sup> (1995) 185 CLR 410, 465.

<sup>137</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>138</sup> [PR750235](#).