



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Maddison Noble

v

Smiling Samoyed Pty Ltd
(U2022/12078)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 24 APRIL 2023

Application for an unfair dismissal remedy – brewer – workplace bullying – loss of confidence in employer response – resignation – whether resignation forced – no dismissal – application dismissed

[1] On 21 December 2022 Maddison Noble (the applicant or Ms Noble) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy against Smiling Samoyed Pty Ltd (Smiling Samoyed, the respondent or the employer).

[2] Ms Noble claims that she was dismissed within the meaning of the FW Act on 12 December 2022 and that her dismissal was unfair. She seeks compensation.

[3] Ms Noble’s application is premised on the proposition that she was forced to resign as a result of the respondent’s handling of a workplace bullying incident by another employee towards her.

[4] Smiling Samoyed oppose the application and raise a jurisdictional objection. It says that Ms Noble was not dismissed but chose to resign.

[5] Conciliation was conducted on 23 January 2023. The matter did not resolve.

[6] Permission was granted for Ms Noble to be represented.¹ The employer was self-represented; by a co-owner, Ms Henning.

[7] On 31 January 2023 and for reasons published on 2 February 2023 I dismissed an application by the employer to summarily strike-out the application on the ground of having no reasonable prospects of success.²

[8] I issued directions on 31 January 2023.

[9] Materials were filed by Ms Noble and Smiling Samoyed including CCTV footage of the workplace incident (vision only; not audio).³

[10] I heard all matters (jurisdiction, merit and remedy) by video on 22 and 27 March 2023.

Evidence

[11] I received evidence (oral and written) from five persons:

- Maddison Noble (applicant);⁴
- Simone Andrews (psychologist);⁵
- Rhiannon Pulford (former employee);⁶
- Katharine Terrel Henning (co-owner and Pack Leader);⁷ and
- Simon Campbell Dunstone (co-owner and Head Brewer).⁸

[12] Some facts are in dispute. In that respect, issues of credit arise.

[13] All witnesses gave evidence conscientiously. None were evasive or lacking credit. The factual differences largely concern matters of detail where evidence was given three months after relevant events. In that context, differences in recall on detail is not unsurprising.

[14] Ms Henning, who was subject to lengthy cross examination, was in particular an impressive witness. Her witness statements were detailed though certain aspects that contained hearsay were struck-out or are given little probative weight. That aside, she displayed impressive recall. Her evidence under cross examination remained consistent and, aside from a few concessions appropriately made, was resolute and unwavering.

[15] Ms Noble was also clear and direct though somewhat stilted. She too made appropriate concessions. Whilst generally confident and consistent, her recall occasionally wavered but not in a manner that rendered her evidence unreliable.

[16] Mr Dunstone's evidence, which was narrower in scope, was credible and largely uncontroversial.

[17] To the extent required, and without necessarily preferring the evidence of Ms Henning or Mr Dunstone over the evidence of Ms Noble (or vice versa), in resolving factual disputes I apply standard tools available to first-instance decision-makers including creditworthiness, plausibility and consistency with the documentary record.

[18] Ms Pulford's evidence is of limited value. It is largely irrelevant because Ms Pulford resigned in September 2021 and had no role directly or indirectly in the events of December 2022. Ms Pulford's evidence concerned her historic observations of Ms Galvin in the workplace. Ms Galvin's earlier conduct is of tangential relevance only and even then only with respect to her dealings with Ms Noble. Ms Pulford's evidence did not concern observations, historic or otherwise, between Ms Galvin and Ms Noble.

[19] I now turn to the evidence of Ms Andrews. Ms Andrews is a clinical psychologist of some eight years standing. Her report of 16 March 2023 was in the form of a letter responding to questions put by Ms Noble's solicitors. A number of those questions were leading and presented in the context of the psychologist having been provided the CCTV footage and Ms Noble's statement in this litigation but not the statements of others.

[20] Ms Andrews was Ms Noble's treating psychologist in the months that followed Ms Noble's employment ending but not prior. She treated Ms Noble on three occasions, all in 2023 (7 February, 21 February and 7 March).

[21] Ms Andrews' evidence is of some relevance. It is certainly relevant to remedy as it concerns Ms Noble's health diagnosis and prognosis and her capacity to resume paid employment in the wake of her employment at the brewery ending. Ms Noble contends that it is also relevant to jurisdiction and merit because it concerns the psychologist's opinion about the impact workplace events (historic and recent) had on Ms Noble's health, and the psychologist's opinion on whether those events forced Ms Noble's resignation.

[22] I agree that Ms Andrews' professionally formed opinion about the impact workplace events, including those of December 2022, had on Ms Noble's health are relevant to jurisdiction and merit with a number of caveats. It is relevant for two reasons; one because professionally formed opinions about Ms Noble's then state of health may explain in part her reaction and responses to workplace conduct and two, [REDACTED]

[23] The caveats however are important. Firstly, Ms Andrews did not know of and was not Ms Noble's treating psychologist at the time of those events. Her opinions were formed *ex post facto*. Secondly, Ms Andrews had no direct knowledge of what occurred in the workplace. Her knowledge of those events are only as good as the factual narrative communicated to her by Ms Noble and the CCTV footage. In some respects, that factual narrative is incomplete or disputed. Thirdly, opinions about historic events (even if relevant) are more remote in time than the events of December 2022 and thus opinions concerning those matters are less likely to be well informed. Fourthly, the psychologist's answers to questions 4, 5 and 7 do not concern a health prognosis or diagnosis but opinions about whether a resignation was forced by workplace conduct. That is a question of fact to be determined in this matter by reference to all relevant circumstances. An opinion by a health professional months later about causation between workplace events and a resignation may be professionally valid but, given that a statement of opinion about an employee's conduct and its cause is not of itself a finding of fact, it is of some but limited usefulness.

[24] There are two further observations I make about evidentiary matters.

[25] Firstly, Smiling Samoyed did not call two persons whose evidence is relevant to the factual narrative – its Venue Manager Ms Galvin and a human resources contractor, Ms Russell. Counsel for Ms Noble submitted that I should draw adverse inferences of the *Jones v Dunkel*⁹ kind against the respondent.

[26] A *Jones v Dunkel* inference, were it made, does not enable facts not otherwise open to be so found. It simply has the effect of creating an inference that evidence of a certain person would not have been helpful to the party that did not call that person.¹⁰

[27] The respondent's submission as to why it did not call Ms Galvin was that the jurisdictional matter does not centrally concern Ms Galvin's conduct. In an important respect the respondent is correct. In determining whether a resignation is forced, the relevant inquiry under s 386(1)(b) of the FW Act is into the employer's conduct, not that of employees engaged in a dispute or altercation. However, in this matter that altercation is relevant to determining the jurisdictional question because all relevant facts need to be considered. The workplace altercation between Ms Galvin and Ms Noble on 2 December 2023 is relevant to the factual narrative. It contextualises and in part explains subsequent conduct including that of the employer and Ms Noble. Further, the evidence of Ms Noble as to historical matters between her and Ms Galvin is, at least on Ms Noble's case, also relevant to views she formed that led her to lose trust and confidence in her employer and precipitated her resignation.

[28] Whilst recognising that Ms Galvin's evidence would have been of some but not central relevance, I nonetheless consider it appropriate to draw the inference that evidence of Ms Galvin would not have been helpful to the respondent. In that context, I am left with the CCTV footage and the evidence of Ms Noble and Ms Henning as to their interactions with Ms Galvin. I am also left with documents prepared by Ms Galvin (emails and an apology letter). The absence of Ms Galvin does not generally preclude me making findings on these issues given the evidence of others.

[29] The respondent explained that being unfamiliar with proceedings such as these, it had thought that Ms Russell would have been required to attend the full hearing and that, being a business of small scale, the cost of engaging her across days of hearing would have been prohibitive. Whilst that explanation is not particularly convincing, I do not consider it necessary to draw the inference that evidence of Ms Russell would not have been helpful to the respondent had she been called. Whilst Ms Russell's evidence concerns matters of relevance (the employer's management of the incident post 2 December 2022) the absence of evidence from Ms Russell does not create a relevant lacuna in the evidentiary narrative such that an adverse inference need be drawn. Both Ms Noble and Ms Henning were able to give clear and reliable evidence as to their dealings with Ms Russell and of arrangements they were aware that she had put in place. Unlike aspects of conversations between Ms Noble and Ms Henning, what was said between these witnesses and Ms Russell is largely not in dispute.

[30] Secondly, some evidence from both Ms Noble and Ms Henning, both oral and written, is hearsay. Aspects of Ms Henning's reply (third) statement that was not only hearsay but also prejudicial was struck-out from the statement and is not before me.¹¹ Other hearsay content is in evidence as it may be relevant to contextualising reactions to events or reported conversations as distinct from being proof of what is asserted to have been said by others to others. That aside, I give little weight to hearsay (unless not contested) and together with opinion evidence (apart from the opinions of the health professional Ms Andrews) treat it as no more probative than that of a submission.

[31] Parts of this decision as published are redacted. The parties have received unredacted versions. The redacted portions concern evidence of a personal nature where I consider

prejudice or potential prejudice from publication outweighs the public interest. In doing so I have considered the importance of open justice and the statutory obligation to publish reasons¹² against those considerations.

Facts

Smiling Samoyed

[32] Smiling Samoyed is co-owned by Mr Dunstone, Ms Henning and a third person. Mr Dunstone and Ms Henning are also domestic partners.

[33] Smiling Samoyed is a small craft beer brewery located in the regional town of Myponga on the Fleurieu Peninsula south of Adelaide.

[34] Smiling Samoyed is not a small business within the meaning of the FW Act but is an enterprise of relatively small scale; employing twenty-two persons at the date of alleged dismissal.

[35] Aside from being co-owners, Mr Dunstone and Ms Henning are full-time employees. Mr Dunstone is Head Brewer. Ms Henning is Pack Leader. This includes responsibility for wholesaling and human resources.

[36] The brewery is adjacent to the Myponga market. Until recently, Mr Dunstone and Ms Henning lived on-site. At the time of relevant events, they had relocated to Victor Harbor, some thirty kilometres away.

[37] Brewery operations are loosely divided between production (manufacturing and wholesaling) on the one hand and venue services on the other. With Mr Dunstone and Ms Henning primarily dealing with manufacturing and wholesaling, the business employs a Venue Manger to manage the bar and venue services (such as food and beverage).

[38] At the date of relevant events, the Venue Manager was Ms Karen Galvin. On weekdays, Ms Galvin usually worked Monday, Thursday and Friday. She had worked for the business since 2017.

[39] Overall operations are largely conducted under one roof and common facilities exist (first aid and staff amenities) with toilets jointly shared with the market. The business appears to be a 'dog-friendly' environment where dogs are allowed to roam.

[40] Being a business of relatively small scale, roles are not slavishly demarked. It is not uncommon for employees whose job is primarily one function to help out with other functions to the extent required and consistent with their skill set.

[41] A staffing structure flowchart and a diagrammatic map of the facility are in evidence.¹³

Ms Noble

[42] Ms Noble commenced work at Smiling Samoyed in July 2015. She was initially employed as a bartender. At the date of relevant events she had worked her way up to be a brewer. Ms Noble was liked and valued by the owners. For a number of months in mid-2017 she was temporarily acting Venue Manager.

[43] Although primarily a brewer, being a business where duties were not slavishly demarked, Ms Noble also worked in the bar when required (as second in charge) and assisted Ms Henning with wholesale activities (including deliveries).

[44] As a brewer, Ms Noble primarily reported to Mr Dunstone. When working in the bar, Ms Noble worked alongside and under the supervision of Ms Galvin and when working in wholesale Ms Noble worked with Ms Henning.

[45] Ms Noble primarily worked in the brewery room including from a high-seated desk located in a corner of the room near the entry door.

Events prior to 2 December 2022

[46] Ms Noble and Ms Galvin had been on staff together since Ms Galvin commenced in 2017 (five years prior). Ms Galvin was older and hierarchically (though not in terms of service) held a more senior (managerial) role.

[47] Occasionally over five years there had been tension between the two. Ms Noble had reported concerns to Ms Henning about Ms Galvin's conduct towards her or other younger staff. These included:

- at the end of 2017 Ms Noble told Ms Henning that she could not comfortably work alongside Ms Galvin in view of what she considered Ms Galvin's rude and exclusionary behaviour. Ms Henning agreed to move Ms Noble into the production (brewery) side of the business, which is what occurred. Ms Henning's evidence was that this occurred because a new bottling line had been installed in the brewery requiring additional labour, not necessarily because of Ms Noble's complaint about Ms Galvin;
- in February 2021 and then again in April 2022 Ms Noble encountered dog faeces left in a scoop outside the brewery room roller-door after busy periods. On both occasions Ms Galvin indicated that the faeces had been scooped (once by her and once by another staff member) but mistakenly forgotten to be disposed of. On both occasions Ms Galvin sent Ms Noble an email apologising that she had encountered the mess;
- in September 2021 Ms Noble asked to meet with both Mr Dunstone and Ms Henning to discuss her concern at events that had led to Ms Pulford resigning. Ms Pulford had witnessed an incident where Ms Galvin had allegedly overcharged a customer (which, according to Ms Henning's evidence was a thirty cent undercharge) and then applied that sum as an overcharge to a different customer. Ms Pulford had reported the matter to Ms Henning but resigned after being dissatisfied with the way the incident had been investigated and dealt with. At their September 2021 meeting, Ms Noble informed the

owners that she considered it unsatisfactory that Ms Galvin had, in her opinion, been treated leniently whereas the business had lost the services of Ms Pulford;

- in October 2021 Ms Noble noticed that Ms Galvin had erroneously adjusted 2.5 hours worked by Ms Noble so as to reduce her pay by that sum. Ms Noble raised her concern with Mr Dunstone. Mr Dunstone rectified the error but Ms Noble remained dissatisfied that Mr Dunstone had put it down to human error on the part of Ms Galvin; and
- in early November 2022 the owners and brewery staff arranged a night out at the Adelaide Casino. Ms Noble felt excluded by Ms Galvin from being invited to a private hotel room. Ms Henning had sought to assuage Ms Noble's feelings at the time. In the days following the incident and when back at work, Ms Noble told Ms Henning that she did not feel welcomed in the workplace by Ms Galvin.

[48]

[49]

Incident 2 December 2022 (Friday)

[50] On 2 December 2022 Ms Noble was working in the brewery room seated at her desk. Ms Galvin was working elsewhere in the facility in her capacity as Venue Manager.

[51] Between 9.54am and 9.56am an incident occurred between the two.

[52] Ms Galvin walked swiftly into the brewery room, took six purposeful steps to the left and confronted Ms Noble.

[53] Ms Galvin stood within arms-length of Ms Noble. In a forceful and direct voice that became progressively louder to the point of yelling Ms Galvin told Ms Noble that she (Ms Noble) had left spillage and mess in Ms Galvin's workspace (the bar area) and that she had had enough of it. Ms Noble was taken aback but replied asking Ms Galvin to calm down, denied that she had done so but said that she would look into the claims. Losing her temper, Ms Galvin gesticulated with her arms and again accused Ms Noble of having done so. Ms Galvin said that she too can send emails "to Kate" (Ms Henning) complaining about the other. By now swearing at Ms Noble in a loud accusatory manner and tone, Ms Galvin demanded that Ms Noble immediately go to the bar area and clean up the mess. In order to de-escalate the altercation, Ms Noble then said "OK, I will when I am done doing this", pointing to her computer screen.

[54] Losing her temper further, Ms Galvin picked up a glass of cordial Ms Noble had on her desk and threw it onto the floor immediately around the body and feet of Ms Noble. Placing the empty glass back on the desk Ms Galvin immediately picked up Ms Noble's glass water bottle

and also squirted water on the floor in and around Ms Noble. Ms Galvin then stated “Fucking clean it up! How do you like it?”.

[55] Ms Noble became fearful and felt cornered. She repeatedly asked Ms Galvin to stop and that she did not like the behaviour stating that it was “out of line”. Ms Galvin did not stop. Ms Galvin mockingly stated “Oh am I? Am I out of line now?” Ms Noble nodded and said “Yes”. Ms Galvin refused to leave and instead said “What are you gonna do about it” whilst throwing her arms around. Ms Noble became more fearful. She said, “You’re acting like you’re going to fight me now”. Ms Galvin repeated shouting her accusations and again stated “What are you gonna do about it?”.

[56] Ms Noble, with an increasing sense of panic, tried to remove Ms Galvin from the vicinity by telling her “You’re currently on camera”. Ms Galvin replied, “I don’t care”. Ms Noble then said to Ms Galvin that a member of the public was on the other side of the window in the waiting room. Ms Galvin repeated “I don’t care”.

[57] Ms Galvin then again picked up the glass water bottle and again squirted water on the ground in the near vicinity of Ms Noble, with a few drops falling on Ms Noble.

[58] Ms Galvin then loudly and forcefully told Ms Noble that she will be required to clean up the mess in the bar area and in other areas.

[59] Ms Galvin turned and purposefully left the brewery room.

[60] Whilst the altercation lasted only two minutes, Ms Noble was left shaken.

Post incident events 2 December 2022

[61] Within seconds of Ms Galvin leaving the brewery room Ms Noble picked up her mobile phone and tearfully called her manager and co-owner Mr Dunstone who was working from home.

[62] After being told in general terms what had happened and noting Ms Noble’s upset, Mr Dunstone agreed with Ms Noble’s suggestion that she take a walk outside to calm down. Mr Dunstone said he would speak to Ms Henning and have her deal with it.

[63] Mr Dunstone telephoned Ms Henning who also was off-site. He relayed what Ms Noble had reported. He suggested she speak to Ms Noble.

[64] Mr Dunstone then viewed the CCTV footage (which he could from home). That vision confirmed an incident of confrontation and water being spilt by Ms Galvin, though it contained no audio of what was said.

[65] Ms Henning gave immediate thought to how to handle the incident. She decided that a human resource professional, Ms Kate Russell of ‘The Huddle’, should be brought in to advise on a plan that could include conflict resolution between Ms Galvin and Ms Noble. Ms Henning had previously used the services of Ms Russell.

[66] Ms Henning then received a phone call shortly after the incident from Ms Galvin. Ms Galvin volunteered that she had had an altercation with Ms Noble, had yelled at her, had poured water on the brewery floor and that her actions were out of line. Ms Henning told Ms Galvin that her conduct was unacceptable, that the company would give her a first warning, that Ms Noble would be informed of that, and that Ms Galvin would have to participate in a conflict resolution process with a human resource contractor, Ms Russell.

[67] Ms Henning (who was driving) then telephoned Ms Noble from her car. It was only a brief conversation. Ms Henning told Ms Noble that she was aware of the incident, and that she intended to engage a human resource professional Kate Russell to deal with the situation between the two as she, Ms Henning felt too close to both. Ms Noble acknowledged those steps. It is disputed whether Ms Noble then told Ms Henning that she (Ms Noble) could no longer work alongside Ms Galvin. Ms Noble's evidence was that she said "I am done working with Karen".¹⁴ Ms Henning could not recall that being said. I find it more probable than not that this was said by Ms Noble.

[68] Later that day, once Ms Henning was able to speak to Ms Russell, it was agreed between her and Ms Russell that Ms Russell would speak to both Ms Noble and Ms Galvin individually the next working day (Monday 5 December), and that a joint discussion facilitated by Ms Russell would be held the day after (Tuesday 6 December). Ms Henning also decided that Ms Galvin would be subjected to a performance improvement plan (PIP), with the first such PIP meeting between herself (Ms Henning) and Ms Galvin scheduled for 8 December 2022.

[69] Ms Noble left work about midday, still upset by the altercation.

[70] Later that afternoon Ms Noble received a further telephone call from Ms Henning. Ms Henning advised her that Ms Russell would speak individually to her the next working day.

[71] Over the weekend that followed, Ms Henning looked at the CCTV footage. It confirmed to her that her plan (a warning and PIP for Ms Galvin and a HR professional to deal with conflict resolution) was necessary and appropriate.

Events 5 December 2022 (Monday) including resignation draft

[72] Ms Noble attended work at her usual time on Monday 5 December.

[73] To both her surprise and unease, Ms Galvin was also in the workplace. The two had one exchange that day which made Ms Noble uncomfortable and which she considered hostile.

[74] Ms Noble spoke to Ms Russell on 5 December. Ms Noble told Ms Russell that she did not feel comfortable working alongside Ms Galvin.

[75] That afternoon, Ms Russell (who had also spoken privately to Ms Galvin) discussed the matter with Ms Henning. The two agreed that it was too early for the joint facilitated discussion scheduled for 6 December. That was cancelled. Ms Henning telephoned Ms Noble and informed her of that fact and that she (Ms Henning) had given Ms Galvin a warning for her conduct on 2 December.

[76] Upon arriving home from work, Ms Noble formed the view that her employer was indifferent to her safety in the workplace and to her desire that she not work in the vicinity of Ms Galvin. Ms Noble formed this view because Ms Galvin had been allowed to work that day (Monday 5 December) and that no contrary indication had been given to her by either Ms Henning, Mr Dunstone or Ms Russell. Ms Noble also felt that a joint discussion between her and Ms Galvin, even one professionally facilitated by Ms Russell, would require her in the same vicinity as Ms Galvin and that would compromise her health and wellbeing.¹⁵

[77] Ms Noble decided to write a resignation letter. She did so by hand that evening. It read:¹⁶

“5/12/22

Kate Henning

I request you accept this letter as my formal resignation from Smiling Samoyed Brewery.

Although I appreciate the skills and opportunities given over my years of service, I can no longer work alongside Karen Galvin as she has exhibited multiple examples of abusive behaviours throughout the term of her employment.

I would like to state clearly that the events leading up to and on Friday 2/12/22, and my dissatisfaction with the results are the role reasons for my contract termination.

I wish the company the best in their future endeavours.

Sincerely,

Maddison Louise Margaret Noble”

[78] Having written and dated the resignation, Ms Noble decided not to activate the resignation. She decided to hold it and see how the following days transpired. She took the letter to each subsequent shift, ready to resign in writing if she felt that her interests were not being appropriately addressed including if her request not to work alongside Ms Galvin continued to be ignored.¹⁷

Events 6 December 2022 (Tuesday)

[79] On 6 December the brewery experienced a machinery breakdown resulting in Ms Noble not brewing that day. On account of the breakdown, Ms Noble was advised to have the rest of the day off as well as the following day.

[80] Prior to Ms Noble leaving the workplace, Ms Noble and Ms Henning had a brief face-to-face conversation. Ms Henning updated Ms Noble that Ms Henning would be meeting with Ms Galvin on Thursday 8 December and that Ms Russell would be meeting Ms Galvin on Friday 9 December. Ms Henning then told Ms Noble to use the machinery breakdown period to try and refresh. In an attempt to reassure Ms Noble, she then told her that on Thursday 8 December when Ms Noble was next rostered that she (Ms Henning) would also be working on-

site even though Ms Galvin would be as well. Ms Noble simply replied “well, there’s not much more to say”.

[81] Later that afternoon text messages were exchanged between Ms Henning and Ms Noble confirming Ms Noble’s absence due to the machinery breakdown until Friday 9 December. In her text, Ms Henning stated:¹⁸

“I know there’s a lot going on at the moment. Please try and use this as a break from that as much as you can. Kate [Russell] and I will be addressing things while you are away and hopefully things will be clearer next week.”

[82] That afternoon, unbeknown to the employer. Ms Noble made an appointment to see her general practitioner the next day.

Events 7, 8 and 9 December 2022 (Wednesday, Thursday, Friday)

[83] Ms Noble was absent from the workplace due to the machinery breakdown on Wednesday 7 and Thursday 8 December.

[84] Ms Noble consulted her general practitioner on 7 December and was referred to a treating psychologist.

[85] Ms Noble attended a work-related CPR refresher course off-site on 8 December.

[86] On 8 December Ms Henning met Ms Galvin for their first PIP meeting. During that meeting Ms Henning told Ms Galvin that she must not only accept the (verbal) warning given for the 2 December incident but must also show regret for her conduct by writing a personal letter of apology to Ms Noble. Ms Galvin agreed to do so. Ms Henning expressed the view that the apology needed to be given personally by Ms Galvin to Ms Noble to have full impact as a personal expression of contrition. For the same reason, Ms Henning also formed the view that Ms Noble should not be told of the letter by Ms Henning or Ms Russell, lest it be seen as forced by the employer or non-genuine.

[87] On or around that day Ms Galvin wrote the apology by hand and in the days following showed it to Ms Henning. The apology letter (undated) read:¹⁹

“Dear Maddi

I just wanted to write an apology to let you know that I am regretful and ashamed of my behaviour toward you on Friday.

The way I behaved was completely unacceptable, and as a manager in a business I should have known better. Obviously I can’t take it back, even though I wish I could. I can only assure you with certainty that nothing of this nature will occur ever again.

My sincerest apologies for acting in a manner that jeopardised your wellbeing in the workplace.

Kind regards

Karen”

[88] The apology was not given to Ms Noble on the day it was written or thereafter. Nor was Ms Noble informed that day or thereafter that an apology was forthcoming.

[89] On 9 December Ms Noble worked all day but did so primarily off-site doing wholesale deliveries with Ms Henning. During the course of the day neither Ms Henning nor Ms Noble discussed the issues between Ms Noble and Ms Galvin nor the work that was being done by Ms Russell (including the fact that Ms Russell was meeting with Ms Galvin that day).

[90] Deliveries concluded that day at around 5.15pm and Ms Noble left for the weekend knowing that she was next rostered as usual the following Monday. She also knew that Monday was a day when Ms Galvin would ordinarily be working, though she had no insight on what her employer’s plans were in that respect.

Events 10 and 11 December 2022 (Saturday and Sunday)

[91] On 10 December via email Ms Russell reported to Ms Henning on the outcome of her (Ms Russell’s) meeting with Ms Galvin the day prior. Ms Russell held the view that a facilitated meeting between the two could resolve the issue but told Ms Henning:²⁰

“My hesitation is if she [*Ms Noble*] is not well at the moment. Let me know if you think Maddi is up to it.”

[92] Ms Henning replied:

“Karen [*Ms Galvin*] is on notice and this will definitely impact her behaviour going forward...Hopefully the apology will go ok tomorrow and they can move on.”

[93] In the early afternoon of Sunday 11 December Ms Henning and Ms Noble exchanged text messages. Ms Henning initiated the exchange because she was going to be late into work the next morning as she was meeting Ms Russell at 8.30am. Ms Henning wanted to reassure Ms Noble that she (Ms Henning) would be present in the workplace from about 10am. Ms Henning gave this advance notice because she believed that Ms Noble felt uncomfortable working with Ms Galvin present and would be more comfortable with Ms Henning on-site. The text exchange read:²¹

MS HENNING: “Hi Maddi Kate has asked to speak to me tomorrow at 8:30am. That will delay me getting to work a bit. Hopefully I will be there by about 9:30am. I can let you know when I leave encounter bay if that helps with your timing. Otherwise, aiming for a 10am arrival would probably be safe.”

MS NOBLE: “Hi Kate Thanks for this update. I’d been meaning to ask what the go was, as both Karen and I are on schedule for tomorrow, and I had made my perspective on the matter clear last week. I’d be more comfortable taking leave on days with Karen on until this situation is completely sorted. Cheers”

MS HENNING: “Maybe I can give you a call after I speak to Kate?”

MS NOBLE: “Ok no worries.”

[94] Ms Henning interpreted Ms Noble’s text reply as a demand that either the business fire Ms Galvin or not roster her when Ms Noble was rostered, or Ms Noble might resign.²²

[95] On that Sunday, Ms Henning believed that as the following day would be the first since the apology was agreed and written that Ms Noble and Ms Galvin would both be on-site, then this would be the opportunity for the apology to be personally given by Ms Galvin to Ms Noble.

[96] On the evening of 11 December Ms Henning, fearing in light of Ms Noble’s text response earlier that day that she might be thinking of resigning, Ms Henning discussed the options with her partner and co-owner Mr Dunstone. Neither wanted Ms Noble to resign. However, they also both held the view that dismissing Ms Galvin for her conduct on 2 December was not justified given the warning, the PIP, the imminent apology, and her remorse. They assessed that it was in the interests of the business to retain both Ms Noble and Ms Galvin. They also believed that Ms Noble’s continuing employment was important for her full return to health. They considered that as the business was functionally separate between processing and venue services then a temporary arrangement could be put in place precluding one from working in the physical vicinity of the other, pending finalisation of Ms Russell’s conflict resolution work.

[97] Being unable to sleep and knowing that she needed to discuss the matter with Ms Noble that morning, Ms Henning rose early at 4.30am and wrote herself a text message of notes she planned to say to Ms Noble.²³ It read:

“Plan – staff issues

Monday, 12 December 2022 4:33 AM

Maddi

- We are going through a formal performance management process with Karen in relation to this incident. Karen has accepted her actions were unreasonable and to take the steps required that we can be assured something like this will never happen again. Our expectation is you will be safe at work. That’s as much as can be said about that process though.
- I knew, even before Kate told me, that both of you think I am not hard enough on the other one. I try to be even handed, do things by the book and fairly. I feel that I am balanced I (sic) my approach to both of you.
- There are some accommodations we can make to limit your contact with Karen. This is suggested only to keep you in a position where you feel safe and is not something that we would be suggesting if you felt that you could participate in the discussions with Kate and attempt to get back to a position of mutual understanding and respect. If you wished to continue working without these accommodations that is an option too. The things we have thought of are moving the lab to Market as soon as possible - we have just received permission to do this. It was always planned since we moved but not on the immediate list. You would not go into the bar for any reason and

- Karen does not go into the brewery for any reason. That includes us arranging someone else to do beer lines and to unload the bar order. You would still load the bar order. You enter the bar, if you choose, as a customer on the customer side of the bar and order thru (sic) a team member. You can have a kettle in one of your workspaces for making hot drinks and a bar fridge for milk/lunch storage. You can use the toilet at the market to avoid meeting in the toilet. You will not be asked to conduct brewery tours unless it is on a day Karen is not present. Your participation would only be within the brewery (any equipment you require and beers/glasses would be managed by a bar staff member). The policy of not going in the bar applies whether Karen is present or not. There may be other accommodations possible that we haven't thought of. If there are others you would like please let us know. Dogs?
- Other options may be for you to take leave (as you suggested) or implement these accommodations until a facilitated discussion with Kate, Karen and possibly me has occurred. Then reassess if that needs to be ongoing.
 - It is your choice if you want to resign or not. We accept your decision either way."

[98] Ms Henning read the notes to Mr Dunstone before he left for work that morning.

Resignation 12 December (Monday)

[99] Also in the early morning of 12 December Ms Henning realised that she had wrongly thought Ms Galvin would be on-site that day. She only then recalled that Ms Galvin would be off-site at a first aid course. As a result, Ms Henning realised that the apology would not be given to Ms Noble that day.

[100] At 8.30am Ms Henning spoke to Ms Russell (by telephone). Ms Henning informed Ms Russell that Ms Noble had effectively repeated an ultimatum that Ms Galvin be sacked or she would resign. Ms Henning read out the interim arrangements she planned to put to Ms Noble. Ms Russell indicated that the plan seemed sensible pending a facilitated joint meeting that could be held a week later, on 19 December.

[101] Immediately following the discussion with Ms Russell, Ms Henning telephoned Ms Noble who was at work. Ms Henning was hoping to forestall Ms Noble from resigning and was hoping that the interim arrangement would be agreed. Ms Henning read the notes almost verbatim (making a variation only to the brewery tour reference).

[102] Ms Noble responded:²⁴

"I think that things are pretty clear then. Can I meet with you in person."

[103] Ms Henning told Ms Noble that Ms Galvin would not in fact be at work that day, and that they (Ms Henning and Ms Noble) could meet in person at 10am.

[104] Nothing more was said. Ms Henning travelled to the workplace. She feared that Ms Noble would resign.

[105] Ms Noble had, in fact decided to resign.

[106] Ms Henning and Ms Noble met at 10am. Ms Noble stated that she was resigning. In a firm and direct manner she said that she was “disappointed” in Ms Henning and her leadership. Ms Noble then expressed criticisms of Ms Galvin and added that “it doesn’t matter how much leadership training Karen [*Ms Galvin*] does, she will never change”.

[107] Ms Noble handed her resignation letter, still dated the week prior. Ms Henning accepted it but did not read it then and there.

[108] Ms Henning allowed Ms Noble to finish uninterrupted and then said “I am sorry you feel that way. I have fought hard for you Maddi and am sorry you can’t see that. I know this hasn’t been easy.”

[109] Ms Noble then said that she personally wanted to first inform Mr Dunstone of her resignation, to which Ms Henning agreed. Ms Henning and Ms Noble also agreed that the notice period arrangements should be worked out between Ms Noble and Mr Dunstone.

[110] Ms Noble immediately telephoned Mr Dunstone. She told him that she had resigned. She said that she was willing to work out a two week period of notice up to Christmas, which is what Mr Dunstone had requested. Ms Noble added “I thought you would say that but I won’t come in if Karen is in”. Mr Dunstone said that this was not possible and that she (Ms Noble) had been offered a temporary solution of working without interacting with Ms Galvin. Ms Noble replied that she “felt sick and I’m going home”. She terminated the call. She packed her belongings and went home, to not again return to the brewery.

[111] Ms Henning had thought that Ms Noble would work out her notice at least on that day and the two days following when Ms Galvin was not rostered. At 11.02am she sent Ms Noble an email relating to certain work matters.²⁵ Immediately following, Ms Henning could not locate Ms Noble on-site. Ms Henning became concerned about her wellbeing in light of Ms Noble’s health challenges. She telephoned Mr Dunstone who relayed what had occurred between the two. Ms Henning then messaged Ms Noble’s mother and advised of her concern and received a polite reply.²⁶

[112] Three emails then passed between Ms Noble and Ms Henning over the next ninety minutes, at 11.30am, 12.36pm and 12.51pm.

[113] At 11.30am Ms Noble wrote to Ms Henning:²⁷

“Hi Kate

As discussed I have formally resigned from Smiling Samoyed and any future shifts are looking unlikely based on the discussion Simon and I briefly shared today.

Please find attached the electronic copies of my reasons for leaving. I think it’s best advised to organise another person to handle the bar order for this week and potentially all weeks going forward.

Cheers
Maddi”

[114] The attachment was the resignation letter.

[115] At 12.36pm Ms Henning responded to Ms Noble:²⁸

“Hi Maddi

The ball is in your court as to whether you wish to serve out your notice period or not.

Simon’s position is that it is not feasible to schedule around your ability to get transport/other people being able to forklift for you and also whether or not Karen is in the bar. As I am sure you understand, we have already made a significant effort to facilitate your return to work in recent months. To continue those accommodations and add more through a notice period is exceptionally difficult. Accordingly, we are prepared to mutually agree to waive the notice period if that is what you prefer. Please let me know either way. If you wish to finish your employment effective today then I will process your final pay on Wednesday.

I understand that you are disappointed in me and my management of the business. I have read your reasons for leaving including the resignation letter you provided today. As you are aware there is a formal process being undertaken with Karen. It is not appropriate to discuss that further.

I am sorry for any impression that we were suggesting excluding you from the bar. We were simply trying to delineate work areas while we worked on a longer term solution with Kate from The Huddle.

On a personal note, I consider you a friend. You are a good and hardworking person. I wish you the best for your future. I will also leave the ball in your court about whether you would like to catch up with me, my family or even just the dogs at any stage in the future.

Kind regards

Kate”

[116] At 12.51pm Ms Noble replied:²⁹

“Hi Kate

I understand the terms hadn’t been necessarily effortless to work around on your behalf these past months, however it was your choices to make that decision. Although I recognise and appreciate this, you still stood to gain from making those efforts and adjustments.

My position, contrary to yours and Simon’s, is that it is considerably outrageous to expect me to be told to continue to work alongside someone who has exhibited that level of uncontrolled anger and hostility, with complete disregard for company policies this person enforces so heavily themselves.

Whom you choose to represent your company is entirely your decision, however it is (sic) greatly impacted both my professional and personal feelings towards both you and Simon, as for now I don't see further contact feasible. [REDACTED]

It's clearly not going to end with Karen's termination despite theft, abuse and neglect of duties riddling her history with reports from countless past employees.

I can no longer represent a company who turns a blind eye to serious infractions to policies and the law, and certainly not this many times. I think it's best for all to terminate my contact effective immediately.

Regards,
Maddison Noble"

[117] Ms Noble did not work out a period of notice. Her employment terminated effective immediately as per her email of 12.51pm. On 14 December 2022 Ms Henning made up Ms Noble's final pay with a termination date effective from 12 December.

[118] Ms Henning did not advise staff immediately on 12 December 2022 that Ms Noble had resigned. She waited the two days until after her final pay was processed. Ms Henning's evidence was that she waited until 14 December as she "felt she (Ms Noble) may reconsider and ask for her job back".

[119] Ms Noble commenced these proceedings seven days later, on 21 December 2022.

[120] Ms Noble is also pursuing a workers' compensation claim for psychological injury under South Australian law.

Submissions

Ms Noble

[121] Ms Noble agrees that she resigned but submits that she was forced to do so because of conduct or a course of conduct engaged in by Smiling Samoyed, and thus was dismissed within the meaning of s 386(1)(b) of the FW Act.

[122] Ms Noble submits that she was forced to resign because the employer failed to appropriately address its responsibilities in the wake of the 2 December 2022 incident including its responsibility to ensure so far as reasonably practicable that her health, safety and wellbeing whilst at work was not put at risk. Ms Noble submits that the employer failed to do so in a number of ways including by ignoring her request not to work with or alongside Ms Galvin.

[123] Ms Noble submits that the employer's conduct reasonably led her to lose trust and confidence in its handling of the matter and become fearful of her safety if remaining in the workplace and which resulted in her resignation.

[124] Accordingly, Ms Noble submits that her application is within jurisdiction.

[125] On merit, Ms Noble submits that she was subjected to a hostile and threatening assault in the workplace which she neither precipitated nor escalated. She submits that she was a valued and competent long-term employee who, but for the egregious conduct of Ms Galvin and the employer's failure to protect her legitimate interests in its wake, would have remained employed and further developed her professional skills as a brewer. As there was no valid reason for dismissal, her dismissal was unfair. Ms Noble also submits that her dismissal was unfair because the employer's conduct did not afford her the full measure of fairness.

[126] Ms Noble submits that re-employment is inappropriate given her reasonably grounded loss of trust and confidence in the employer and the close working relationships amongst staff required in a business of relatively small scale. She considers that an award of the maximum level of compensation (six months) is appropriate.

Smiling Samoyed

[127] Smiling Samoyed submit that Ms Noble was not terminated at its initiative, that she resigned, and that she was not forced to resign. Thus Smiling Samoyed submit that Ms Noble was not dismissed within the meaning of the FW Act or at all.

[128] Smiling Samoyed submit that it neither intended to dismiss Ms Noble nor was Ms Noble denied a real or effective choice but to resign. In particular Smiling Samoyed submit that it took the 2 December 2022 incident seriously and promptly put in place a plan including securing external professional human resources advice and assistance, immediate disciplinary and performance scrutiny of Ms Galvin, an immediate process of conflict resolution between Ms Noble and Ms Galvin (including a requirement that a written apology be given to Ms Noble) and an interim plan to minimise any workplace interaction between Ms Noble and Ms Galvin until at least such time as the conflict resolution process was completed.

[129] Smiling Samoyed also submit that it kept Ms Noble updated and informed of progress, listened and considered her points of view and took all reasonable steps to meet its responsibilities to ensure, so far as reasonably practicable, her health, safety and wellbeing whilst at work.

[130] As such, Smiling Samoyed submit that there was no dismissal within the meaning of the FW Act. There being no dismissal, there could be no unfair dismissal.

[131] In the alternative, Smiling Samoyed submit that there was no relevant deficiency in its processes so as to characterise its conduct as unfair.

[132] As to remedy, Smiling Samoyed submit that Ms Noble could have worked out and earned two weeks of a notice period but chose not to accept the interim working arrangements that sought to separate her from Ms Galvin.

Consideration

[133] Aside from the issue of whether Ms Noble was dismissed, the other jurisdictional pre-requisites for a valid unfair dismissal application are not in dispute. I am satisfied that Ms Noble was a person protected from unfair dismissal (s 382 FW Act).

[134] Section 394 of the FW Act provides:

“394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) whether the person first became aware of the dismissal after it had taken effect; and

(c) any action taken by the person to dispute the dismissal; and

(d) prejudice to the employer (including prejudice caused by the delay); and

(e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position.

[135] A person has not been unfairly dismissed unless, amongst other matters, they have been dismissed (s 385(a)) FW Act).

[136] I now turn to consider whether Ms Noble was dismissed.

[137] Sections 385(a) and 394 require a dismissal to have occurred as a jurisdictional fact. A mere allegation that a person has been dismissed will not establish this as fact.³⁰ “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1). It provides:

“386 Meaning of dismissed

(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."

[138] A full bench of the Commission in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli* set out the background to s 386:³¹

"[33] Notwithstanding that it was clearly established, prior to the enactment of the FW Act, that a "forced" resignation could constitute a termination of employment at the initiative of the employer, the legislature in s.386(1) chose to define dismissal in a way that retained the "termination at the initiative of the employer" formulation but separately provided for forced resignation. This was discussed in the Explanatory Memorandum for the Fair Work Bill as follows:

"1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200).

1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).

1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:

- where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
- where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign."

[34] It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd*, that "The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the then Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd* (No. 1) and summarised by the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*" (footnotes omitted). The body of pre-FW Act decisions concerning "forced" resignations, including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen*

Pty Ltd (in liq); Ryan v ISS Integrated Facility Services Pty Ltd; Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust.” (footnotes omitted)

Termination at the employer’s initiative

[139] Termination at the initiative of an employer within the meaning of s 386(1)(a) of the FW Act arises where the action of the employer is the principal contributing factor leading to the termination of the employment relationship.³²

[140] It is not contended and nor do I find that Ms Noble’s employment was terminated at the employer’s initiative.

Resignation

[141] Whether an employee has resigned from their employment is a question of fact. A resignation can be oral or in writing.

[142] It is not contested and the evidence clearly establishes that Ms Noble resigned on 12 December 2022 by oral and then written notice (as per letter dated 5 December 2022) to Ms Henning.

[143] The reasons for resignation were stated in her resignation letter and expanded on by Ms Noble in her subsequent emails to Ms Henning at 11.30am and 12.51pm that day.

[144] Ms Noble’s resignation had immediate effect given that mutually agreeable terms to work out a notice period could not be reached. She was not required to work out a notice period.

Forced resignation

[145] I now consider whether Ms Noble was forced to resign because of conduct or a course of conduct engaged in by Smiling Samoyed. If this was so, Ms Noble was dismissed within the meaning of s 386(1)(b) of the FW Act.

[146] What is meant by a “forced resignation” is well established.

[147] The statutory test in s 386(1)(b) requires an assessment of “whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable (sic) result of the employer’s conduct such that the employee had no effective or real choice but to resign.”³³

[148] Conduct or a course of conduct forcing a resignation is not required to be repudiatory or unlawful. It could, depending on the circumstances, simply be conduct such that, in an objective sense, it forced the employee’s resignation.

[149] I do not find that Smiling Samoyed’s conduct was “conduct with the intention of bringing the employment to an end” within the meaning of the established authorities on s 386(1)(b).

[150] Both Mr Dunstone and Ms Henning considered Ms Noble a good worker with long and loyal service. As Head Brewer Mr Dunstone required and valued the brewing skills of Ms Noble. In the preceding six months, both Mr Dunstone and Ms Henning had sought to keep Ms Noble working for the business despite her health challenges by providing time off work to recover her health and make a gradual return to full-time employment. The very morning of her resignation and despite Ms Henning’s apprehension that Ms Noble may resign, it was agreed between the two owners that they did not want Ms Noble to resign. In the wake of her resignation both Ms Henning and Mr Dunstone wanted Ms Noble to remain at work and work out her notice period, though only on the terms they considered the business could accommodate.

[151] These factors in combination point strongly to a finding that, in objective terms, Smiling Samoyed did not intend to bring Ms Noble’s employment to an end.

[152] However, was Smiling Samoyed’s conduct such, in the language of the established authorities on s 386(1)(b)), that Ms Noble “had no effective or real choice but to resign”?

[153] The reason for resignation is relevant as it provides context in answering this question.

[154] In her letter of resignation Ms Noble stated:³⁴

“I would like to state clearly that the events leading up to and on Friday 2/12/22, and my dissatisfaction with the results are the sole reasons for my contract termination.”

[155] It is apparent from this letter, as well as Ms Noble’s evidence, that her resignation was for three interconnected reasons:

- “events leading up to 2 December”. I find that in this respect Ms Noble was referring to her past dissatisfaction with the owners passing, in her view, a blind eye to Ms Galvin’s earlier conduct, as well as her view (which had been communicated to Ms Henning) that Ms Galvin was not a person with whom she could effectively work;
- the “events of 2 December”. I find that in this respect Ms Noble was referring to the altercation in the brewery room between Ms Galvin and herself that morning; and
- Ms Noble’s “dissatisfaction with the results”. I find that to be a reference to Ms Noble’s dissatisfaction with her employer’s response to and management of the 2 December incident at least as it concerned its responsibilities to her.

[156] In her email to Ms Henning some hours later (12.51pm 12 December) Ms Noble expanded on what she meant by “dissatisfaction with the results”:

“My position, contrary to yours and Simon’s, is that it is considerably outrageous to expect me to be told to continue to work alongside someone who has exhibited that level of uncontrolled anger and hostility, with complete disregard for company policies this person enforces so heavily themselves.

Whom you choose to represent your company is entirely your decision, however it is (sic) greatly impacted both my professional and personal feelings towards both you and Simon, as for now I don't see further contact feasible. [REDACTED]

It's clearly not going to end with Karen's termination despite theft, abuse and neglect of duties riddling her history with reports from countless past employees.

I can no longer represent a company who turns a blind eye to serious infractions to policies and the law, and certainly not this many times. I think it's best for all to terminate my contact effective immediately."

[157] I am well satisfied that the principal operating reason for Ms Noble's dissatisfaction with the employer's response was her belief that the employer was, in the wake of the incident, unreasonably requiring her (Ms Noble) to work in the same workplace on the same days as Ms Galvin. I find that Ms Noble wanted Ms Galvin to no longer be employed or, at the very least, to not be rostered on days when Ms Noble was rostered. Ms Noble held this view in the wake of the 2 December 2022 incident and continuously in the week that followed up and until (and immediately after) her resignation. She did so because she did not feel that her workplace was safe (physically and psychologically) if Ms Galvin was also present.

[158] I make this finding because:

- the timing of Ms Noble's resignation; it followed her being told of the "functional separation" plan by Ms Henning on the morning of 12 December. Ms Henning had immediately replied "I think that things are pretty clear then. Can I meet with you in person";
- Ms Noble expressed as much in her 12.51pm email on 12 December ("It's clearly not going to end with Karen's termination...");
- Ms Noble had earlier told Ms Henning on 5 December and by text on 11 December that she did not want to work in the presence of Ms Galvin;
- Ms Noble had told Ms Russell this at least on 6 December; and
- Ms Noble declined to work out a two week notice period because Ms Galvin would also be working on days she was rostered ("I think it's best for all to terminate my contact effective immediately").

[159] Ms Noble's belief that working in the vicinity of Ms Galvin was inimical to her health was genuinely held, consistent and sincere. It was borne of a legitimate and proper concern for her wellbeing, particularly but not exclusively in the context of the health challenges she had experienced over the preceding six months. It was driven not by a flight of fancy but by her having been the target of an unprovoked verbal and threatening altercation in the workplace at the hand of Ms Galvin on 2 December.

[160] Having established the reason for resignation, I now turn to consider whether, objectively, the employer's conduct was a course of conduct that forced Ms Noble's resignation in the sense of her being denied a real and effective choice but to resign.

[161] The primary elements of the conduct of the employer in this period were:

- an assessment of the 2 December incident;
- measures concerning Ms Galvin (warning, PIP and a requirement to issue a personal apology);
- engagement of professional human resource expertise;
- commencement of a process of facilitated conflict resolution;
- communication with Ms Noble; and
- a functional separation proposal between Ms Noble and Ms Galvin.

[162] I now consider each of these matters in the context of assessing whether they individually or collectively constituted conduct that denied Ms Noble a real or effective choice but to resign.

Assessment of 2 December incident

[163] I have found that the incident was serious, unprovoked and threatening to Ms Noble and her wellbeing.

[164] The employer's investigation of the incident was not robust. Whilst Mr Dunstone viewed the CCTV footage that day, Ms Henning only viewed the footage days later. Discussions between the owners and Ms Noble about the incident and how it left her feeling was only brief.

[165] Somewhat (but only somewhat) mitigating the lack of robustness is the fact that before Ms Henning had the opportunity to speak to Ms Noble she had already been contacted by Ms Galvin who had fessed up to an altercation whereby she had lost her temper and acted improperly. I accept that this meant that Ms Henning did not need lengthy discussion with Ms Noble to work out who was right and who was wrong. Clearly, Ms Galvin was the wrongdoer. However, whilst this explains why Ms Henning focussed on finding a solution rather than interrogating the incident itself, the lack of attention to the incident and failure to secure Ms Noble's version of it meant that Ms Henning failed to appreciate the seriousness of the incident and its impact on her. For example, simply viewing non-audio CCTV footage meant that Ms Henning had no idea of what was said other than what she was told. By not speaking at length to Ms Noble about what was said, she failed to grasp the seriousness of the swearing, the threat of physicality, the yelling and the requests to desist.

[166] Resulting from this lack of appreciation of the seriousness of the incident was the view formed by Ms Henning, repeated in her evidence, that she did not consider that Ms Galvin

presented an actual threat to Ms Noble's health or wellbeing at the time of the incident or thereafter. Those views significantly understate the objective facts. This is so particularly in light of the employer knowing of Ms Noble's health challenges and the fact that workplace safety obligations relate not just to one's physical wellbeing but also an employee's psychological wellbeing. Both were compromised by the 2 December incident. In isolation, the employer's assessment of the 2 December 2022 incident fell well short of adequate.

[167] The employer's lack of engagement with Ms Noble on the incident itself and the inadequate conclusions it reached about its seriousness and impact on her weigh in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handling of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

Measures concerning Ms Galvin

[168] Ms Henning took immediate steps to give Ms Galvin a verbal warning, put her on a performance improvement plan, and required her to give a personal apology to Ms Noble.

[169] In a general sense these were steps reasonably open as they involved disciplinary and conduct measures, and were within the ambit of Smiling Samoyed's discretion as the employer. However, the warning was only verbal and aside from not being written or final it was decided upon instinctively and before Ms Noble was spoken to or footage viewed. As such, it was an inadequate disciplinary response. This limited response underscored the lack of insight Ms Henning had into the seriousness of the incident.

[170] However, Ms Noble was promptly made aware of the fact that Ms Galvin had been issued a warning and Ms Henning told Ms Galvin specifically that she would be advising Ms Noble of that fact. In so doing the employer acted reasonably in wanting to reassure Ms Noble that it was responding to the incident and not brushing it under the carpet.

[171] Further, in requiring Ms Galvin to evidence her remorse by giving a written personal apology to Ms Noble the employer also acted reasonably. A written apology had the prospect of letting Ms Noble know that wrongdoing was being acknowledged by the perpetrator and that no fault was being apportioned to Ms Noble.

[172] Was it reasonable for the employer to not inform Ms Noble of the fact that an apology was forthcoming? Whilst in hindsight this was clearly an error, Ms Henning wanted to give the apology the best chance of success. One known to have been forced by the employer risked being discounted or rejected. It was only hours before the resignation that Ms Henning realised that the apology was not going to be able to be personally delivered that day.

[173] However, given the capacity of a written apology to restore a working relationship and avoid Ms Noble's resignation, Ms Henning did not act with sufficient urgency to ensure that the written apology (of which she was aware at least by 9 December) was in fact given. I take into account that over the weekend of 10 and 11 December Ms Henning believed it would be given by Ms Galvin on 12 December, and only realised early on the Monday morning that this would not happen due to Ms Galvin being off-site. Whilst it was not unreasonable in the week prior for Ms Henning to not want Ms Noble tipped-off about the apology or spoken to by Ms Galvin whilst absent from the workplace, events had moved apace. On the morning of 12

December, and in light of her apprehension from the previous afternoon's texts that Ms Noble may resign, Ms Henning ought reasonably to have told Ms Henning of the imminent apology in advance of her resignation.

[174] Clearly Ms Noble wanted Smiling Samoyed to take more decisive disciplinary action against Ms Galvin. Ms Noble wanted her removed from the business or at least not working when she was rostered, so she could continue to work as a brewer without the burden or fear of Ms Galvin being around. I have found that she told Ms Henning on 2 December words to the effect:

“I am done working with Karen”.

[175] This Smiling Samoyed did not do. I accept that for the purposes of s 386(1)(b) of the FW Act conduct can include conduct by way of omission. However, objectively considered, I do not conclude that dismissing Ms Galvin was the necessary disciplinary response for Smiling Samoyed's conduct to have been reasonable. Nor was it the only response by which the employer could have reasonably managed, so far as practicable, its obligation to ensure Ms Noble's health and wellbeing whilst at work.

[176] Ms Noble considered that Ms Galvin no longer being employed was and would have been the “ideal” outcome.³⁵ To the extent that Ms Noble believed that Ms Galvin no longer being employed was necessary for the employer to appropriately respond to her legitimate concerns, and that its failure to do so was an unreasonable omission on its part, that is not a conclusion I reach.

[177] However, the termination of Ms Galvin's employment was not the sole outcome contemplated by Ms Noble. In her text message on Sunday 11 December Ms Noble raised the possibility of “being “more comfortable taking leave on days with Karen on until this situation is completely sorted”.³⁶ Ms Henning's evidence that she believed Ms Galvin's dismissal to have been Ms Noble's only option³⁷ was an overstatement and a misjudgement on her part.

[178] I conclude that to a material degree (the inadequacy of a first verbal warning and the lack of advice about the apology but not the failure to end Ms Galvin's employment) Smiling Samoyed's conduct in taking the action it did against Ms Galvin weighs in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handling of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

Engagement of Ms Russell

[179] Ms Henning's decision to engage Ms Russell was driven by her belief that the business needed external professional expertise to manage a damaged relationship between two employees with whom she had a long and close association.

[180] In making this decision Smiling Samoyed acted reasonably. It meant that a process of conflict resolution could be commenced without delay and independently facilitated.

[181] It also meant that Ms Henning could secure independent advice on the issues, which she did.

[182] Ms Noble was informed promptly of the engagement of Ms Russell and did not demur from liaising with her.

[183] I do not conclude that Smiling Samoyed's conduct in engaging Ms Russell weighs in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handling of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

Facilitated conflict resolution

[184] The central function required by the employer of Ms Russell was to facilitate conflict resolution and the restoration of a working relationship between Ms Noble and Ms Galvin.

[185] Clearly, having made a decision that neither would be asked to leave their job following the 2 December incident, a professionally conducted process of mediation and conflict resolution was a reasonable response by the employer. It was directed at mitigating the risk of future misconduct by Ms Galvin and the restoration of a relationship that could, at least to a minimum degree, enable both parties to work effectively in their roles.

[186] The employer took advice from Ms Russell on how and when to conduct this process. It was incomplete at the time of resignation, having until then revolved around on-on-one discussions. Ms Henning had reasonably taken advice that a joint facilitated discussion needed to be deferred until at least a week later until Ms Russell had established a necessary level of confidence amongst both and after taking into account Ms Noble's health.

[187] Ms Noble was informed of the purpose of the work Ms Russell had been commissioned and of the deferral of the planned joint session.

[188] I do not conclude that Smiling Samoyed's conduct in putting in place a programme of professionally conducted conflict resolution weighs in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handling of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

Communication with Ms Noble

[189] From the moment Smiling Samoyed was informed by Ms Noble of the 2 December incident, it was in regular communication with Ms Noble, by phone, face-to-face dialogue and by text. Although some of the discussions were brief and unreasonably short given my finding that securing Ms Noble's version of the incident and how it left her was inadequate, those that occurred were generally prompt and genuine. Ms Noble was not left in the dark concerning the employer warning to Ms Galvin, of Ms Russell being engaged or of meetings being scheduled or deferred. She was kept in the dark about the imminent apology, but the employer's reasons for doing so were not unreasonable.

[190] Ms Henning sought to acknowledge Ms Noble's concerns by encouraging her, on the days of absence due to the machinery breakdown, to take time out. She dealt with her in a regular and friendly manner on the subsequent day when they worked together making

deliveries and she kept her updated even on a Sunday to reassure her that she (Ms Henning) would be at work albeit late the following day to manage any problems.

[191] Ms Noble did not agree with all she was told by Smiling Samoyed of decisions it had made, but I do not conclude that Smiling Samoyed's communication with Ms Noble in the wake of the 2 December incident weighs in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handling of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

Functional separation proposal between Ms Noble and Ms Galvin

[192] Ms Noble resigned after being informed by Ms Henning of the functional separation proposal on the morning of 12 December 2022. Ms Noble considered it unworkable and inadequate. Based on that view, the resignation letter that had been in her back-pocket for a week was actioned.

[193] The functional separation proposal was not what Ms Noble wanted to hear but it was not, considered objectively, unreasonable. It was designed by the employer to separate Ms Galvin from Ms Noble so far as practicable, and in so doing was an attempt to minimise any prospect of their future interaction or conflict and to assuage Ms Noble's belief that her workplace was not safe whilst Ms Galvin was around.

[194] In assessing the reasonableness of this proposal I take into account that:

- it was presented to Ms Noble as an option ("If you wished to continue working without these accommodations that is an option too")³⁸;
- it was a proposal to give Ms Noble space away from Ms Galvin so she could do her work;
- it was a proposal for a temporary period, at least until the conflict resolution work of Ms Russell was completed; and
- it was a proposal in the context of a business of relatively small scale which operated at only one location and had inherent limitations on just how far separation between staff could be guaranteed.

[195] Under the proposal, Smiling Samoyed could not guarantee that there would never be paths crossed given that some common staff facilities existed but even then the employer was open to practical input from Ms Noble and was making contingencies for the different use of common amenities such as the lab and toilets, as well as being willing to alter working arrangements on beer lines and brewery tours.

[196] Relevantly, when told of the proposal Ms Noble was also told that another option "may be for you to take leave (as you suggested)".³⁹

[197] The functional separation proposal was put to Ms Noble by Ms Henning in the context of Ms Henning fearing that Ms Noble was thinking of resigning. Ms Henning concluded her remarks by saying:⁴⁰

“It is your choice if you want to resign or not. We accept your decision either way.”

[198] The proposal was not acceptable to Ms Noble because it did not involve Ms Galvin not being at work at the same time as she was rostered and did not guarantee that their paths would not cross. As such, Ms Noble considered that it remained a risk to her health and wellbeing.

[199] I accept that Ms Noble genuinely held this belief. However, this matter is to be determined in objective terms and not based on an employer or employee’s subjective belief.

[200] I am satisfied that the functional separation proposal was a reasonable response by which Smiling Samoyed was seeking to manage, so far as practicable, its obligation to ensure Ms Noble’s health and wellbeing whilst at work. It was doing so in the context of its continuing obligations and duties to the business, its customers and to other employees including Ms Galvin who remained its employee and entitled to work.

[201] At its core, the functional separation proposal was a proposal for separation not collaboration. I do not conclude that Smiling Samoyed’s functional separation proposal and the fact that it could not guarantee no passing interaction between Ms Noble and Ms Galvin weighs in favour of a finding that Ms Noble’s loss of trust and confidence in the employer’s handling of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

Conclusion on forced resignation

[202] In considering the circumstances overall and assessing whether Ms Noble had a real or effective choice but to resign I note the caution expressed by a Full Bench in *Doumit v ABB Engineering Construction Pty Ltd*:⁴¹

“Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination.

...

The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.”

[203] This caution notwithstanding, there are circumstances where it can be reasonably concluded that an employer's conduct in response to an objectively found material risk to an employee's health and welfare could trigger a resignation such that it is a dismissal by way of forced resignation.⁴² However, as indicated in *Green v KS United Pty Ltd* each case is to be determined on its own facts.⁴³

[204] Based on the aforementioned findings, one element of the conduct of the employer clearly points to a finding of forced resignation (its inadequate investigation of the 2 December 2022 incident resulting in its failure to appreciate its seriousness and impact on Ms Noble) and one other element does so to a material degree (the measures taken concerning Ms Galvin including the lack of advice about the apology). Other elements of the employer's conduct do not do so.

[205] Considered overall, I do not find that Ms Noble had no real or effective choice but to resign.

[206] Ms Noble had a number of choices short of resignation.

[207] She had a choice to allow the conflict resolution process being conducted by Ms Russell to be completed. She resigned mid-point and knowing it was incomplete. This was a real and effective choice because the process was occurring, had directly engaged Ms Noble, was being independently and professionally conducted, and had the goal of re-establishing a working relationship between the two.

[208] Ms Noble also had a choice to give the employer's functional separation proposal a go, even if only on a temporary basis until Ms Russell's work was completed. Ms Noble resigned without doing so even after being told it could be interim only if she preferred or could be varied if she had practical suggestions to make. It was a real and effective choice because it came from an owner, was capable of almost immediate implementation and had the goal of largely excluding Ms Galvin from her immediate working environment.

[209] Ms Noble also had the choice to seek leave at least until Ms Russell's work was completed. Whilst Ms Noble had only a small amount of paid leave remaining, the employer had in recent months accommodated leave requests and requirements for time off. It was an option opened up by Ms Henning on 12 December for discussion at least, but not one pursued by Ms Noble.

[210] Put simply, after being told by Ms Henning on 12 December 2022 that there would be days where Ms Noble and Ms Galvin would still be rostered to work at the premises on the same day as herself, Ms Noble had had enough. She did not wish to engage in further discussion, negotiation or meetings. Ms Noble resigned on a day and at a time of her choosing. She had rational reasons for resigning but she was not, objectively considered, forced to do so.

[211] I accept Ms Andrews evidence that Ms Noble was likely to have been under considerable stress and feeling a perceived lack of employer workplace support. I have found that she had held back giving her resignation for a week to assess what the employer's position would be as it related to her and Ms Galvin. The assessment Ms Noble made was that the

employer was not meeting her expectations and as a result she lost confidence in the owners insofar as protecting her wellbeing was concerned.

[212] Ms Andrews' opinion that a causal relationship existed between the events of 2 December 2022 (including Ms Noble's perceptions of lack of employer support) and the resignation accord with findings I have made. However, given the constraints faced by a treating health professional on being fully informed of the complete workplace narrative, a fact acknowledged by Ms Andrews in evidence,⁴⁴ the psychologist's opinion on the resignation having been forced by the employer is far from determinative. I have made objective findings on those matters based on the totality of the evidence including actual and not simply perceived employer conduct.

[213] It is not difficult to have considerable empathy for the situation faced by Ms Noble. She rightly put what she considered to be her health and wellbeing first. She had been the target of an unprovoked incident of workplace bullying and, [REDACTED] her decision to resign was not unreasonable. This does not however make her resignation forced. The employer neither wanted her to do so, had not intended that she do so nor denied her an effective or real choice when doing so.

[214] There was no forced resignation within the meaning of s 386(1)(b) of the FW Act.

Conclusion

[215] I have not found that Ms Noble's employment was terminated by Smiling Samoyed at its initiative within the meaning of s 386(1)(a) of the FW Act. I have not found that Ms Noble's resignation was forced within the meaning of s 386(1)(b). Accordingly, Ms Noble was not dismissed from her employment as a brewer.

[216] Accordingly, there is no utility in dealing with merit or remedy issues as there can be no unfair dismissal as there was no dismissal.

[217] The jurisdictional objection by Smiling Samoyed is upheld. Ms Noble's application under s 394 of the FW Act fails for want of jurisdiction and must be dismissed.

[218] An order giving effect to this decision will be issued in conjunction with its publication.⁴⁵



DEPUTY PRESIDENT

Appearances:

Mr A Wright, *with permission*, on behalf of Ms M Noble

Ms K Henning, of and on behalf of Smiling Samoyed Pty Ltd

Hearing details:

2023

Adelaide (by video)

22, 27 March

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¹ Interlocutory hearing 31 January 2023

² [\[2023\] FWC 267](#)

³ A1

⁴ A2 Statement of Maddison Noble 23 February 2023

⁵ A3 Report of Simone Andrews 16 March 2023

⁶ A4 Statement of Rhiannon Pulford 16 March 2023

⁷ R3 Statement of Katharine Henning 17 February 2023 (first statement); R4 Statement of Katharine Henning 24 February 2023 (second statement); R5 Statement of Katharine Henning 17 March 2023 (third statement)

⁸ R2 Statement of Simon Dunstone 24 February 2023

⁹ (1959) 101 CLR 298

¹⁰ *Tamayo v AlSCO Linen Service Pty Ltd* (1997) Print P1859 as cited in *Hyde v Serco Australia Pty Limited* [\[2018\] FWCFB 3989](#), [102]

¹¹ R5 paragraph 9

¹² Section 601(4) FW Act

¹³ R4 Attachment 3 (Staff Structure); R4 Attachment 4 (Site Diagram)

¹⁴ Recording of Hearing, 22 March 2023, 1:58:19-1:58:30

¹⁵ A2 paragraph 121

¹⁶ MN05

¹⁷ A2 paragraphs 127 - 129

¹⁸ R4 Attachment 7

¹⁹ R4 Attachment 8

²⁰ A5

²¹ R4 Attachment 9

²² R4 paragraph 26

²³ R4 Attachment 10

²⁴ R4 paragraph 44

²⁵ R4 Attachment 11

²⁶ R4 Attachment 13

²⁷ R4 Attachment 12(2)

²⁸ R4 Attachment 12(1)

²⁹ R4 Attachment 12(1)

³⁰ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54]

³¹ [\[2017\] FWCFB 3941](#)

³² *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200

³³ *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli* [\[2017\] FWCFB 3941](#), [47]

³⁴ MN05

³⁵ Recording of Hearing, 22 March 2023, 3:36:46-:3:36:55

³⁶ R4 Attachment 9

³⁷ Recording of Hearing, 27 March 2023, 1:45:23-1:45:39

³⁸ R4 Attachment 10

³⁹ Ibid

⁴⁰ Ibid

⁴¹ *Barkla v GAS Custodial Services Pty Ltd* [\[2011\] FWAFB 3769](#) citing with evident approval the Full Bench of the Australian Industrial Relations Commission in *Doumit v ABB Engineering Construction Pty Ltd* (unreported, AIRC (FB), N6999, 9 December 1996)

⁴² *Green v KS United Pty Ltd* [\[2022\] FWC 3228](#)

⁴³ Ibid, [105]

⁴⁴ Recording of Hearing, 22 March 2023, 2:44:41-2:44:57

⁴⁵ [PR761253](#)