DECISION

Fair Work Act 2009
s.604—Appeal of decision

Pecker Maroo Verano Pty Ltd

v

Linda Margaret Stevens, Matthew Kenneth Stevens
(C2023/5135)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BINET
DEPUTY PRESIDENT GRAYSON

BRISBANE, 14 MARCH 2024

Appeal against decision [2023] FWC 1096 of Deputy President Lake at Brisbane on 31 July 2023 in matter numbers U2023/1198 and U2023/1199.

Overview and background

[1] Pecker Maroo Verano Pty Ltd (Appellant / Pecker Maroo Verano) has lodged an appeal under s. 604 of the *Fair Work Act 2009* (the FW Act), for which permission is required, against a Decision[1] and Order[2] of Deputy President Lake issued on 31 July 2023 (Decision) dealing with unfair dismissal applications made by Ms Linda Stevens and Mr Matthew Stevens (the Respondents). The Deputy President found that the Respondents were National System Employees protected from unfair dismissal on the basis that a Management Agreement setting out the terms of their relationship with Pecker Maroo Verano was an employment contract rather than a contract for service. The Deputy President also dealt with the merits of the applications finding that there was not a valid reason for their dismissal and that the Appellant failed to give the Respondents an opportunity to respond to the reasons for dismissal before deciding to dismiss them. The Deputy President found that the dismissals were unfair and having concluded that reinstatement was not appropriate, awarded compensation to the Respondents totalling $13,846.32 ($6,932.16 for each Respondent), equating to 12 weeks at their contract rate (Order)[3].

[2] On 27 August 2023, the Appellant lodged a Notice of appeal against the Decision and sought a stay of the Order made by the Deputy President. The stay application was heard on 6 September 2023 and a stay of the Order was granted on 7 September 2023, pending the determination of the appeal.[4]

[3] The appeal was listed for hearing before the Full Bench on 13 November 2023 in relation to permission to appeal and the merits of the appeal. The Appellant was represented by its General Manager, Mr G Barden and a Director, Ms S Charlton. The Respondents were self-represented. The Appellant did not prepare an Appeal Book in accordance with Directions issued for the appeal and one was prepared by staff of the Commission. The parties were requested to confirm that the Appeal Book contained all documents relevant to the appeal by

25 October 2023 and were informed that if they did not respond to this request, the Full Bench would assume that the Appeal Book contained all relevant documents. Neither party responded to this request.

[4] After hearing the appeal, we identified that the Appellant had incorrectly stated in the Form F7 Notice of appeal, that the appeal was lodged within the time required in rule 56(2) of the *Fair Work Commission Rules 2013* (the FWC Rules). The Appellant had 21 calendar days from the date the decision under appeal was issued to lodge its Notice of appeal. The Decision was issued on 31 July 2023, and the Notice of appeal was required to be lodged by 21 August 2023. The Notice of appeal was received by the Commission on 27 August 2023, six days outside the time required. On 5 December 2023, further Directions were issued requiring the Appellant to lodge written submissions addressing the basis on which an extension of time in relation to the appeal should be granted and for the Respondents to provide a written response to the Appellant's submission.

[5] For the reasons below, we have determined to:

- Extend the time for the Notice of appeal to be lodged;
- Grant permission to appeal;
- Redetermine the matter;
- Vary parts of the Decision; and
- Otherwise confirm the Decision.

Decision under appeal

[6] The background as set out in the Decision under appeal is that the Respondents, who are husband and wife, were employed by the Appellant to manage a residential/holiday property in Noosaville Queensland and were both dismissed by the Appellant on the same grounds. The Deputy President decided to hear the matters jointly. The Deputy President also noted that the hearing of the applications was subject to delay due to the way the Appellant conducted its case, including the making of various assertions that it did not recognise the authority of the Commission to make an arbitrated decision and that several extensions had to be granted for the Appellant to provide material in relation its position.

[7] Before considering the merits of the applications, the Deputy President made the following determination in respect of the matters set out in s. 396:

> "[6] It is undisputed that the Applicants lodged their application with the Commission within 21-days as required by the Act. The dismissal did not involve a genuine redundancy. At the time of the Applicant's dismissal, the Respondent stated they are a small business with less than 15 employees. However, the Respondent did not rely on the Small Business Fair Dismissal Code.
>
> [7] There are issues regarding whether the Applicants are persons protected from unfair dismissal. The Act prescribes that a person must be a 'National System Employee' in order to claim an unfair dismissal remedy. The Applicants and Respondent have raised factors that may indicate that the Applicants are independent contractors.
>
> [8] I will first determine whether the Applicants are National System Employees who are protected from unfair dismissal before assessing the merits of the matter."

[8] The Deputy President commenced his consideration by citing principles articulated by the High Court in relation to the approach to characterising whether a relationship is one of employment or principal and independent contractor[5]. The Deputy President also referred to case law dealing with the indicia of employment and independent contracting involving the application of a "*multifactorial test*" in circumstances where a comprehensive written contract does not exist.[6]

[9] In applying these principles, the Deputy President considered a document, entitled "*Management Agreement for Verano Resort, Noosaville*" and regarded this document as the written agreement between the parties setting out the terms of their relationship (Agreement).[7] While it was not recorded in the Decision, the Agreement was dated 31 March 2021 and was signed by the Respondents on 2 April 2021 but was not signed by the Appellant. Noting that the Agreement did not state whether the Respondents were employees or independent contractors, the Deputy President summarised the terms of the Agreement as follows:

> "a. A minimum term of two years and commencing on the 30 April 2021.
> b. It included a 3-bedroom home located on the complex with a car space.
> c. Annual Leave of 20 days was available but must be taken in one week blocks every 2-3 months. The leave could not be taken during peak seasons.
> d. The Remuneration was to be $60,000 per annum and were paid a weekly amount of $1,153.86.
> e. A mobile phone and a company credit card would be provided.
> f. A bonus scheme was also applicable for unit sales which was 50% of the profit after conveyancing, advertising and other associated expenditure if the Applicants were able to sell the units.
> g. The requirement to wear a uniform and name badge.
> h. The list of duties that the Applicants were required to undertake."[8]

[10] Consideration was then given to the "*contractual terms*" identified by the Deputy President as being favourable towards a finding that the relationship between the parties was one of employment and the terms that were favourable to finding that the Respondents were independent contractors. In this regard, the Deputy President stated:

> "[17] Although the Agreement purports to be a 'management agreement' I note the following contractual terms are favourable towards determining an employment relationship existed:
>
> a. The Respondent exercised control over the manner in which the Applicants' work was performed, hours of work and the location.
> b. The Applicants could not perform work for others and were expected to report to Ms Stephanie Charlton for all invoices and payment of suppliers.
> c. The Applicants were required to wear work uniforms.
> d. The Applicants were paid a weekly amount on a salary basis.
> e. The Applicants were provided 20 days of annual leave.
> f. The Applicants were provided some equipment to undertake their role. The role also required a car which was not a substantive part of the role.
> g. The Applicants were provided with the company credit card to make purchases that were consistent with their role. They did not utilise business expenses.
>
> [18] There are some contractual terms which are favourable towards finding a contracting arrangement existed:
>
> a. The Applicants were required to provide an ABN.
> b. The Applicants appeared to delegate their work when they were unavailable. In this case, to Ms Sue Barden and Mr Geoff Barden
> c. The working period between the Applicants and Respondent was subject to a two-year limit."

[11] Although the Deputy President did not make clear the weight he placed on each matter, he was satisfied that in considering "*all the contractual terms*", the Agreement overall is reflective of an employment contract more than a contracting arrangement and the Respondents were employees protected from unfair dismissal.

[12] In respect of the material relied upon by the parties at first instance, the Deputy President noted at paragraph [4] of the Decision that Mr and Ms Stevens gave evidence at the hearing and that the Appellant was represented by Ms Charlton but did not refer to witnesses who gave evidence for the Appellant. At paragraph [27] of the Decision, there is a reference to statements submitted by the Appellants having been provided by Mr Geoffrey Barden and Ms Sue Barden but the contents of those statements have not been set out in the Decision and there are limited references to the contents of those statements or to the oral evidence that Mr Barden and Ms Charlton gave at the hearing or to their evidence under cross-examination.

[13] The Deputy President noted that the Respondents submitted at first instance that they were dismissed without any notice, after Ms Stevens wrote to the Appellant advising that she required two weeks' leave based on her doctor's advice, and that they received a termination letter stating that they were dismissed for their "*performance ethic*" by taking unauthorised leave on 4 February 2023. The Deputy President also recorded that the Respondents sought a payment of 12 weeks at their contract rate, on the basis that their contract would have concluded on 30 April 2023, together with outstanding annual leave entitlements.

[14] The Appellant at first instance did not file a Form F3 Response to the Applications, generally indicated an unwillingness to engage with the Commission process and only provided several documents and submissions to support its position after what the Deputy President described as "*much to-and-froing*" by his Associate[9]. In relation to the material that was provided by the Appellant, the Deputy President said:

> "[24] The Respondent filed a series of documents titled "Amicable Agreement" and "The Standard" which I regard nonsensical. The documents assert high treason being undertaken by various members of the judiciary and elected officials, variously quoting biblical scripture and arcane legal phrases. I have not had regard to these documents which on a generous interpretation look to have been prepared as a challenge to the responses by various governments to the COVID-19 pandemic.
>
> [25] The Respondent also filed materials regarding the dismissal. The Respondent argues that the termination of the Applicants was valid on the basis that they did not perform the role they were required to do. The Respondent states:
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> "*Points for termination of Matt & Linda Stevens contract with Pecker Maroo Verano Pty Ltd*
>
> - *the Dr's certificate written to Linda Stevens stating to have 2 weeks holiday was 5 days AFTER Matt & Linda demanded to go on holidays for 2 weeks.*
> - *Why did Matt Stevens have to go on a holiday when he was not sick?*
> - *Matt & Linda Stevens gave us an ultimatum* ***on 3 separate occasions*** *and* ***threated us*** *that if we did not comply with their* ***demands*** *they would abandon their post and terminate their contract with Pecker Maroo Verano Pty Ltd.*
> - *Matt & Linda's work performance and standards were not of a satisfactory standard to the owners and the body corporate and management of Pecker Maroo Verano Pty Ltd*
> - *we had to pay an extra $3000 to an outside contractor to bring the resort up to standard required by body corporate in November 2022.*

- *The body corporate has also **denied our option** renewal request based on the poor performance of the onsite managers - Matt & Linda Stevens.*
- *As a NON- smoking resort – the owner of unit 5 complained about continuous smoking coming from the managers unit.- Unit 1. Linda admitted she was still smoking. Matt also admitted that Linda still smoked*
- *Bad language – heard by many people – guests and owners by Matt & Linda Stevens*
- *Use of owners apartments FREE OF CHARGE for Matt & Linda's family over 3 months duration. - Sep to Dec 2022 - this equates to theft*
- *Correct Office Hours stated on the contract and stipulated by the body corporate were not adhered to by Matt & Linda Stevens- the office was often unattended after 12.00pm many days. Owners would attend to clients and show them how to access the security box to gain access to their units.*"

[15] At first instance, the Appellant also alleged that the Respondents had "*lied about Mrs Stevens having an accident by falling out of a car*" resulting in a foot injury and that Ms Stevens was in fact having planned surgery. In addition to the statements of Mr and Ms Barden, the Deputy President noted that the Appellant provided a response from Mr Geoff Coy, Chairman of Verano Owners Corporation, setting out a range of upkeep issues at the resort accommodation and the performance issues of the Respondents.[10] The Deputy President did not refer to an email containing a statement made by Ms Karla Goldsmith, the Appellant's Receptionist. The Deputy President records that the Appellant's position at first instance was that the dismissal of the Respondents was "*substantiated and justified*" and that their applications should be dismissed.

[16] The Deputy President then went on to outline the relevant considerations in s. 387 of the FW Act before turning to consider whether there was a valid reason for the dismissal within the meaning of s. 387(a). In relation to whether there was a valid reason for the dismissal the Deputy President observed that:

> "[33] The Respondent argues that the Applicants were dismissed on the basis of poor performance of their duties. I note that this was not stated in the termination letter.
>
> [34] The termination letter states issues of 'performance ethic' and the failure to provide proper notice for annual leave. It does not take into account poor performance of duties. Therefore, I can only consider the issues of 'performance ethic' and the failure to provide proper notice for annual leave in determining whether there was a valid reason for dismissal."[11]

[17] With respect to the Respondents' request for leave, the Deputy President found that the request was reasonable, accepted that Ms Stevens was unwell and provided a medical certificate supporting her reasons for leave, and that Mr Stevens needed time off to look after her. Further, the Deputy President was of the view that although the Agreement required one-weeks' notice to be provided for taking annual leave, the Agreement also provided for "*other leave*" which could have been taken by the Respondents and there were employees who could cover their absence. In respect of the issue of the Respondents' performance ethic, while noting a complaint by the Appellant that the Respondents had twice threatened to abandon their positions, the Deputy President concluded that the reason for the dismissal appeared to be capricious, spiteful and prejudiced and that the Appellant did not provide a valid reason for the dismissal of the Respondents.

[18] The Deputy President then considered the matters in ss. 387(b) and 387(c) together and was not satisfied that the Respondents were notified of the reason for their dismissal, nor were

they given an opportunity to respond to any reason relating to their capacity or conduct. In this regard, the Deputy President found that the Appellant contacted the Respondents by telephone at around 10.15 am on 4 February 2023, being the date of the dismissal, and other than instructing them to vacate the Manager's residence in 2 weeks and return the keys, no opportunity was afforded to the Respondents to provide a response to any reasons for dismissal. The Deputy President further noted that while there was evidence from the Appellant about the Respondents' poor performance, there was no evidence that the Respondents had been warned of their poor performance, nor did the termination letter reflect their performance issues.

[19] In relation to whether the Respondents were refused a support person (s. 387(d)) the Deputy President considered this matter to be irrelevant on the basis that the Respondents did not ask to have a support person during the phone call with the Appellant. The Deputy President was also not satisfied, based on the evidence, that the Respondents were warned of their unsatisfactory performance as required by s. 387(e). Whilst acknowledging the Appellant's assertions that written complaints had been received from apartment owners about the level of service and upkeep not meeting the requisite standard, that the Respondents had been told in verbal discussions about their unsatisfactory performance, and that the Appellant provided statements from other people complaining about the Respondents' performance, the Deputy President did not accept that evidence, finding that those statements were provided after the date of the dismissal.

[20] With respect to the size of the Appellant's enterprise (s. 387(f)), the Deputy President made a finding that the Appellant is a small business with eight employees without a dedicated human resources department. While the Deputy President took into consideration that the Appellant's business did not have the resources of a larger organisation, he did not express a view as to whether this matter weighed in favour or against the dismissal being unfair or whether it was a neutral matter in his assessment.

[21] In respect of s. 387(h) – any other relevant matter – the only matter the Deputy President considered relevant was that if the Appellant had allowed the Respondents to resign without threatening them with legal action for purportedly failing to fulfil their contract, the Respondents may not have been eligible to pursue an unfair dismissal remedy unless a case of constructive dismissal was established.

[22] In conclusion, the Deputy President was satisfied that the dismissal was harsh, unjust or unreasonable. In relation to remedy, the Deputy President accepted that reinstatement was not an appropriate remedy and proceeded to consider compensation. In this regard, the Deputy President noted that the end date of the Agreement between the parties was 30 April 2023 and that the dismissal took effect on 4 February 2023 with 12 weeks remaining on the Agreement. On that basis, the Deputy President considered that the amount payable under the contract for this period was the maximum remuneration the Respondents would have received had they not been dismissed and ordered that they be paid the amount of $13,846.32 gross, to be split equally between them, and paid in two instalments. An order to that effect was issued by the Deputy President with the Decision.

Extension of time to lodge Notice of appeal

[23] The Appellant provided several reasons to explain its delay in lodging the Notice of appeal. In response to question 5.1 of the Form F7 Notice of Appeal, asking whether the appeal was filed within 21 days, the Appellant provided the following response:

> "21 WORKING CALENDER DAYS- but if you include weekends- we have not received the orders by post PO BOX 341 Pyrmont NSW 2009 - and the email was missed. This is not acceptable"

[24] We understand from this comment that the Appellant asserts that it misunderstood the requirement under the FWC Rules to lodge an appeal within 21 calendar days, inclusive of weekends, from the date the decision under appeal is issued. We also understand that the Respondent asserts it was unacceptable for the Deputy President to have forwarded the Decision to the parties by email rather than by post. In this regard, the Appellant contends in question 1.2 of the Notice of appeal that it "*gave very specific instructions that any and all paperwork had to be sent via mail to* [a stated postal address]" and "*found an email 2 weeks after it was sent*" – on 15 August 2023. The Appellant went on to provide an email address and two postal addresses for future paperwork to be sent.

[25] On 5 December 2023, we caused correspondence to be sent to the Appellant requiring it to lodge with the Commission and serve on the Respondents, an outline of submissions addressing the basis on which the Full Bench should grant an extension of time for the appeal as it was filed out of time. The parties were put on notice that the Full Bench could not proceed to determine the appeal unless a further period was granted by the Full Bench for the appeal to be lodged, and if a further period was not granted, the Notice of appeal may be dismissed.

[26] On 11 December 2023, the Appellant sent an email to the Commission explaining that the delay in lodging its Notice of appeal was due to the fact that "*the Directors were unavailable*" and that it did not understand the "*correct format*" required by the Commission. The Appellant also stated that "[they] *are a small Business and do not have the facilities of HR department or the capital required to engage a Lawyer to fulfil* [the Commission's] *demands for more documentation*".

[27] On 12 December 2023, we caused an email to be sent to the parties requiring the Appellant to provide written submissions addressing matters relevant to whether a further period to appeal should be granted being reasons for the delay, an explanation of the likelihood that the appeal would succeed on one or more grounds and whether prejudice would be suffered by the Respondents if the further period was granted.

[28] In response, the Appellant sent two emails to the Commission on 12 December and 13 December 2023, respectively. In these emails the Appellant explained that it was facing a difficult situation at the time as Mr Barden had been on holiday in Bali from 2 to 18 August 2023 and the co-directors, Ms Charlton and Mr Steven Shanks were dealing with the body corporate of Verano Resort's decision to not extend the Appellant's caretaking and letting agreements due to performance issues, and this meant it took "*a while*" for them to fill out the Form F7.

[29] The Respondents oppose the granting of the extension of time for the appeal for the following reasons:

> "1. The Appeal is supposed to based on the original hearing where a decision was laid down with the all the relevant information provided to the Commission at the time of the first hearing.
>
> 2. Not to now provide Information that was not supplied at the time of the hearing.
>
> 3. The fact that Mr. Bardon was only called as a witness in the hearing. And saying he was away does not exclude the Directors of Pecker Maroo from submitting the document within the due time frame, as laid out in the appeal process.
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> 4. When the Appeal was granted, there were stipulations laid down that the monies that were in contest were to be placed into a Trust account in the name of Mattew and Linda Stevens, this did not happen.
>
> 5. Again, when asked to provide a submission to explain the late lodgement they were late in doing so. And required an extension of time.
>
> 6. At the time of the appeal, we raised the time frame issue with the document being presented after the due date but the Commission did not act on this point at that time.
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> 7. The issue that is being brought up about the Body Corp happened prior to our arrival when the extension option was not taken up by Pecker Maroo at that time. And has been an on going issue. Again this was not brought up at the original Hearing.
>
> 8. The statement Re abandoning our position is incorrect, we put in for annual leave and at that point a letter of instant termination was sent by email and we had received no other warnings prior to this. Our office keys were taken by Mr Bardon on that day. This is not Abandonment it was termination."

Appeal grounds and Appellant's submissions

[30] The Appellant seeks permission to appeal on the basis that there were "*many factors*" the Deputy President failed to consider.[12] On 13 October 2023, the Appellant filed its appeal submissions which are in substantially identical terms to the grounds of appeal outlined in its Form F7 Notice of appeal. The grounds of appeal and submissions set out 14 points as follows:

> "1. Linda and Matt Did not follow proper due process to take 2 weeks of annual leave- no notice is given- just abandoned their post with no notice.
>
> 2. Linda had a Dr certificate that was dated 5 days after she abandoned her job. Matt was not sick and there was no reason for both of them to abandon their post.
>
> 3. Matt and Linda were not in the office for the correct hours of operation and there were any complaints from the body corporate and owners.
>
> 4. Linda pretended to have an accident – but in fact had PLANNED surgery on her foot that put her out of work for 3 months – hence the business and resort suffered and was noted by the body corporate that management was not doing a good job – to the point that body corporate refused to extend our option and now we have no business to sell. Linda lied on her application and said she was fit and had no issues that would detain her from performing her duties- the resort had MANY STAIRS and NO LIFTS- Linda could not possibly perform her duties for 3 – 4 months – checking rooms and the cleanliness of the apartments. But for the fact that Linda lied at her interview they would not have been given the contract for managing the Verano Resort.

5. Linda also lied about not smoking- when in fact she chain smoked and this was noted by many owners including complaints from guests and owners who could smell the smoke and also saw Linda smoking. It was a specific requirement that Verano is a NON-SMOKING resort- plus there are signs up on all the gates and entrances.

6. Matt & Linda had their family come over from New Zealand and stayed at the resort for 3-4 months- using other owners' apartments without paying- hence stealing money from our business and other owners. We had complaints from owners stating their apartments were cleaned and to the point, beer bottles and food were still in the wardrobes- and owners wanted to know why Linda's children's names were on their Netflix TV in their apartments. This is a serious breach of protocol, and trust by the employees for our owners.

7. Matt and Linda had 2 extra security keys cut in early October 2022 and still have not handed back all of the security keys to Verano Resort

8. 1st time – Matt & Linda put in writing that they were leaving the resort and abandoning their post 2 weeks before XMAS- the busiest time of the year. 2nd time – Matt & Linda rang us to say they were quitting there and then. The THIRD THREAT for abandoning ship – I found out from Geoff Barden to say Matt & Linda have told him to get over to the office the same day on a Saturday– "they were out of there".

9. Proper due process for Annual leave must be in writing with notice and approved by the directors. The week before Annual leave they must also send a reminder to advise they will be away. THERE MUST BE RELIEF MANAGERS ORGANISED for the time off – this was not done and Matt & Linda left anyway – abandoning their post with no relief and no notice and no approval. Matt was not sick and nor was Linda

10. Linda spent much time in hospital for other health reasons not just her leg- again not being able to perform her duties. Again the resort deteriorated to the extent that the body corporate and owners had had enough and refused to extend our option – based on the neglected state of the resort.

11. Stephenie & Stephen had to pay a gardener approximately $3000 to assist in getting the gardens back to an acceptable presentation- however this is work that we had already paid Matt 7 Linda to do.

12. Linda had a foul mouth and the swearing was noted by many guests and owners that she was not professional and could not believe some of the arguments and fights coming from their apartment in the stairwells and in the car park.

13. When Matt & Linda abandoned their post and had threatened us for the 3rd time – we had no choice but to terminate their contract because of all the reasons stated above. We gave them plenty of opportunities and even paid to have their work done by others.

14. The body corporate and many owners were not happy along with the Directors of Pecker Maroo Verano – just how run down and bad the resort and business had become."

[31] During the hearing of the stay application, the Appellant withdrew ground seven.[13] We discern from the material filed and the oral submissions made at the appeal hearing that the 13 remaining grounds of appeal essentially assert that in finding that there was not a valid reason for dismissal, the Deputy President failed to fully consider the Appellant's evidence in relation to the reasons for terminating the Respondents' employment. At the appeal hearing, the Appellant raised an additional appeal ground, contending that the Deputy President erred in finding that the Respondents were employees and not independent contractors.

[32] In relation to the initial appeal grounds set out in the Form F7, the Appellant submitted that the Deputy President failed to properly consider an email sent on 25 April 2023 from Ms Charlton to the Deputy President's Chambers, outlining the reasons for terminating the Respondents. While the contents of that email are set out at paragraph [25] of the Deputy President's Decision (see above), the Appellant contends that the evidence about these matters and additional matters raised in the material it filed, were not properly considered.

[33] In this regard, the Appellant contended that the reasons for terminating the Respondents' employment included that the Respondents did not follow the process for applying and taking leave as set out in their contract of employment and the Respondents had been subject to a litany of performance issues and complaints from owners of the properties they managed and the co-directors. The Appellant contended that Ms Charlton had received complaints from a part-time receptionist[14] and a property owner at the Verano Resort[15] in relation to the Respondents' performance and their misuse of the properties they managed.

[34] Regarding the Appellant's allegation that a property owner found the Respondents' grandchildren's names on their Netflix account in their apartment, Mr Barden said at the hearing of the appeal that the property was owned by a married couple. One of the owners provided a written statement asserting various issues with the performance of the Respondents but did not refer to the Respondents' grandchildren being in their apartment or using their Netflix account. The statement about these matters was conceded by Mr Barden in his submissions in the appeal to only be "*hearsay*" evidence,[16] which was referred to in an email from the receptionist for the complex, Ms Karla Goldsmith, who was not called to give evidence. Mr Barden conceded that the Appellant did not want to pursue this matter at the time they became aware of it and persuaded the property owners not to do so.[17]

[35] The Appellant also made an assertion that it is a small business and does not have a HR department. In response to a question from the Full Bench regarding what evidence the Appellant put forward before the Deputy President to indicate that it is a small business, the Appellant relied on the Form F2 Applications filed by the Respondents where in response to question 1.3 – "*To the best of your knowledge, how many employees were employed in the workplace when you were dismissed?*" – the Respondents ticked the box "*1-14*" to indicate there had been between 1 to 14 employees employed by Pecker Maroo Verano when they were dismissed.[18] In the appeal hearing, the Appellant submitted that it has a maximum of eight employees, three being full-time employees and the remainder being casual employees.[19]

[36] In relation to the additional ground raised at the appeal hearing, the Appellant contends that the Respondents were independent contractors on the basis that they could run other businesses and it was "*quite clearly spoken on the original agreement that was signed by* [the Respondents]*, what their terms of employment would* be".[20] The Appellant also submitted that the Respondents were not paid superannuation or tax and were not entitled to sick leave or "*benefits*".[21]

[37] It was also conceded by the Appellant that Ms Charlton, who had represented the Appellant in the hearing before the Deputy President, had not taken the initial proceedings seriously and did not take the opportunity given to properly present the Appellant's case, until the hearing before Deputy President Millhouse resulting in a stay of the Decision being granted[22].

Respondent's submissions in the appeal

[38] The Respondents' outline of submissions was set out in an email to the Commission on 18 October 2023. The email notes that the Appellant had failed to lodge its submissions on time but to comply with the Directions issued by the Commission, they provided "*this information without seeing what* [the Appellant] *are presenting as evidence*". In their submissions, the Respondents raised four points.

[39] *Firstly*, the Respondents reject the Appellant's submission that they abandoned their position on two occasions. On the first occasion, the Respondent said they were offered a position in Townsville in September 2022 and submitted their resignation with 4 weeks' notice. However, the Respondents were told by the Appellant that it would seek legal action against them if they resigned. On the second occasion, Ms Stevens attempted to resign during an argument with the Appellant but following the issue being resolved, the Respondents were told that the resignation was not to be spoken about and did not occur.

[40] *Secondly*, the Respondents reject the Appellant's submission that they abandoned their position. Rather, the Respondents said they were told to leave the office and return all keys to Mr Barden who would collect them. The Respondents submit they were told to vacate the unit that was their home within two weeks and did so within a week.

[41] *Thirdly*, the Respondents contend that they sought to be paid their annual leave entitlements but had been advised by the Appellant that this would occur after their unit was vacated. The Respondents said that following the unit being professionally cleaned and the receipts being provided to the Appellant, the Respondents were still denied their three weeks of annual leave. *Fourthly*, the Respondents acknowledged that the medical certificate filed with its Form F2 Application was incorrectly dated but submitted that Ms Stevens' doctor had been prepared to correct the date prior to his passing.

[42] In addition to the outline of submissions, the Respondents filed three letters from two property owners of Verano Resort and a letter from Mr Coy, the Chairperson of the Verano Resort body corporate committee. The Respondents sought to rely on these letters as evidence that the property owners and Mr Coy were supportive of the Respondents.

[43] During the appeal hearing, the Respondents submitted that they were employees on the basis that they accrued annual leave, unlike independent contractors. The Respondents noted that when the matter was heard before the Deputy President, they had not been paid their annual leave. In response to questions from the Full Bench about the nature of the Respondents' employment, they accepted that in the first instance hearing, they told the Deputy President that they had an ABN, paid for their own insurances, provided the Appellant with invoices for their services and there was no tax taken out of the amounts paid to them.[23] The Respondents also said that Pecker Maroo Verano has less than 15 employees, but they were aware Ms Charlton may have another business she operates in Sydney.[24]

[44] In relation to Ms Stevens' request for sick leave, she said that she had been hospitalised in December 2022 and January 2023 but was not paid sick leave and instead took annual leave.

Ms Stevens conceded that she did not provide evidence of this in the proceedings before the Deputy President.[25]

Whether further period to lodge appeal should be granted

[45] Rule 56(2) of the *Fair Work Commission Rules 2013* requires that an appeal must be filed within 21 calendar days after the date of the decision appealed against, or such time as is allowed by the Commission on application.

[46] In *Snyder v Helena College Council, Inc. t/a Helena College*,[26] a Full Bench of this Commission held that time limits of the kind in rule 56(2) of the FWC Rules should not simply be extended as a matter of course. There are sound administrative and industrial reasons for setting a limit to the time for bringing an appeal and it should only be extended where there are good reasons for doing so.

[47] The usual principles applying to consideration of an application to extend time to lodge an appeal were summarised in the Full Bench decision in *Jobs Australia v Eland*,[27] as follows (footnote omitted):

> "[5] Time limits of the kind in Rule 56 should not simply be extended as a matter of course. There are sound administrative and industrial reasons for setting a limit to the time for bringing an appeal and it should only be extended where there are good reasons for doing so. The authorities indicate that the following matters are relevant to the exercise of the Tribunal's discretion under Rule 56(2)(c):
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> - whether there is a satisfactory reason for the delay;
> - the length of the delay;
> - the nature of the grounds of appeal and the likelihood that one or more of those grounds being upheld if time was extended; and
> - any prejudice to the respondent if time were extended."

[48] Taking these matters into account, the exercise of discretion will be guided by a consideration of whether, in all the circumstances, the interests of justice favour the Appellant being granted an extension of time within which to lodge its Notice of appeal.[28]

[49] After considering the submissions of the parties we conclude as follows in relation to each of these matters. The reasons for the delay in the Appellant lodging its appeal are not satisfactory. Other than a bare assertion, the Respondent has provided no evidence that it "*gave very specific instructions*" that any correspondence be sent to a postal address. We can find no evidence in the Commission's case management system indicating that such a request was ever made. To the contrary, the audio recording indicates that at the conclusion of the hearing before the Deputy President, he was asked by Ms Charlton how they would receive the Decision and stated that he would forward it to the parties by email. No issue was raised by any of the parties with this proposal. There is nothing unacceptable about the Deputy President corresponding with the parties by email. We note that during proceedings before the Deputy President the Appellant sent voluminous correspondence by email and responded to emails from the Chambers of the Deputy President.

[50] In those circumstances, the assertion that the email forwarding the Deputy President's decision to the Appellant was overlooked is not a satisfactory explanation for the delay in lodging the appeal. Nor is the fact that the Appellant did not understand that it had 21 calendar days rather than 21 working days from the date the Decision was issued to lodge its Form F7. Further, we do not accept that the Appellant did not understand the 21-day requirement, given the comment set out in the Notice of appeal in response to the question as to whether it had been lodged within the required time. These matters weigh against the grant of a further period to the Appellant.

[51] The length of the delay – six days – is not extensive, and this is a neutral consideration. The Respondents have suffered prejudice from the delay by reason that they have lost the benefit of the amounts ordered by the Deputy President. This weighs against the grant of a further period for the appeal to be lodged.

[52] The nature of the appeal and the likelihood that one or more grounds will succeed, is a matter that weighs in favour of the grant of a further period in the present case. For reasons that follow, the appeal raises a ground going to the proper approach to determining whether a dismissal for misconduct is unfair where the employer is a small business and does not raise a defence to the application based on the Small Business Fair Dismissal Code. We are also of the view that as identified in the stay decision, the approach adopted by the Deputy President to considering whether there was a valid reason for the dismissal was erroneous and did not have regard to all the relevant evidence. These considerations outweigh the other matters and we have decided to grant a further period for the appeal to be lodged.

Permission to appeal

[53] The Deputy President's decision was made under Part 3-2 – Unfair Dismissal of the FW Act. Section 400(1) of the FW Act provides that permission to appeal must not be granted from a decision made under Part 3-2 unless the Commission considers that it is in the public interest to do so. Further, in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a "*significant error of fact*" (s. 400(2)). Section 400 of the FW Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally.

[54] The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[29] The public interest might be attracted where:

- a matter raises issues of importance and general application;
- there is a diversity of decisions at first instance so that guidance from an appellate court is required;
- the decision at first instance manifests an injustice;
- the result is counter intuitive; or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[30]

[55] The test set out in s. 400 has been described as "*a stringent one*". To be characterised as significant, a factual error must vitiate the ultimate exercise of discretion. The decision subject to appeal in this matter is also properly viewed as a discretionary decision. The appeal is

therefore to be considered in accordance with the principles in *House v the King*[31] expressed in that decision as follows:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." [32]

[56] The ground of appeal raised at the hearing in relation to whether the Respondents were employees or independent contractors does not in our view disclose an error. We agree with the conclusion reached by the Deputy President in relation to this matter, notwithstanding that he appears to have applied a multi-factoral approach before exhausting the approach established by the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[33] and *ZG Operations Australia Pty Ltd v Jamsek*.[34] However, in relation to the other grounds of appeal we are of the view that the Deputy President adopted an erroneous approach to considering whether the Respondents were unfairly dismissed for the following reasons.

[57] Section 385 of the FW Act provides that a person has been unfairly dismissed, if the Commission is satisfied of the following matters:

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

[58] Section 396 of the FW Act provides that the Commission must decide four matters before considering the merits of an unfair dismissal application, including at s. 396(c), whether the dismissal was consistent with the Code. The wording of s. 396 makes clear that the fact that an employer does not contend that a dismissal was consistent with the Code does not relieve the Commission of the statutory duty to actively consider and determine whether the Code was complied with.[35]

[59] The Deputy President noted in his decision that the Appellant stated that it was a small business but did not rely on the dismissals being consistent with the Code. Other than making this observation, the Deputy President did not consider whether the Appellant's assertion that it was a small business was correct and if so, whether the Respondents' dismissals were consistent with the Code. It is apparent from paragraph [6] of the Decision that the Deputy President considered that he was not required to determine this matter on the basis that it was not argued by the Appellant.

[60] This is an error of principle. The Commission has an obligation in all matters to satisfy itself that it has the requisite jurisdiction to perform a particular function.[36] By failing to

consider whether the Appellant's assertion that it was a small business was correct, and if so, whether the dismissal was consistent with the Code, the Deputy President did not comply with the decision-making process required by the FW Act and adopted an approach that is disharmonious with Full Bench authority.[37]

[61] The Deputy President also observed at paragraphs [33] – [34] of the Decision that in relation to the question of whether there was a valid reason for the dismissals within the meaning in s. 387(a), he could only consider the matters set out in the letter informing the Respondents that they had been dismissed. It is apparent from these paragraphs that the Deputy President considered that he was limited to matters set out in the termination letter when deciding whether there was a valid reason for dismissal for the purposes of s. 387(a). This approach is erroneous. It is well established that facts justifying dismissal, which existed at the time of the dismissal, should be considered even if the employer was unaware of those facts and did not rely on them at the time of dismissal.[38] Ultimately, the Commission is bound to determine, whether on the evidence provided, facts existed at the time of termination that justified the dismissal.[39] Further, the reason for dismissal need not be the one given by the employer and can be any reason underpinned by evidence provided to the Commission.[40]

[62] The approach adopted by the Deputy President makes his finding that the dismissal was not for a valid reason unsound because it was not based on all of the evidence before the Deputy President as to the reasons for the dismissal.

[63] There is also a real possibility that the Deputy President's error in relation to s. 387(a) could have resulted in a further error related to the balancing exercise which requires that each of the matters in s. 387 must be weighed and taken into account to determine whether a dismissal is unfair, because it is harsh, unjust or unreasonable. A failure to properly consider one of the matters in s. 387 casts doubt on the overall balancing of those matters.

[64] While not all errors of this nature will result in the granting of leave to appeal we are satisfied that in the circumstances of this case there is the possibility that the absence of the error may have produced a different result.

[65] Accordingly, we have concluded that permission to appeal should be granted. We have also decided, in the interests of efficiency, to redetermine the matter of whether the Respondents' dismissals were unfair, based on the material that was before the Deputy President and the submissions in the appeal. We commence by considering the evidence that was before the Deputy President at first instance.

Redetermination

Evidence

[66] Prior to the hearing, the Deputy President issued Directions requiring the filing of submissions and witness statements. While the Directions did not indicate that statements of evidence would not be received unless the person who made the statement was available to swear to its truth and be cross-examined, the parties were advised that:

> "The Submissions must include all relevant facts, dates and incidents to support all claims made. The Witness Statements are required to outline the evidence of each witness that the party intends to call at

> the hearing and are to be provided in the form of a signed statement. All documents referred to in the Witness Statement are required to be attached as an Annexure to that Witness Statement and numbered accordingly."[41]

[67] We accept that the Deputy President made repeated requests that the Appellant file and serve a Form F3 Employer response to the Applications. The Appellant did not comply with this request. We also accept, based on the material on the Commission's file, that the Deputy President's Associate was required to communicate extensively with the Appellant to attempt to persuade it to engage with the proceedings. The Appellant pressed for various rulings relating to the standing of the Deputy President and demanded to be provided with information about the status of the FW Act. The Appellants also purported to instruct staff of the Commission to join the two applications and referred to the Respondents as "*clients*" of the Commission. Ultimately, the Appellant filed some 293 pages of material. That material included approximately 36 pages that were relevant to the matter the Deputy President was required to determine. The irrelevant material purported to establish an "*amicable agreement*" between the Deputy President and the parties and included references to "*misprison of treason*", challenges to the Oath the Deputy President "*stood under*", quasi-biblical references, a discourse on Christianity and Freemasonry and various demands and assertions about fraud and conspiracy.

[68] The audio recording of the proceedings at first instance indicates that Ms Charlton, who then represented the Appellant, attempted at the commencement of the hearing to press for a ruling in relation to "*amicable agreement*" and to demand that the Deputy President respond to requests for rulings on earlier points the Appellant had raised concerning the Deputy President's standing and authority. We agree with the Deputy President's assessment of this material at paragraph [24] of the Decision – it is nonsensical.

[69] In our view, the Appellant must bear some responsibility for aspects of its case which were obscured by its own conduct, not being fully considered. The Appellant had no difficulty forwarding enormous amounts of detailed material to the Deputy President and writing numerous emails demanding rulings about irrelevant matters, yet failed to provide its evidence in a format which would have allowed it to be received. The Appellant also, failed to have all of its witnesses attend the hearing. While the Respondents did not file material in the form required, they did make reasonable attempts to engage with the process, provided statements and evidence to the Commission and attended the hearing via video link, so that any defect in the material they filed could be addressed.

[70] Notwithstanding our views about the Appellant's conduct, it filed several documents and statements in the proceedings before the Deputy President. Other than setting out the Appellant's submissions (at paragraph [25]), the Deputy President's Decision does not specifically refer to evidence given at the hearing by Mr Barden and Ms Charlton. We do not turn to consider the documents filed by the Appellant and the matters canvassed in the evidence of Mr Barden and Ms Charlton at the hearing which were not specifically considered by the Deputy President.

[71] The Appellant filed a copy of the letter of 4 February 2023 advising the Respondents of the termination of their employment. The Appellant also filed an email from Mr and Ms Barden sent to Ms Charlton on 26 February 2023, in the following terms:

"I would like to advise you of the incident leading up to my confronting call from Linda on the 4th of February.

We covered The day for Linda and Matt as they informed us they had to go to Brisbane on the 3rd of February, to attend a court session for her daughter regarding children taken from New Zealand without parent consent.

I was awoken on Saturday at 7.45 am by a phone call from Linda screaming down the phone to me telling me I had to get my F, ING arse into Verano Resort as she had been informed by her doctor she had to take two weeks off sick.

If this was indeed the case there is no reason that Matt could have covered the Resort for the time she was not available.

But as I told you on the phone Sue and I would not let you down and would cover them.

I was then given your authorization to go to them and get the master keys and phone from them and take over in the interim as Acting General manager.

This we did, and I met Matt, who I informed that I had your permission to get the master keys from him and that he was not being fair to either you, Sue, and myself and it was not being reasonable or responsible in the way they had demanded annual leave without notice.

During our time as your employed contractors, we would not dream of making such ludicrous demands. The Resort in general has not been up to its usual standard and even after you spent thousands of dollars to bring it up to the standard required, it still did not look presentable.

There was still evidence of smoking around the resort and smoking is prohibited in Verano resort. (pictures supplied)

We also raised our concerns with you, since Karla's report that they were allowing their family to reside in an apartment free of charge, there is evidence to prove this was the case in at least apartment No 5.

Please find attached the report from Karls Goldsmith who was present on site to cover Sue and I in November 2022.

I believe that if Linda had been told by her Doctor to take two weeks off she would have a medical Certificate to prove that was the case, even then it would still be up to Matt to cover her absence.

We were aware that no sick pay is due to contractors and only annual leave as per our contract with you."[42]

[72] In addition, Mr Barden made a witness statement in the following terms:

"I am employed by Verano Resort (Pecker Maroo Verano Pty Ltd). in the role of Acting General Manager. I have been employed by Verano Resort since 1st November 2018. Firstly, as a permanent On-Site Manager along with my wife, Susan Barden and then we worked on a part time. basis to allow the new Managers, Linda, and Matt Stevens, to take two days off per week.

On Saturday, 4th of February at 7.45am, I received a very abusive and irate call from Linda Stevens stating that & quote; "I had better get my F*** ing arse over to the Resort as they were out of there" & quote; I asked Linda Stevens if she had contacted Stephenie Charlton advising her of her and Matt Steven's intentions. Her response was & quote "I do not care as the Doctor had told me to take the time off".

> I understand from an email sent to Stephenie Charlton in November 2022 that Matt and Linda Stevens had accused myself and my wife Susan Barden of letting them down.
>
> The Owner's Body Corporate of Verano Resort refused to grant Pecker Maroo Verano an extension for the caretaking agreement In November 2022 because of the very poor performance of the Verano Management- Linda & Matt Stevens. Linda and Matt were not doing the work required by the caretaking agreements nor the letting agreements.
>
> As an emergency remedy Stephenie Charlton arranged and paid outside gardeners for a complete overhaul of the Verano Resort gardens, at a cost of approximately $3000.00 to have the gardens, up to the standard that they should have been if Linda and Matt did their job as per the caretaking agreement.
>
> On 1st January Pecker Maroo Verano Pty Ltd promoted me to acting General Manager because Matt and Linda Stevens had already threated to abandon their post on two occasions prior to Xmas.
>
> On Saturday, 4th February 2023, after the phone call from Linda, I called Stephenie Charlton to advise her of Linda's call and Stephenie asked me to retrieve the keys and phone from the resort, as this was the 3rd threat from Matt & Linda and they were abandoning their post immediately.
>
> Upon instruction from Stephenie Charlton, I went to the resort and spoke to Matt Stevens, who handed over the keys. Matt said Linda had been to the Doctor on the 4th of February and the Doctor advised Linda to take sick leave due to stress.
>
> Subsequently however, this was proved to be not true as the Doctors visit did not take place until the 9th of February, as per the dated sick note. In fact, on 3rd February Matt and Linda asked us to work for them as they had to go to Court over a family matter, and the alleged stress was not mentioned to us personally at that point.
>
> Over the 22 months that the Stevens worked for Verano Resort we saw a steady decline in the conditions of the gardens, stairs, and general areas of the resort. We held several discussions regarding the managers poor performance of their duties with the owners of Pecker Maroo Verano. After the Managers left, I spent a considerable amount of time getting the grounds and garden pathways back to an acceptable standard required by the Caretakers agreement with the Body Corporate."[43]

[73] Mr Barden gave evidence at the hearing before the Deputy President and was cross-examined in relation to his statement. In oral evidence at the hearing, Mr Barden said that he had covered for the Respondents on Friday, 3 February 2023 and that Ms Charlton had granted them leave on that date. Mr Barden also said that a deed of amendment sought by the Appellant with the body corporate of the Verano Resort had been refused in November 2022, because of a "*list of discrepancies*" that owners wanted rectified, including overgrown gardens, broken watering systems and mould on pathways that needed to be cleaned and that a gardening contractor had been engaged to perform work at a cost of $3,000 to the Appellant.

[74] In relation to allegations that the Respondents' work performance was not of the standard required by the owners and body corporate management, it is accepted by the parties that by October or November 2022, performance concerns had been raised by the body corporate during a Committee meeting.[44] The evidence in relation to these matters was as follows. An email said to have been sent by Ms Charlton and Mr Shanks to the body corporate, with annotations in response made by the Chairman of the body corporate was tendered. That document is undated, and it is unclear when the annotations were made. The document also indicates that it was sent to Ms Charlton for the hearing of the Respondents' unfair dismissal applications but was in draft form as feedback from Committee members was still being sought and that the document had not previously been sent to Ms Charlton. It lists a range of issues in

and around the Resort and its grounds, which cannot be solely attributed to the Respondents. The Appellant did not call the Chairman of the body corporate to give evidence before the Deputy President nor provide a statement signed by him to verify the evidence that was given about the document. The list of items deals with major work to gardens, issues with the Council over the entrance to the resort following the removal of a tree, mould on pathways, maintenance of driveways, foot paths and carparks, and removal and pruning of trees. There are no items concerning general cleanliness of the Resort and the list of items are of a larger scale.

[75] It is notable that in the email, Ms Charlton states that: "*Overall there are a lot of gardens and hedges, trees and palms. Whilst the agreement contract states to maintain the gardens, it is still a grey area as to the level of gardening. For this reason* ***we suggest a once a year garden overhaul including mulching.***" (emphasis in original). Ms Charlton's comments also refer to issues with the irrigation system and that this should be maintained every six months. Some of the annotations to those comments appear to indicate that the matters have been resolved.

[76] According to Mr Barden the irrigation had deteriorated but should have been rectified before the body corporate raised the issue. Mr Barden also said that Mr Stevens had arranged a contractor to do the work between November 2022 and January 2023. Mr Barden said that after initially being refused, the option had been granted to the Appellant on the proviso that the standard of the complex after the Respondents had left would be maintained and that the current management arrangements were secure. Further, Mr Barden said that after the issues the body corporate had raised were rectified in November, the complex had again deteriorated prior to the Respondents leaving.

[77] In response to questions about Mr and Ms Stevens' family living with them in the Manager's unit, Mr Barden said that the family was living with the Respondents at times and at "*various times*" were living in other apartments in the complex. Mr Barden said that there were complaints from neighbours about noise coming from the Manager's apartment including foul language and arguing. Complaints were also received about smoking. Further, Mr Barden gave evidence that investigations by Ms Goldsmith, the Appellant's part-time receptionist had indicated that apartments were being booked and that bookings were then cancelled, but the apartments had been used. The owners of the apartments had confirmed they had not made the bookings.

[78] Mr Barden gave evidence that the owner of unit 5 had told him their television had broken down and when her husband arrived at the apartment, the Respondents' family were in the apartment and the Netflix account had the Respondents' children and grandchildren' names on it. In relation to Ms Stevens smoking on the premises, Mr Barden said that there were photographs showing hundreds of cigarette butts in a particular area, but these were not tendered. Mr Barden also said that there are signs around the resort stating that smoking is not allowed and this is stated on the website. Further, Mr Barden asserted that the no smoking requirement is set out in the caretakers' agreement. According to Mr Barden's evidence, on the last day that the Respondents were working for the Appellant, they were swimming in the pool with cleaning staff. Mr Barden said that caretaking tasks were often not done because Mr or Ms Stevens were absent and on several occasions Ms Stevens asked guests to help her clean the pool.

[79] Ms Charlton was permitted to give oral evidence despite not providing a witness statement. In that evidence Ms Charlton reiterated matters set out in submissions. Ms Sue Barden provided an unsigned and undated statement which was not sought to be tendered by the Appellant in the hearing. An undated statement prepared by Ms Goldsmith, a part-time receptionist employed by the Appellant, was also filed.[45] That statement purported to be Ms Goldsmith's observations of the Resort on 8 and 9 November 2022. The statement alleged false bookings of apartments had been made and asserted that Ms Goldsmith was told by the owners of apartment 5 that they had driven to the resort to deliver a new television to their apartment and had found "*people*" in the apartment when they believed that it was empty.

[80] The Appellants also tendered an email from an owner of unit 5. That email outlines issues with "*other charges*" showing on their account; requests for receipts; constant smoking on the balcony of the Manager's apartment drifting into apartment 5; general upkeep of the complex noting a "*slow decline*" in cleaning including stairwells and sun lounges which were said to need replacement and maintenance; the office being shut with a note on the door on "*a number of occasions*" and being required to assist guests to get their key from a locked box and directing them to their apartments on 5 occasions in the last 7 months. In conclusion, the email states:

> "Whilst Matt and Linda were always pleasant to us as owners, and Matt's work ethic was observed directly on a day- to- day basis. I would challenge the quality of work being undertaken and efficiency. As we were directly above their unit we would observe family arguments, a managers unit full of their grandchildren using the resort on numerous occasions."[46]

[81] The email makes no mention of the Respondent's family members being found in apartment 5. An email from Ms Charlton to the owner of apartment 5 dated 27 February 2023 was also included in the Appellant's material indicating that Ms Charlton met with the owner and requested that the owner "*clarify your points in writing…Please add all the issues you mentioned*." The email does not inform the owner that her response was to be tendered in proceedings in the Commission and there is no indication that the owner was otherwise informed of this fact. The owner was not called as a witness by the Appellant.

[82] During the hearing before the Deputy President, Ms Stevens acknowledged that she smoked but denied doing so on the grounds or in the office, and stated that if she was outside the office, this was to assist Mr Stevens in the garden. In relation to the office hours, Mr Stevens did not know what Ms Charlton was referring to in relation to "*after 12:00pm*" and said that the office closed after 10:30pm on weekends so they may not be in the office. Mr Stevens agreed that there was a list of issues that the body corporate wanted rectified but that he was working with the Chairman on this list and had essentially completed it by November 2022.

[83] The Respondents submitted a statement from the owner of unit 3 and another statement from a previous unit owner at the resort. The statements asserted that the Respondents had "*worked extremely hard to keep the place spick and span*", had a "*respectful and happy manner*", had "*managed the property to a very high and professional standard*" and "*were very approachable at all times*". The Respondents denied that their family members stayed in apartments other than on one occasion when they stayed in an apartment that had not been cleaned, and later, the Respondents paid for the cleaning. The Respondents also said that they did not know that the names of their grandchildren were on the Netflix account for apartment 5

and had no idea how this could have occurred[47] and pointed out that the email of 27 February 2023 sent by the owner of unit 5 does not mention these matters.

Preliminary matters

[84] In relation to the matters requiring initial determination in s. 396 of the FW Act, we agree with, and confirm the findings of the Deputy President that:

(1) The Respondents' unfair dismissal applications were made within the period required by s. 394(2) – s. 396(a);

(2) Mr Stevens and Ms Stevens were persons protected from unfair dismissal – s. 396(b);

(3) The dismissals were not a case of genuine redundancy – s. 396(d).

[85] In relation to s. 396(c), s. 388 of provides that a person's dismissal is "*consistent with the Small Business Fair Dismissal Code*" where:

(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.

[86] For the purpose of the FW Act, sub-section 23(1) 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*".

[87] In the Decision, the Deputy President noted that the Appellant had eight employees[48] and is "*a small business with less than 15 employees. However, the* [Appellant] *did not rely on the Small Business Fair Dismissal Code*".[49] On appeal, the parties agreed that the Appellant had eight employees including in related businesses.

[88] We are satisfied and find that the Appellant was a small business at the time the Respondents were dismissed, and that it is necessary to consider whether the dismissals were consistent with the Code.

Whether the dismissals were consistent with the Code

[89] The Code deals with Summary Dismissal and Other Dismissal. In the present case, the Respondents were advised of their dismissal in a letter dated 4 February 2023. The letter, in the following terms, was appended to the Respondents' Form F2 Applications and tendered by the Appellants, and stated:

> "As per our phone conversation with Matt Stevens this morning at 10.15 am Saturday 4th February 2023, we hereby terminate your contract:

> Matt & Linda Stevens and Verano Resort- Pecker Maroo Verano Pty Ltd effective immediately as onsite Managers. Your services are no longer required around the resort nor in the office.
>
> **Performance Ethic**
>
> Your continual threats are not conducive to a successful working business relationship and we can no longer tolerate nor run the business with this attitude. Despite ignoring your **two previous threats** of walking out of Verano Resort and abandoning your post with Pecker Maroo Verano Pty Ltd, prior to Christmas 2022, we can no longer ignore **your third threat** of leaving the business with one days' notice demanding two weeks Annual leave. We did authorize **one day** annual leave Friday 3rd February 2023 even though proper due process was not adhered to. We did not receive any phone calls from either of you, nor emails requesting Annual Leave- Friday 3rd February 2023.
>
> **Notice for Annual Leave**
>
> As per your contract, Annual leave must be authorised by Stephenie and Stephen with suitable relief managers in place. Your request must be put in writing to us in a timely manner. Given the urgency of your demand of 2 weeks annual leave, it required a phone call to either Stephenie or Stephen to discuss such an important issue as abandoning your post with one days' notice, Not, Ringing our part time managers Sue & Geoff Barden demanding that they cover for you for the next two weeks."[50]

[90] The letter went on to state that the Respondents' keys, other than to the Manager's unit, would be obtained by Mr Barden and that the Respondents were required to vacate the Manager's unit by 17 February 2023. In conclusion, the letter stated – under the heading of "*Annual Leave pay*" – that any remuneration owed to the Respondents would be paid after the inspection of the Manager's residence was completed and that "*It is best for all parties to keep this matter, amicable and free from anger and rage.*"

[91] It is clear from the termination letter that the Respondents were summarily dismissed on the basis that the Appellant believed that they had "*abandoned their post without notice*" and for making threats not conducive to the maintenance of their relationship with the Appellant by seeking to take leave without giving notice to the Appellant, and that the "*Performance Ethic*" referred to in the letter was limited to these matters. The letter made no reference to other matters relating to conduct and work performance referred to in the evidence given on behalf of the Appellant in the hearing before the Deputy President. The fact that the letter indicates that the Respondents were to be paid their annual leave subject to requirements relating to cleaning the Manager's unit does not alter the summary nature of the dismissals. Accordingly, the part of the Code dealing with summary dismissal is relevant to our consideration.

[92] The Summary Dismissal part of the Code declared by the Minister pursuant to s. 388(1) is as follows:

> "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."

[93] As a Full Bench of the Commission explained in *TIOBE Pty Ltd T/A TIOBE v Cathy (Yaqin) Chen*,[51] the unfair dismissal part of the Code operates in the following way:

> "(1) 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.
>
> (2) In assessing whether the "Summary dismissal" section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, and second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element."

[94] It is axiomatic that the belief of the employer discussed by the Full Bench in the above case, must be held at the time the decision is made to dismiss the employee. It follows that the conduct must be known to the employer at that time. As a matter of logic, an employer cannot have a genuine belief on reasonable grounds, that an employee has engaged in misconduct, where the employer has no knowledge of the misconduct at the time the employer dismisses the employee. In this regard, a Full Bench of the Commission in *Gainbridge Limited v Mrs Diane Wiburd*,[52] said:

> "The proper inquiry raised by the Code is relevantly, whether at the time of the dismissal the employer genuinely believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. The Code 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."

[95] This can be contrasted with the consideration required by s. 387(a) of the FW Act dealing with valid reason for dismissal, which as we have noted, encompasses facts that existed at the time of the dismissal, even if the employer was not aware of those facts and did not rely on them as reasons for dismissal.

[96] The fact that an employee may be paid an amount said to be in lieu of notice, or that the dismissal occurs some days after the conduct to which it relates, is not determinative of whether the summary dismissal provisions of the Code apply. Regulation 1.07 relevantly provides:

> "(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.
>
> (2) For subregulation (1), conduct that is serious misconduct includes both of the following:
>
> (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
>
> (b) conduct that causes serious and imminent risk to:
>
> (i) the health or safety of a person; or
>
> (ii) the reputation, viability or profitability of the employer's business.

> (3) For subregulation (1), conduct that is serious misconduct includes each of the following:
>
> (a) the employee, in the course of the employee's employment, engaging in:
>
> (i) theft; or
>
> (ii) fraud; or
>
> (iii) assault; or
>
> (iv) sexual harassment;
>
> (b) the employee being intoxicated at work;
>
> (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment."

[97] In our view, the evidence does not establish that the Respondents' conduct as described in the termination letter, was sufficiently serious to justify immediate dismissal, nor did it constitute reasonable grounds for the Appellant to have believed that the conduct justified this response. The evidence before the Deputy President included an email sent on 4 February 2023 to Ms Charlton by the Respondents advising that they required two weeks annual leave from Monday, 6 February to 21 February 2023, due to Ms Stevens' current health issues. A letter provided by Ms Stevens' doctor dated 9 February 2023 was also tendered, stating that she had multiple medical issues and three recent hospital admissions and required a two week break from work commencing on 6 February 2023, to improve her physical and mental health.[53]

[98] Ms Stevens stated that she had been hospitalised three times in December 2022 and January 2023, and had been required to take annual leave in relation to these absences. While no documentary evidence supporting the hospitalisation was provided, the Appellant did not dispute that Ms Stevens took annual leave for medical reasons but contended that Ms Stevens had previously lied about needing foot surgery because she had an accident, and that she took leave on that occasion to undergo planned surgery.

[99] Ms Stevens explained the discrepancy in the date on the doctor's certificate stating that she had seen the doctor on 3 February 2023 and had been told that she needed to take two weeks of personal leave. Ms Stevens saw the doctor again on 9 February 2023 when the certificate was provided but unfortunately the doctor had passed away before the date could be corrected.[54] In the hearing of the appeal, no issue was taken with that explanation.[55] We accept that Mr Stevens did not "*go on holiday when he was not sick*" as asserted by the Appellant, but took leave to support Ms Stevens while she was sick. We also accept that previous "*demands*" as referred to in the termination letter were in fact attempts by the Respondents to resign from their employment to move to Townsville, and the resignations were ultimately withdrawn because of a threat of legal action by the Appellant, and due to Ms Stevens' stress and health at the time. Even if we accept that the Appellant genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, we do not consider that objectively speaking this was based on reasonable grounds.

[100] While the Respondents did not provide the necessary notice to take annual leave as required by their contract, that contract also makes provision for "*Other Leave*" and provides that "*Any other time off must be paid for at your own cost*." The contract does not require notice of other leave to be given and nor does it restrict the circumstances in which such leave may be taken. In all of the circumstances, it cannot be said that the Respondents threatened to abandon their post on 4 February 2023. Neither can it be said that the Respondents were going on a holiday as asserted by the Appellant in submissions it filed in the proceedings before the Deputy President. It is apparent that they were requesting leave to cover a period when Ms Stevens was ill and had been advised by a medical practitioner to take a break from work. The fact that Mr Stevens also requested leave at the same time, is not surprising given that Ms Stevens likely required his assistance.

[101] The fact that Ms Stevens had previously been absent because she required foot surgery, regardless of whether the surgery was required after an injury or was planned, is not a reasonable basis for a belief that the Respondents were abandoning their employment on a later occasion. It is improbable that Ms Stevens would subject herself to unnecessary surgery and the fact that the surgery may have been elective, does not reduce the need for Ms Stevens to take leave to recover.

[102] The Appellant's assertion that Ms Stevens' medical certificate, dated 9 February 2023, advising her to take a break from work for 2 weeks was 5 days after the Respondents had demanded to go on a 2 week holiday is misconceived. The medical certificate advising Ms Stevens to take leave was sought by the Respondents to support their request on 4 February 2023 to take two weeks leave for health reasons. The fact that Mr and Ms Stevens had previously indicated an intention to resign their employment or made demands about their terms and conditions, was not a reasonable basis for the Appellant to believe that they were abandoning their employment on 4 February 2023. There is nothing inherently improper about employees on a common law contract of employment seeking to improve their terms and conditions and threatening to resign if demands are not met. We also note that the termination letter stated, under the heading "*Annual Leave pay*" that the Appellant would pay the Respondents remuneration owed once the inspection of the Manager's residence had been completed. We infer from the letter of termination that the Respondents had accrued leave and that the issue from the Appellant's perspective was that sufficient notice of the intention to take that leave was not given, rather than whether the Respondents had sufficient accrued leave to cover the period of their proposed absence.

[103] Based on the evidence, we do not accept that the Appellant genuinely believed on reasonable grounds that the Respondents had abandoned their post or their employment. Even if we did accept that the Appellant genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, we would not find that, objectively speaking, this was based on reasonable grounds. Further, there is no evidence that the Appellant investigated the alleged misconduct of the Respondents. Instead, they were summarily dismissed by telephone with the dismissal being confirmed by email, immediately after making the request for leave for medical reasons.

[104] In all the circumstances, we are satisfied and find that the dismissals of the Respondents were not consistent with the Code. Accordingly, it is necessary to consider whether the dismissals were unfair based on the matters in s. 387 of the FW Act.

Whether the dismissals were unfair

Statutory provisions and approach to their application

[105] In deciding whether a dismissal was unfair on the grounds that it was harsh, unjust or unreasonable, the Commission is required to consider the criteria in s. 387 of the Act, as follows:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
> (b) whether the person was notified of that reason; and
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (h) any other matters that the FW Commission considers relevant.

[106] A valid reason for dismissal within the meaning in s. 387(a) is one that is "*sound, defensible or well founded"* and not *"capricious, fanciful, spiteful or prejudiced*."[56] The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,[57] and validity is judged by reference to the Tribunal's assessment of the factual circumstances as to what the employee is capable of doing or has done.[58] The Commission does not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[59] However, where a dismissal relates to conduct of the employee, it is also necessary to determine whether the matter was of sufficient gravity to constitute a sound, defensible and well-founded (and therefore valid) reason for dismissal.[60]

[107] In finding that there was a valid reason for dismissal, the Commission is not limited to the reason relied on by the employer.[61] Nor is the employer limited to relying on the reason given to the employee at the time of the dismissal to establish a valid reason for a dismissal, although this may have implications for the considerations in s. 387 going to procedural fairness.

[108] In *Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Services*[62] (*Bartlett*), a Full Bench of the Commission summarised the principles derived from earlier cases[63] as to the meaning and application of paragraphs (b) and (c) of s. 387 as follows:

> "(1) Each of the matters specified in s 387, including those in paragraphs (b) and (c), must be taken into account as matters of significance, to the extent that they are relevant to the particular case at hand, and given due weight.
>
> (2) Proper consideration of s 387(b) requires a finding to be made as to whether the applicant has been notified of "*that reason*" – that is, the reason for dismissal relating to the capacity or conduct of the applicant found to be valid under s 387(a) – prior to the decision to dismiss being made.

> (3) Proper consideration of s 387(c) requires a finding to be made as to whether the applicant has been given a real opportunity to respond to the reason for dismissal. As a matter of logic, unless the applicant has been notified of the reason, it is difficult to envisage that it could be found that the applicant has been afforded an opportunity to respond to that reason.
>
> (4) Once findings are made in relation to s 387(b) and (c), they may then be weighed together with the other matters required to be taken into account in order to form a conclusion as to whether the applicant's dismissal was harsh, unjust or unreasonable. Where it is found that the applicant was not notified of the reasons for dismissal and/or was not given an opportunity to respond, a relevant consideration as to the weight to be assigned to this is whether this meant that the applicant was deprived of the possibility of a different outcome in terms of avoiding his or her dismissal."[64]

[109] In relation to the other provisions in s. 387, paragraph (d) is only relevant where an employee seeks to have a support person present at discussions relating to the dismissal and that request is refused. The provision does not establish a positive duty on an employer to conduct an in-person meeting or any meeting, and nor does it positively obligate an employer to offer a support person for discussions about the possible termination of an employee's employment. Whether an employee is given warnings referred to in s. 387(e) is relevant to dismissals based on unsatisfactory work performance involving the employee's capacity to do the job rather than the employee's conduct.

[110] The matters referred to in ss. 387(f) and (g) relate to the impact of the size of the employer's enterprise on the procedures followed in effecting a dismissal and the degree to which the absence of human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting a dismissal. These provisions are directed to smaller businesses but are not a shield behind which employers engaging in improper conduct with respect to a dismissal, can hide[65] or a basis for a dismissal to be conducted without the employee being afforded procedural fairness.[66] Section 387(h) allows the Commission to take into account any other matter it considers relevant in deciding whether a dismissal was unfair.

[111] The matters in s. 387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust, or unreasonable. A dismissal may be:

- *Harsh* - because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;
- *Unjust* - because the employee was not guilty of the misconduct on which the employer acted; and/or
- *Unreasonable* - because it was decided on inferences that could not reasonably have been drawn from the material before the employer.[67]

Whether there was a valid reason for the Respondents' dismissals

[112] In relation to the matters relied on by the Appellant as valid reasons for dismissal, we make the following findings. For the reasons set out above, we do not accept that the request made by the Respondents on 4 February 2023, to take leave commencing on 6 February, constituted an abandonment of their posts or their employment. We are satisfied that Ms

Stevens was ill and had been informed by her treating medical practitioner that she needed to take two weeks leave to recover from her illness. Ms Stevens had a medical certificate for the period of the absence and provided a reasonable explanation for the discrepancy with respect to the date on the certificate. Ms Stevens' explanation for the discrepancy was not disputed by the Appellant. We accept that explanation. We also accept that it was reasonable for Mr Stevens to also take time off to support Ms Stevens during her absence. In the circumstances any failure to follow the Appellant's procedures with respect to giving notice to take leave was not of sufficient gravity to constitute a valid reason for dismissal. Mr and Ms Barden stepped into the Respondents' roles and the resort did not suffer on account of the Respondents' absence. The evidence established that Mr and Ms Barden had previously filled in for the Respondents and that this was the practice when they were on leave.

[113] We do not accept that past occasions when Mr and Ms Stevens had sought to resign their employment in pursuit of better conditions, constitutes a valid basis for assuming that the leave they sought to take from 4 February 2023 was also a threat to resign their employment as was asserted in appeal ground 8. Nor do we accept that the fact that Ms Stevens had previously taken time off to recover from foot surgery, whether planned or unplanned, was a valid reason for her dismissal. Where surgery is necessary, the fact that it is planned does not establish a valid basis for an inference on a later occasion that further leave is not for a genuine reason. Ms Stevens explained that the surgery was necessary because she had exacerbated a previous injury. We accept her explanation and note that she was not cross-examined in relation to it.

[114] The evidence does not establish that the Respondents abandoned their posts and their employment, and the matters in 1, 2 and 4 of the appeal grounds and the first three points in paragraph [25] of the Decision are not a sound, defensible and well-founded reason for dismissal. Nor do we accept the assertion in appeal ground 9 that Mr Stevens was not sick. As we have noted, Mr Stevens was taking leave to care for Ms Stevens and the fact that he was not sick is not a valid reason for dismissing him. In relation to appeal ground 3, the evidence does not establish that there were "*many complaints*" about the Respondents not being in the office during opening hours as asserted by the Appellant or that the office was often unattended requiring owners to attend to clients and show them how to access the security box to obtain keys to the units. The email from the Chairman of the body corporate does not make such a complaint. We also note that the Chairman provided a document in the form of a statement of service to the Respondents which was not in negative terms and which is dated 26 September 2023, after the Appellant lodged its appeal.

[115] At best the "*many complaints*" were raised in the email sent to Ms Charlton by the owner of unit 5 who said that on at least five occasions in the last 7 months they had assisted guests to obtain keys and pointed them in the direction of their unit when the office was unattended. It was also stated that there was a mobile telephone number on the office door for the purpose of contacting the managers. This is not a valid reason for dismissal. Firstly, the opening hours of the office were not established by the evidence and the Respondents contended that those hours were less than the Appellant claimed. Secondly, the email making this assertion does not state the times at which it is asserted that the office was unattended. Thirdly, it is apparent that there was a process for guests to obtain keys to units if they arrived at times the office was unattended indicating that it was contemplated that there would be occasions when this was required. Fourthly, the parties accept that the grounds of the complex were extensive and, in those circumstances, Ms Stevens' explanation that she was assisting Mr Stevens in his work on some

occasions when the office was unattended, and was contactable by mobile telephone, is reasonable and not a valid reason for termination of her employment.

[116] The allegation about Ms Stevens smoking on the premises (appeal ground 5 and the seventh point in paragraph [25] of the Decision, is not a valid reason for dismissal. Contrary to Mr Barden's assertion, the Agreement does not stipulate that the complex is non-smoking. There was a lack of evidence about how the non-smoking policy was implemented and whether smoking on balconies of units was or was not permitted. It is notable that this issue was also only raised in the email from the owner of unit 5, who did not complain of Ms Stevens' smoking *per se*, but that smoke was drifting into their unit. Ms Stevens did not lie about smoking and conceded in her evidence that she is a smoker and smoked on the balcony of the Manager's apartment. There is no reason why Ms Stevens could not have been requested to cease this practice. Mr Barden gave evidence about large numbers of cigarette butts in a particular area of the complex and said that he had photographs of this but did not tender those photographs. There is no evidence that the butts were left in this location by Ms Stevens. Ms Stevens also said in her evidence that she never smoked anywhere on the grounds and other than accusing her of lying, Ms Charlton did not cross-examine Ms Stevens on this point or provide any evidence to the contrary. There was no evidence of foul language and yelling coming from the Manager's apartment other than assertions in submissions. Evidence in the email sent to Ms Charlton by the owner of apartment 5, refers to "*family arguments*" rather than foul language and yelling.

[117] The allegations in appeal grounds 4, 6, 10 and 14 about general deterioration of the resort do not constitute a reason for dismissal that is defensible or justifiable on an objective analysis of the relevant facts and are not a sound, defensible and well-founded reason for dismissal. If this problem was of such significance, it would be expected that it would be recorded in letters of complaint from the body corporate. The document tendered by the Appellant setting out details of an "*emergency visit*" paid by Ms Charlton to the complex on an unidentified date lists substantive maintenance and gardening works which are not related to general cleanliness. It is also the case that Ms Charlton's email upon which the Chairman of the body corporate has placed his notations, indicates her view that the "[w]*hilst the agreement contract states to maintain the gardens, it is still a grey area as to the level of gardening*". Ms Charlton also suggests six monthly maintenance be undertaken of the watering system and that the garden by overhauled once a year. Implicit in her comments and the response of the Chairman of the body corporate is that responsibility for these matters is partly that of the body corporate.[68] The validity of the document as grounds for dismissal is further undermined by the fact that it was undated, not sent until the hearing of the unfair dismissal applications and was a draft.

[118] The allegations of theft are particularly concerning given the lack of evidence called by the Appellant to support those allegations. Those allegations were not made out on the evidence. The allegations related to unit 5. A statement from one of the owners of unit 5 makes no mention of these allegations. It is surprising that the statement is silent on this point, given that the allegation is that the husband of the owner who provided the statement to Ms Charlton, arrived unexpectedly at the apartment and found the Respondents grandchildren in unit 5 and their names on the Netflix account, and asserted that they had been living in the apartment. If this allegation had substance, it would be expected that a statement of the owners to substantiate this allegation would have been tendered. We also note that the owner of unit 5 who provided

the statement was not called to give evidence. Further, the allegations of cancelled bookings to enable family members to stay in apartments in the complex were not substantiated. There were no statements from owners to support these serious allegations and the mere fact that bookings were cancelled does not establish that the bookings were fake. We do not consider that these matters are valid reasons for dismissal or that the conduct as alleged occurred. At most, the evidence establishes that the Respondents on occasion, allowed their family members to stay in apartments that were otherwise empty and paid for those apartments to be cleaned. There is no evidence that this was a common or regular occurrence.

[119] When these matters are considered individually and collectively, they are not of sufficient gravity to constitute a sound, defensible and well-founded reason for dismissal. In all of the circumstances, we are satisfied and find that there was no valid reason for the dismissal.

[120] We otherwise agree with and confirm the findings made by the Deputy President in relation to the matters in s. 387(b) – (d). In relation to the conclusion in respect of s. 387 (e), to the extent that the issues identified in the evidence of the Appellant's witnesses and the other documentation filed by the Appellant alleging unsatisfactory work performance, we agree with the Deputy President that there is insufficient evidence to establish that the Respondents received any warning prior to dismissal. We agree with the Deputy President's conclusions in relation to ss. 387(f) and (g). We do not consider the conclusion in s. 387(h) to be relevant but nothing turns on this. We agree with the Deputy President's conclusion in [50] that the dismissals were harsh, unjust or unreasonable.

[121] We find that the dismissals were harsh because of the consequences for the Respondents who had 12 weeks left on their contracts, and had withdrawn earlier resignations which would have allowed them to take up other opportunities, because of threats of legal action by the Appellant. The dismissals were unjust because the Respondents were not guilty of abandoning their posts or the other misconduct alleged against them, and unreasonable because they were decided on inferences that could not reasonably have been drawn based on the material before the Appellant.

[122] We agree with and confirm the Deputy President's decision that the Respondents should have a remedy for their unfair dismissals and that reinstatement was not an appropriate remedy. We also agree with and confirm the Deputy President's assessment of compensation and the quantum of $13,846.32 – $6,932.16 to each of the Respondents – awarded by the Deputy President. We note that the Deputy President ordered that the compensation be paid in instalments, within 30 days and 60 days of the date of the Decision, which was issued on 31 July 2023. In circumstances where the Appellant has retained the amount awarded for an extensive period pending the hearing and determination of the appeal, the total of the compensation amounts will become payable within seven days of the issuing of this decision.

Disposition of the appeal

[123] We Order as follows:

1. Time is extended until 27 August 2023 for the Appellant to lodge its appeal.

2. Permission to appeal is granted.

3. The appeal is upheld.

4. The Decision ([2023] FWC 1096) and Order (PR764777) are varied by deleting paragraphs [30] – [38] of the Decision and inserting in lieu our consideration and conclusions in relation to the Small Business Fair Dismissal Code and s. 387(a).

5. We vary paragraph [64] of the Decision and determine that the $13,846.32 is to be paid within seven days of the issuing of this decision.

6. The Appellant will pay to each of the Respondents (the applicants in U2023/1198 and U2023/1199) the amount of $6,932.16 (a total of $13,846.32) to their nominated bank account within seven days of the issuing of this decision.

7. The Decision is otherwise confirmed.

[124] An Order to this effect, setting aside the stay granted in [2023] FWC 2287, will issue with this decision.

VICE PRESIDENT

Appearances:

G Barden and *S Charlton*, Appellant.
L Stevens and *M Stevens*, Respondents.

Hearing details:

2023.
Sydney (via Microsoft Teams):
November 13.

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<PR772367>

[1] [2023] FWC 1096.

[2] PR764777.

[3] PR764777.

[4] [2023] FWC 2287, PR766008.

[5] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

[6] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217; *Hollis v Vabu Pty Ltd (*2001) 207 CLR 21 [40]; *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448; *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

[7] Appeal Book at pp. 79 – 83.

[8] Decision at [16].

[9] Decision at [24].

[10] Appeal Book at pp. 380 – 382.

[11] Decision at [33]-[34].

[12] Correspondence from the Appellant to the Commission, 13 October 2023.

[13] [2023] FWC 2287 at [11].

[14] Appeal Book at pp. 104-105.

[15] Appeal Book at pp. 112-113.

[16] Transcript of Appeal Hearing on 13 November 2023 at PN87 and PN97.

[17] Transcript of Appeal Hearing on 13 November 2023 at PN97 – PN99.

[18] Transcript of Appeal Hearing on 13 November 2023 at PN34 – PN42.

[19] Transcript of Appeal Hearing on 13 November 2023 at PN36.

[20] Transcript of Appeal Hearing on 13 November 2023 at PN155.

[21] Transcript of Appeal Hearing on 13 November 2023 at PN206.

[22] Transcript of Appeal Hearing on 13 November 2023 at PN113 – PN117.

[23] Transcript of Appeal Hearing on 13 November 2023 at PN167 – PN176.

[24] Transcript of Appeal Hearing on 13 November 2023 at PN177 – PN182.

[25] Transcript of Appeal Hearing on 13 November 2023 at PN189 – PN191.

[26] [2019] FWCFB 815.

[27] [2014] FWCFB 4822.

[28] *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25, 186 CLR 541.

[29] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46].

[30] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[31] [1936] HCA 40; (1936) 55 CLR 499.

[32] *House v the King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

[33] [2022] HCA 1.

[34] [2022] HCA 2.

[35] *TIOBE Pty Ltd T/A TIOBE v Cathy (Yaqin) Chen* [2018] FWCFB 5726 at [21].

[36] Ibid at [22] citing *Hewitt v Topero Nominees Pty Ltd t/a Michaels Camera Video Digital* [2013] FWCFB 6321 at [15].

[37] *Appeal by Rosevi. Hair. Face. Body* [2012] FWAFB 1359; *TIOBE Pty Ltd T/A TIOBE v Chen* [2018] FWCFB 5726; *Inner West Towing Pty Ltd v Maynard* [2017] FWCFB 757.

[38] *Shepherd v Felt & Textiles of Australia Ltd* (4 June 1931), [1931] HCA 21; (1931) 45 CLR 359 at pp. 373, 377–378].

[39] *Lane v Arrowcrest* (1990) 27 FCR 427, 456; cited with approval in *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at paras 131, 136 (McHugh and Gummow JJ), [(1995) 185 CLR 410 at pp. 467, 468].

[40] *MM Cables (A Division of Metal Manufacturers Limited) v Zammit* Print S8106 (AIRCFB, Ross VP, Drake SDP, Lawson C, 17 July 2000) at para. 42. See also *Fenton v Swan Hill Aboriginal Co-operative Ltd* [1998] FCA 1613 (4 September 1998).

[41] Directions issued on 16 March 2023.

[42] Appeal Book at p. 109.

[43] Appeal Book at p. 377.

[44] Appeal Book at pp. 380-382.

[45] Appeal Book at pp. 104-105.

[46] Appeal Book at pp. 112 – 113.

[47] Microsoft Teams Recording of the hearing before the Deputy President on 9 May 2023 at 38 minutes and 35 seconds to 38 minutes and 58 seconds.

[48] Decision at [47].

[49] Decision at [6].

[50] Appeal Book at pp. 86 – 88.

[51] [2018] FWCFB 5726.

[52] [2017] FWCFB 6732 at [14].

[53] Appeal Book at p. 85.

[54] Microsoft Teams Recording of the hearing before the Deputy President on 9 May 2023 at 18 minutes and 29 seconds to 18 minutes and 38 seconds.

[55] Transcript of Appeal Hearing on 13 November 2023 at PN185.

[56] *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[57] *Rode v Burwood Mitsubishi* Print R4471 at [90] per Ross VP, Polites SDP, Foggo C.

[58] *Miller v University of NSW* [2003] FCAFC 180 at pn 13, 14 August 2003, per Gray J.

[59] *Walton v Mermaid Dry Cleaners Pty Limited* [1996] IRCA 267 (12 June 1996); (1996) 142 ALR 681 at para 24.

[60] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373.

[61] *Heran Building Group Pty Ltd v Anneveldt* [2013] FWCFB 4744 at [15] per Acton, SDP, Sams DP and Hampton C citing *MM Cables (a Division of Metal Manufacturers Ltd v Zammit* AIRC (FB) S8106 17 July 2000.

[62] [2020] FWCFB 6429.

[63] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [27], [64]-[73], [75]; *Chubb Security Australia Pty Ltd v Thomas* [2000] AIRC 822 at [41]; *Wadey v YWCA Canberra* [1996] IRCA 568.

[64] [2020] FWCFB 6429 at [19].

[65] *Sykes v Heatly Pty Ltd t/a Heatly Sports* PR914149 (AIRC, Grainger C, 6 February 2002) at [20].

[66] *Williams v The Chuang Family Trust t/a Top Hair Design* [2012] FWA 9517 at [40].

[67] *Stewart v University of Melbourne* (U No 30073 of 1999 Print S2535) Per Ross VP citing *Byrne v Australian Airlines* (1995) 185 LR 410 at 465-8 per McHugh and Gummow JJ.

[68] Appeal Book at p. 381.