



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Guy Goonewardena

v

Komeyui Management Pty Ltd
(U2023/10241)

COMMISSIONER CRAWFORD

SYDNEY, 5 JUNE 2024

Application for relief from unfair dismissal – alleged unsatisfactory performance – lack of details and evidence from employer – no valid reason - dismissal unfair – compensation ordered

Background

[1] Guy Goonewardena (**Mr Goonewardena**) commenced employment with Komeyui Management Pty Ltd (**Komeyui**) on 12 December 2022 as a Floor Manager. Komeyui employs workers at a Japanese restaurant in Brisbane.

[2] Mr Goonewardena was notified of his dismissal on 17 October 2023. The termination letter states the dismissal would take effect on 24 October 2023. The reason for dismissal provided in Mr Goonewardena’s termination letter is:

“The decision to terminate your employment is based on several issues that have been consistently raised and observed during your tenure, specifically in the areas of Booking Schedule and System, Information Sharing, Professional Communication, Independence as a Manager, Leadership and Trust, and Resolving Late Service Issues.”

[3] Mr Goonewardena filed an unfair dismissal application form on 18 October 2023. Based on the termination letter, the application may have been filed prior to the termination taking effect on 24 October 2023. However, Komeyui did not argue that the application had been filed before the dismissal took effect and there is no evidence that Mr Goonewardena performed work after 17 October 2023. On balance, I find that the dismissal took effect when it was communicated to Mr Goonewardena on 17 October 2023. In any event, if I had found the dismissal took effect on 24 October 2023, I would have allowed Mr Goonewardena to amend his application to reflect a filing date of 24 October 2023. I consider this would have been appropriate given the early filing would have been explained by confusion about the effective date of the dismissal.

[4] Komeyui filed an employer response form on 9 November 2023, which did not raise any jurisdictional objections. The Commission conducted conciliation conferences to try and

resolve the matter, but these were not successful. I issued directions for the filing of material and listed a determinative conference/hearing for 7 May 2024 via video.

[5] Mr Goonewardena represented himself at the determinative conference/hearing on 7 May 2023. Motomu Kumano (Director/Executive Chef) represented Komeyui with assistance from Shahedur Rahman (Accountant).

[6] At the commencement of the proceeding, I indicated my provisional view was that I should conduct a determinative conference given both parties were not represented and were unfamiliar with the Commission's processes. The parties did not object to this approach. I conducted a determinative conference.

Additional issue – minimum employment period

[7] After the determinative conference had ended on 7 May 2024, I noticed that Komeyui had indicated on its Form F3 employer response that it only had seven employees when Mr Goonewardena was dismissed. Komeyui did not raise any jurisdictional objections in the Form F3 employer response and did not raise any jurisdictional issues during the determinative conference on 7 May 2024. However, if Komeyui had only seven employees when Mr Goonewardena was dismissed, Komeyui would be a "small business employer". That in turn would mean the longer minimum employment period of 12 months would apply.¹ Mr Goonewardena commenced employment on 12 December 2022 and was terminated effective 17 October 2023. That is a period of around 10 months.

[8] The minimum employment period issue was raised with the parties in writing after the determinative conference on 7 May 2023 and further material was requested about Komeyui and its related entities. I sought information about Komeyui and its related entities because s.23(3) of the FW Act states:

"For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity."

The dictionary in s.12 of the FW Act states "**associated entity** has the meaning given by section 50AAA of the *Corporations Act 2001*." Section 50AAA of the *Corporations Act 2001* (Cth) (**Corporations Act**) states:

"Meaning of associated entity

(1) One entity (the *associate*) is an associated entity of another entity (the *principal*) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.

(2) This subsection is satisfied if the associate and the principal are related bodies corporate.

(3) This subsection is satisfied if the principal controls the associate.

(4) This subsection is satisfied if:

- (a) the associate controls the principal; and
- (b) the operations, resources or affairs of the principal are material to the associate.

(5) This subsection is satisfied if:

- (a) the associate has a qualifying investment (see subsection (8)) in the principal; and
- (b) the associate has significant influence over the principal; and
- (c) the interest is material to the associate.

(6) This subsection is satisfied if:

- (a) the principal has a qualifying investment (see subsection (8)) in the associate; and
- (b) the principal has significant influence over the associate; and
- (c) the interest is material to the principal.

(7) This subsection is satisfied if:

- (a) an entity (the *third entity*) controls both the principal and the associate; and
- (b) the operations, resources or affairs of the principal and the associate are both material to the third entity.

(8) For the purposes of this section, one entity (the *first entity*) has a *qualifying investment* in another entity (the *second entity*) if the first entity:

- (a) has an asset that is an investment in the second entity; or
- (b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.”

[9] Given the emergence of this potential jurisdictional issue, I listed a further determinative conference for 23 May 2024 via video. There was no change to the appearances.

[10] Komeyui provided the following additional evidence prior to, and after, the second determinative conference on 23 May 2024:

- ASIC information displaying ownership and office holders for the following entities:
 - Komeyui
 - Komeyui Brisbane Pty Ltd
 - Komeyui Pty Ltd

- Komeyui HR Pty Ltd
 - Komeyui Com Pty Ltd
- Employee payroll information for the month of October 2023 which indicates the entities above had the following number of employees when Mr Goonewardena was dismissed on 17 October 2023:
 - Komeyui = 8 employees
 - Komeyui Brisbane Pty Ltd = 15 employees
 - Komeyui Pty Ltd = 12 employees
 - Komeyui HR Pty Ltd = 22 employees
 - Komeyui Com Pty Ltd = 0 employees – this entity is used to manage leases.

[11] Mr Kumano is the director, secretary, and owner of Komeyui Brisbane Pty Ltd. Mr Kumano is also a director and owner of Komeyui Pty Ltd.

[12] Jianping Jin is the director, secretary, and owner of Komeyui, which is the entity that Mr Goonewardena was employed by. However, the address identified for Jianping Jin is the same as that identified for Mr Kumano. It appears highly likely they are relatives.

[13] Based on the differing directors and owners, it is arguable that Komeyui is not an associated entity of the two companies that Mr Kumano owns and directs, Komeyui Brisbane Pty Ltd and Komeyui Pty Ltd. However, Mr Rahman provided the following evidence via email on 20 May 2024:

“Komeyui Management was the HR company that Mr Guy Goonewardena works for but the operating entity was Komeyui Brisbane.”

Mr Rahman’s evidence is consistent with the documentation surrounding Mr Goonewardena’s employment. Mr Goonewardena’s termination letter is drafted on the letterhead of Komeyui Brisbane Pty Ltd and is signed by Mr Kumano. The letter refers to termination from employment with Komeyui Brisbane.² To further complicate things, Mr Goonewardena’s offer letter and employment contract states the employer is Komeyui Pty Ltd. Those documents are signed by Mr Kumano.

[14] Section 50AA of the Corporations Act defines “control” as follows:

“(1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(2) In determining whether the first entity has this capacity:

(a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and

(b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

(3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(4) If the first entity:

(a) has the capacity to influence decisions about the second entity's financial and operating policies; and

(b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members

the first entity is taken not to control the second entity.”

[15] The Komeyui group of companies operates Japanese restaurants in Brisbane and Melbourne.³ The evidence indicates Mr Kumano controls the Komeyui group of companies. The various companies employ people to work in the restaurants at the direction of Mr Kumano, or his appointed managers. Komeyui Com Pty Ltd is used to manage leases for the restaurants. I consider it is likely that all the companies in the Komeyui group are associated entities that are controlled by Mr Kumano, either as a natural person or through his office holding positions with Komeyui Brisbane Pty Ltd and/or Komeyui Pty Ltd. However, I do not need to make a finding about the whole group of companies to determine whether Komeyui is a “small business employer.”

[16] I am satisfied based on the evidence before me that Komeyui is an associated entity of Komeyui Brisbane Pty Ltd. Komeyui Brisbane Pty Ltd is a “principal” that controls Komeyui as an “associate” within the meaning of s.50AAA(3) of the Corporations Act. Presumably, that is why Mr Kumano was able to make employment decisions for Komeyui, including hiring and firing. Komeyui has provided no evidence that indicates it is anyone but Mr Kumano that is controlling Komeyui. I also consider it is relevant that two of the employees who made complaints about Mr Goonewardena’s performance, Ganga Rai and Deenirun Neysungnoen, were employed by Komeyui Brisbane Pty Ltd. This further highlights the practical overlap between the two entities.

[17] Given my conclusion that Komeyui and Komeyui Brisbane Pty Ltd are associated entities, Komeyui Brisbane Pty Ltd’s employees are included in the numerical assessment required to determine if Komeyui was a “small business employer” when Mr Goonewardena was dismissed. Based on the payroll information provided by Mr Rahman, Komeyui had eight employees and Komeyui Brisbane Pty Ltd had 15 employees. The result is that Komeyui is not a “small business employer” and Mr Goonewardena had completed the minimum employment period of six months.

Material relied upon - merits

Mr Goonewardena

[18] Mr Goonewardena relied on the following material in support of his unfair dismissal application:

- A Form F2 unfair dismissal application dated 18 October 2023. Given Mr Goonewardena did not file a witness statement and the application contains evidence about his dismissal, I marked the application **Exhibit A1**.
- Mr Goonewardena's termination letter dated 17 October 2023. I marked the letter **Exhibit A2**.
- Mr Goonewardena's contract of employment dated 29 November 2022. I marked the contract **Exhibit A3**.
- A spreadsheet prepared by Mr Goonewardena that suggests he is claiming \$571,046.00 from Komeyui. I marked this document **Exhibit A4**.

[19] Mr Goonewardena was cross-examined to a limited degree on his evidence and answered some questions from me.

[20] Mr Goonewardena also made oral submissions at the end of the determinative conferences.

Komeyui

[21] Komeyui relied on the following material in opposing Mr Goonewardena's application:

- A Form F3 employer response dated 9 November 2023. Given the absence of any witness statement from Mr Kumano or Mr Rahman and because the response contains evidence, I marked the employer response form **Exhibit R1**.
- Copies of three payslips provided to Mr Goonewardena in September and October 2023. I marked the payslips **Exhibits R2, R3 and R4**.
- Emails sent between Mr Kumano and Mr Goonewardena on 20 June 2023 and 2 August 2023. Mr Kumano initially sent an email to Mr Goonewardena at 4:04pm on 20 June 2023 which identified eight areas of concern that had apparently been raised by team members concerning Mr Goonewardena. Mr Goonewardena sent a response at 8:43pm on 20 June 2023. Mr Goonewardena either provided a response to the issues raised by Mr Kumano or requested more information. Mr Kumano sent a further email to Mr Goonewardena on 2 August 2023 which identified the following issues with his performance: Booking Schedule and System, Information Sharing, Professional Communication, Independence as a Manager, Leadership and Trust, and Resolving Late Service Issues. I marked the emails **Exhibit R5**.

- A covering email with Mr Goonewardena's termination letter attached which was sent by Mr Kumano to Mr Goonewardena on 17 October 2023. I marked the email and the termination letter **Exhibit R6**.
- An email from Ganga Rai Jones to Mr Kumano dated 18 June 2023. The email raises concerns about Mr Goonewardena's behaviour and performance on the previous evening. I marked the email **Exhibit R7**.
- A further copy of the emails between Mr Kumano and Mr Goonewardena on 20 June 2023 and 2 August 2023. I marked the emails **Exhibit R8**.
- A document headed "Incident Report" and signed by Apavee Binkumson (Waiter) on 17 April 2024. The document refers to an alleged incident with Mr Goonewardena on 23 June 2023. I marked the document **Exhibit R9**.
- A document containing a summary of issues with Mr Goonewardena's performance signed by Deenirun Neysungnoen (Waiter) on 18 April 2024. The document is directed at Mr Goonewardena's alleged behaviour on 23 and 24 June 2023. I marked the document **Exhibit R10**.
- A document containing a report of an incident on 4 June 2023 prepared by Ganga Rai. The report raises concerns with Mr Goonewardena's till closing process. I marked this document **Exhibit R11**.

[22] Mr Kumano was briefly cross-examined on this evidence, and he answered some questions from me.

[23] Ganga Rai, Apavee Binkumson and Deenirun Neysungnoen did not attend the determinative conference to give evidence. As a result, I do not intend to afford any significant weight to their evidence. In any event, the statements prepared by the three employees are directed at events in June 2023, which is well before Mr Goonewardena's dismissal on 17 October 2023. It also appears that the statements were prepared for the purposes of the unfair dismissal application and were not prepared or submitted contemporaneously by the employees.⁴

[24] Mr Kumano and Mr Rahman made oral submissions at the end of the determinative conferences.

When can the Commission order a remedy for unfair dismissal?

[25] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) Mr Goonewardena was protected from unfair dismissal at the time of being dismissed; and
- (b) Mr Goonewardena has been unfairly dismissed.

[26] Both limbs must be satisfied. I am therefore required to consider whether Mr Goonewardena was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Goonewardena was so protected, whether Mr Goonewardena has been unfairly dismissed.

When is a person protected from unfair dismissal?

[27] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

When has a person been unfairly dismissed?

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

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

Was Mr Goonewardena dismissed?

[29] There was no dispute and I find that Mr Goonewardena's employment with Komeyui terminated at the initiative of Komeyui. I am therefore satisfied that Mr Goonewardena has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[30] Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code (**SBFDC**);
- (d) whether the dismissal was a case of genuine redundancy.

[31] Given I have found Mr Goonewardena was dismissed on 17 October 2023, the unfair dismissal application was filed within the relevant 21-day period. In the alternative, if I had found Mr Goonewardena's dismissal took effect on 24 October 2023 as stated in the termination letter, I would have allowed an amendment to Mr Goonewardena's application to identify a lodgment date of 24 October 2023.

[32] I have already determined that Mr Goonewardena had completed the minimum employment period of six months for a non-small business employer. The *Restaurant Industry Award 2020* applied to Mr Goonewardena's employment. Mr Goonewardena's earnings were below the high-income threshold. I find Mr Goonewardena was a person protected from unfair dismissal.

[33] I have already determined Komeyui was not a "small business employer", which means the SBFDC is not relevant.

[34] Komeyui has not argued Mr Goonewardena's dismissal was a case of genuine redundancy, and it clearly was not.

[35] Having considered each of the initial matters, I am required to consider the merits of Mr Goonewardena's application.

Was the dismissal harsh, unjust or unreasonable?

[36] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

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

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

[37] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.⁵

[38] I set out my consideration of each below.

Was there a valid reason for the dismissal related to Mr Goonewardena’s capacity or conduct?

[39] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁶ and should not be “capricious, fanciful, spiteful or prejudiced.”⁷ However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁸

[40] Mr Goonewardena was dismissed due to alleged performance issues, as opposed to his conduct or capacity. A dismissal relates to unsatisfactory performance where it refers to “the level at which the employee renders performance, including factors such as diligence, quality, care taken and so on.”⁹

[41] Mr Goonewardena’s termination letter identifies the following six alleged issues with his performance in the Floor Manager position:

- **Booking Schedule and System:** The termination letter refers to “ongoing issues arising from a lack of knowledge and confusion within the team when the booking schedule is changed.”
- **Information Sharing:** The termination letter states: “we have noticed instances where relevant information has not been adequately shared among team members.”
- **Professional Communication:** The termination letter states: “We have received feedback from a guest expressing concern about your communication, which was perceived as inappropriate.”
- **Independence as a Manager:** The termination letter states: “we have observed that you frequently seek assistance from Kuma or others to resolve issues that should be within your scope.”

- Leadership and Trust: The termination letter states: “there have been concerns raised about the level of trust from other team members.”
- Resolving Late Service Issues: The termination letter refers to “feedback from guests regarding late service” and states “As the manager, you are responsible for investigating the root causes of these issues and implementing appropriate solutions.”

[42] The issues raised in Mr Goonewardena’s termination letter are extremely similar to the issues Mr Kumano raised in an email to Mr Goonewardena dated 2 August 2023.¹⁰

[43] The alleged performance issues are identified at a very high level in the termination letter and in Mr Kumano’s email dated 2 August 2023. There is a lack of detail provided about the specific concerns with Mr Kumano’s performance. In contrast, the email Mr Kumano sent to Mr Goonewardena on 20 June 2023 did provide specific examples of concerns with Mr Goonewardena’s performance and conduct.¹¹ Mr Goonewardena provided a comprehensive response to these concerns in an email to Mr Kumano dated 20 June 2023¹² and generally denied the allegations against him. After this exchange of emails on 20 June 2023, it appears Mr Kumano reverted to raising vague high-level issues with Mr Goonewardena’s performance in his email dated 2 August 2023 and the termination letter. None of the identified issues present as overly serious. I pressed Mr Kumano for more details about his concerns during the determinative conference on 7 May 2024, Mr Kumano referred to having ongoing difficulties communicating with Mr Goonewardena, but did not provide any specific examples.

[44] Mr Goonewardena denied the allegations regarding his performance and presented as a credible witness.

[45] I do not consider that Komeyui has provided sufficient evidence to establish that Mr Goonewardena’s performance was unsatisfactory, either at the time of dismissal or during the unfair dismissal proceedings. Komeyui did not provide evidence to establish that Mr Goonewardena’s performance was deficient in any of the six areas identified in his termination letter.

[46] I am not satisfied the six alleged performance issues identified in Mr Goonewardena’s termination letter provided a valid reason for dismissal either individually or collectively.

Was Mr Goonewardena notified of the reason for dismissal?

[47] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Goonewardena “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).¹³

[48] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,¹⁴ and in explicit¹⁵ and plain and clear terms.¹⁶

[49] As I am not satisfied that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.¹⁷

[50] If I had found there was a valid reason for dismissal, I would have found that Mr Goonewardena was not notified of the reason for his dismissal prior to a final decision being made by Komeyui. Mr Goonewardena was simply emailed a copy of his termination letter on 17 October 2023. The termination letter itself refers to Komeyui understanding the “decision may come as a surprise.”

Was Mr Goonewardena given an opportunity to respond to any valid reason related to his capacity or conduct?

[51] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee’s employment.¹⁸

[52] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.¹⁹ Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.²⁰

[53] As I have not found that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.²¹

[54] If I had found there was a valid reason for dismissal, I would have found that Mr Goonewardena was not given an opportunity to respond to the valid reason. Mr Goonewardena was simply emailed a copy of his termination letter on 17 October 2023. The termination letter itself refers to Komeyui understanding the “decision may come as a surprise.”

Did Komeyui unreasonably refuse to allow Mr Goonewardena to have a support person present to assist at discussions relating to the dismissal?

[55] There were no discussions prior to the dismissal at which Mr Goonewardena could have requested a support person to be present. I consider this to be a neutral factor.

Was Mr Goonewardena warned about unsatisfactory performance before the dismissal?

[56] A Full Bench has previously stated the following regarding what constitutes being “warned” when considering this same factor in predecessor legislation:

“In the context of s.170CG(3)(d) we think that a warning must:

- identify the relevant aspect of the employee's performance which is of concern to the employer; and
- make it clear that the employee's employment is at risk unless the performance issue identified is addressed.

In relation to the latter requirement, a mere exhortation for the employee to improve his or her performance would not be sufficient. We also note that we accept that these criterion are to be applied in a practical and commonsense way taking into account the employment context.”²²

[57] I accept Mr Kumano raised the same alleged performance issues that were relied upon to dismiss Mr Goonewardena in the email he sent on 2 August 2023. However, there are no specific details about the performance issues in the email dated 2 August 2023. I consider the email lacks the degree of specificity that would be required to constitute a “warning” for the purposes of s.387(e) of the FW Act.

[58] However, given Komeyui clearly made an attempt to raise concerns with Mr Goonewardena’s performance prior to the dismissal, I have decided to treat this as a neutral factor.

To what degree would the size of Komeyui’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[59] Komeyui is a reasonably small business and I accept this had an impact on the procedures followed in effecting the dismissal.

To what degree would the absence of dedicated human resource management specialists or expertise in Komeyui’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[60] I find that a lack of dedicated human resource management specialists contributed to a significant degree to the defects in the procedures followed by Komeyui in effecting the dismissal.

What other matters are relevant?

[61] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[62] Neither party referred to any “other matters that are relevant.”

[63] I consider Mr Goonewardena’s age is a relevant matter because it may make it more difficult for him to locate alternative employment.

Is the Commission satisfied that the dismissal of Mr Goonewardena was harsh, unjust or unreasonable?

[64] I have made findings in relation to each matter specified in s.387. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.²³

[65] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Goonewardena was unjust and unreasonable because there was no valid reason for his dismissal.

[66] If I had found that there was a valid reason for dismissal, I would have found the dismissal was harsh given Mr Goonewardena's age and because the performance issues raised against Mr Goonewardena were not overly serious.

[67] If I had found there was a valid reason for dismissal, I would have found the dismissal to be unjust and unreasonable because Mr Goonewardena was not notified of the reason for dismissal and was not provided with an opportunity to respond prior to the final decision being made.

Conclusion

[68] I am therefore satisfied that Mr Goonewardena was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[69] Being satisfied that Mr Goonewardena:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order Mr Goonewardena's reinstatement, or the payment of compensation to Mr Goonewardena.

[70] Under s.390(3) of the FW Act, I must not order the payment of compensation to Mr Goonewardena unless:

- (a) I am satisfied that reinstatement of Mr Goonewardena is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of Mr Goonewardena inappropriate?

[71] Mr Goonewardena does not seek reinstatement on the basis that the employment relationship has been irreparably damaged. I agree that reinstatement is inappropriate.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[72] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, “[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one...”²⁴

[73] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.²⁵

[74] Mr Goonewardena has suffered financial loss in circumstances where I have found there was not a valid reason for dismissal. In all the circumstances, I consider that an order for payment of compensation is appropriate.

Compensation – what must be taken into account in determining an amount?

[75] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to Mr Goonewardena in lieu of reinstatement including:

- (a) the effect of the order on the viability of Komeyui’s enterprise;
- (b) the length of Mr Goonewardena’s service;
- (c) the remuneration that Mr Goonewardena would have received, or would have been likely to receive, if Mr Goonewardena had not been dismissed;
- (d) the efforts of Mr Goonewardena (if any) to mitigate the loss suffered by Mr Goonewardena because of the dismissal;
- (e) the amount of any remuneration earned by Mr Goonewardena from employment or other work during the period between the dismissal and the making of the order for compensation;
- (f) the amount of any income reasonably likely to be so earned by Mr Goonewardena during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[76] I consider all the circumstances of the case below.

Effect of the order on the viability of Komeyui’s enterprise

[77] I have no evidence about Komeyui’s financial circumstances. I consider this is a neutral factor.

Length of Mr Goonewardena’s service

[78] Mr Goonewardena had only worked for Komeyui for around 10 months. I consider this to be a neutral factor.

Remuneration that Mr Goonewardena would have received, or would have been likely to receive, if Mr Goonewardena had not been dismissed

[79] As stated by a majority of the Full Court of the Federal Court, “[i]n determining the remuneration that the employee would have received, or would have been likely to receive... [the Commission must] address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination.”²⁶

[80] Although I am not satisfied the performance issues raised against Mr Goonewardena provide a valid reason for dismissal, the evidence establishes that Mr Kumano had been raising various concerns about Mr Goonewardena’s performance since at least 20 June 2023. It appears there were ongoing communication issues between Mr Kumano and Mr Goonewardena that would have made it difficult for the employment to continue for a lengthy period. There is also some evidence of Mr Goonewardena having difficulties with other staff working at the restaurant.

[81] Taking all the evidence into account, I find Mr Goonewardena would likely have remained employed with Komeyui for a further two months, until 17 December 2023. This is the “anticipated period of employment.”²⁷

[82] Mr Goonewardena’s annual salary rate was \$65,957.00.

[83] I calculate the remuneration Mr Goonewardena would have been likely to receive working for Komeyui from 17 October 2023 to 17 December 2023 to be \$10,992.83 gross plus superannuation of \$1,209.21.

Efforts of Mr Goonewardena to mitigate the loss suffered by Mr Goonewardena because of the dismissal

[84] Mr Goonewardena must provide evidence that he has taken reasonable steps to minimise the impact of the dismissal.²⁸ What is reasonable depends on the circumstances of the case.²⁹

[85] Mr Goonewardena referred to doing some voluntary work at aged care homes since his dismissal and not wanting to seek welfare payments from Centrelink.

[86] Mr Goonewardena provided no evidence about any steps he has taken to try and find another job since being dismissed.

[87] I consider a deduction of 30% should be made for failure to mitigate loss.

Amount of remuneration earned by Mr Goonewardena from employment or other work during the period between the dismissal and the making of the order for compensation

[88] Mr Goonewardena's evidence was that he has not earned any remuneration since being dismissed by Komeyui.

Amount of income reasonably likely to be so earned by Mr Goonewardena during the period between the making of the order for compensation and the actual compensation

[89] This factor is not relevant given the anticipated period of employment ended on 17 December 2023.

Other relevant matters

[90] Neither party submitted that there were any other relevant matters.

Compensation – how is the amount to be calculated?

[91] As noted by the Full Bench, “[t]he well-established approach to the assessment of compensation under s.392 of the FW Act... is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket (Sprigg)*.³⁰ This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.³¹”³²

[92] The approach in *Sprigg* is as follows:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination. Workers’ compensation payments are deducted but not social security payments. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[93] I have estimated that Mr Goonewardena would have remained employed by Komeyui until 17 December 2023.

[94] The remuneration Mr Goonewardena would have received, or would have been likely to have received, from his dismissal on 17 October 2023 until 17 December 2023 is \$10,992.83 plus superannuation of \$1,209.21.

Step 2

[95] Only monies earned since termination for the anticipated period of employment are to be deducted.³³

[96] Mr Goonewardena did not earn any remuneration during the anticipated period of employment.

[97] For the reasons outlined above, I have applied a deduction of 30% because Mr Goonewardena has failed to take steps to mitigate his loss.

[98] A figure of \$7,694.98 plus superannuation of \$846.45 is left after the deduction.

Step 3

[99] I now need to consider the impact of contingencies on the amounts likely to be earned by Mr Goonewardena for the remainder of the anticipated period of employment.³⁴

[100] I know Mr Goonewardena's earnings during the anticipated period of employment. I therefore do not need to make a deduction for contingencies.

Step 4

[101] I have considered the impact of taxation but have elected to settle a gross amount of \$7,694.98 plus superannuation of \$846.45 and leave taxation for determination.

Compensation – is the amount to be reduced on account of misconduct?

[102] If I am satisfied that misconduct of Mr Goonewardena contributed to the employer's decision to dismiss, I am obliged by s.392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[103] Mr Goonewardena was not dismissed for misconduct and no reduction is required.

Compensation – how does the compensation cap apply?

[104] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

- (a) the amount worked out under s.392(6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

[105] Section 392(6) of the FW Act provides:

- (6) The amount is the total of the following amounts:
 - (a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal...

[106] Given Mr Goonewardena's annual salary rate of \$65,957.00 a compensation cap of \$32,978.50 plus superannuation applies in accordance with s.392(6) of the FW Act.

Is the level of compensation appropriate?

[107] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."³⁵

[108] The application of the *Sprigg* formula has resulted in an outcome where Mr Goonewardena would be awarded compensation of \$7,694.98 plus superannuation of \$846.45.

[109] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

Compensation order

[110] Given my findings above, I will make an order that Komeyui must pay Mr Goonewardena \$7,694.98 less taxation as required by law, plus superannuation of \$846.45 to be paid into Mr Goonewardena's nominated fund, with both payments to be made within 14 days of the date of this decision.



COMMISSIONER

Appearances:

Mr Goonewardena representing himself.

Mr Rahman and Mr Kumano on behalf of *Komeyui*.

Determinative conference details:

2024.

Via video.

7 May.

23 May.

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<PR775625>

¹ Section 383 of the FW Act.

² Exhibit A2.

³ Komeyui website: [Komeyui | Japanese creations of the highest excellence](#).

⁴ The DC reports for Exhibit R9 and R10 indicate the documents were created on 17 April 2024 and potentially prepared by Mr Kumano rather than the two employees.

⁵ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

⁶ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁷ *Ibid*.

⁸ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁹ *Annetta v Ansett Australia Print S6824* (AIRC FB, Giudice J, Williams SDP, Cribb C, 7 June 2000), [16].

¹⁰ Exhibit R5.

¹¹ Exhibit R5.

¹² Exhibit R5.

¹³ *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWC FB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWC FB 533, [55].

¹⁴ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

¹⁵ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

¹⁶ *Ibid*.

¹⁷ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWC FB 762, [46]-[49].

¹⁸ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

¹⁹ *RMIT v Asher* (2010) 194 IR 1, 14-15.

²⁰ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

²¹ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWC FB 762, [46]-[49].

²² *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRC FB, Ross VP, Williams SDP, Blair C, 21 August 2000), [43]-[44].

²³ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].

²⁴ *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWC FB 7198, [9].

²⁵ *Vennix v Mayfield Childcare Ltd* [2020] FWC FB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWC FB 4171, [5]-[7].

²⁶ *He v Lewin* [2004] FCAFC 161, [58].

²⁷ *Ellawala v Australian Postal Corporation* Print S5109 (AIRC FB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

²⁸ *Biviano v Suji Kim Collection* PR915963 (AIRC FB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRC FB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

²⁹ *Biviano v Suji Kim Collection* PR915963 (AIRC FB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

³⁰ (1998) 88 IR 21.

³¹ [2013] FWC FB 431.

³² *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWC 7206](#), [16].

³³ *Ibid.*

³⁴ *Enhance Systems Pty Ltd v Cox* [PR910779](#) (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

³⁵ *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWC 7206](#), [17].