DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kathy Rawson and Michelle McMaster
v
Darton Warners Bay Pty Ltd
(U2024/6508 & U2024/6516)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 30 AUGUST 2024

Application for relief from unfair dismissal – dismissal of casual employees – dismissal unfair – compensation ordered.

Introduction

[1] I consider these cases to be most unfortunate. Prior to a dispute arising concerning unpaid meal breaks to be taken by Supervisors, each of Ms Rawson and Ms McMaster were held in very high regard by their employer, Darton Warners Bay Pty Ltd T/A Darton Spar Anna Bay (***Darton***). Both Ms Rawson and Ms McMaster worked as regular casual employees in the position of Supervisor in Darton's grocery store (***Store***) in Anna Bay, which is located in the Port Stephens area of New South Wales. Following the dispute about breaks, the employment relationships between Ms Rawson and Darton and between Ms McMaster and Darton came to an end. Ms Rawson and Ms McMaster allege that they were unfairly dismissed. Darton contends that it did not dismiss Ms Rawson or Ms McMaster and, in the alternative, their dismissals were not unfair.

[2] Given the similarities between the cases advanced by Ms Rawson and Ms McMaster, I made directions for both cases to be heard together, with evidence in one proceeding to be evidence in the other. The hearing took place on 16 August 2024. Ms Rawson and Ms McMaster gave evidence in support of their cases. Rawson adduced evidence from Mr Shane Punton, a director and owner of Darton, and Ms Cheryl Campbell, Manager of the Store.

Initial matters to be considered

[3] Section 396 of the *Fair Work Act 2009* (Cth) (***Act***) sets out four matters which I am required to decide before I consider the merits of the application.

[4] There is no dispute between the parties and I am satisfied on the evidence that:

(a) Ms Rawson's and Ms McMaster's applications for unfair dismissal were made within the period required in s 394(2) of the Act;

(b) Ms Rawson and Ms McMaster were persons protected from unfair dismissal;

(c) the Small Business Fair Dismissal Code did not apply to the alleged dismissal of Ms Rawson and Ms McMaster; and

(d) the alleged dismissal of Ms Rawson and Ms McMaster was not a genuine redundancy.

Dismissal

[5] The question of when a person has been dismissed is governed by s 386 of the Act. It relevantly provides:

"(1) A person has been dismissed if:

a. the person's employment with his or his employer has been terminated on the employer's initiative; or

b. the person has resigned from his or his employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or his employer."

General principles

[6] The expression termination "on the employer's initiative" in s 386(1)(a) is a reference to a termination of the employment relationship and/or termination of the contract of employment[1] that is brought about by an employer and which is not agreed to by the employee.[2]

[7] In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry under s 386(1)(a) is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.[3]

[8] Section 386(1)(b) of the Act concerns the resignation of an employee where the resignation was "forced" by conduct or a course of conduct on the part of the employer. The question of whether a resignation did or did not occur does not depend on the parties' subjective intentions or understandings.[4] Whether an employee resigned depends on what a reasonable person in the position of the parties would have understood was the objective position, based on what each party had said or done, in light of the surrounding circumstances.[5]

[9] The test to be applied in determining whether a resignation was "forced" within the meaning of s 386(1)(b) is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign.[6] The requisite employer conduct is the essential element.[7]

[10] It is necessary to consider all the relevant circumstances to determine whether there has been a dismissal by words or conduct. The range of facts or factors which may need to be examined to answer the question of whether an employment relationship has ceased to exist by

reason of the communication of a dismissal by words or conduct will be determined by the circumstances of a particular case, and may include, without limitation, whether the employee is being paid a wage or other benefits or entitlements, whether the employee is attending or performing work for the employer, whether the employee is being rostered to work or offered work, whether, in the case of a business employing casuals, the employer is rostering other employees to do work in the same role as the applicant in a particular case, and whether either party has communicated to the other party a decision to terminate the relationship.

[11] The question of whether an employment relationship has ceased to exist does not depend upon the parties' subjective intentions or understandings. Rather, it depends upon what a reasonable person in the position of the parties would have understood was the objective position. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.[8]

Relevant facts re alleged dismissal

[12] It was the longstanding practice at the Store for Supervisors to work through their 30 minute unpaid meal break during a shift of at least five hours' duration and to be paid for this work.

[13] In about August 2023, Mr Punton noticed that the rostering system used for the Store was not recording some employees' entitlement to a 30 minute unpaid break and employees were being paid for all hours of their shift, including the 30 minute unpaid break. Mr Punton was aware that the *General Retail Industry Award 2020* (***GRIA***), which covered employees working in the Store, conferred an entitlement on employees who worked for at least five hours to take a 30 minute unpaid meal break.

[14] Mr Punton asked Ms Campbell and her second in charge, Ms Jamie Dawkings, if they knew why this was occurring. Ms Campbell informed Mr Punton that employees could, at the conclusion of their shift, select in the rostering system used at the Store that they had not taken their unpaid meal break, in which case they would be paid for the entirety of their shift. Ms Campbell told Mr Punton that this was a practice which had been carried over from the previous owner of the Store. Mr Punton directed Ms Campbell and Ms Dawkings to ensure that unpaid breaks were rostered by management for all employees working in the Store for at least five hours and that employees took such breaks at the time they fell due.

[15] In about May 2024, Mr Punton again noticed in the rostering system used for the Store that some employees were not taking their meal breaks. Mr Punton gave a further direction to Ms Campbell and Ms Dawkings for meal breaks to be rostered and taken by employees working in the Store.

[16] On about 15 May 2024, Ms Campbell told Mr Punton that some of the Supervisors, including Ms Rawson and Ms McMaster, were unhappy because they believed that as a result of taking their unpaid meal breaks they would work fewer hours and therefore receive less pay each week. Ms Campbell recommended that Mr Punton arrange a meeting with all Supervisors who worked at the Store to discuss their concerns about breaks and how to resolve those concerns. Mr Punton agreed with this recommendation and asked Ms Campbell to arrange a meeting. Ms Campbell arranged for a meeting to take place on 22 May 2024.

[17] In the period leading up to the meeting on 22 May 2024, Ms Campbell and the Supervisors who worked at the Store exchanged messages on their Supervisors' group chat about the issue concerning unpaid breaks. This was the usual way in which messages were communicated with Supervisors at the Store. Ms Campbell wrote that Mr Punton "is having a melt down about breaks so we need to take them please". Ms Rawson repeatedly raised the point that if Supervisors were being required to take a 30 minute unpaid break, then they were entitled to leave the Store, or do whatever they wished to do during their break, and someone would need to cover the Supervisor while they took their break. Ms Campbell informed the Supervisors that Mr Punton was trying to find a solution that was the "best outcome for you all".

[18] At about 10:45am on 22 May 2024, Mr Punton attended the Store for a meeting with Supervisors. Ms Rawson and Ms McMaster, together with Ms Campbell and Ms Dawkings, attended the meeting. Other Supervisors did not attend. Mr Punton explained that it was important for the Store to be compliant with the GRIA and that all employees must take their unpaid breaks. According to Mr Punton, two concerns were raised by Ms Rawson, Ms McMaster and Ms Dawkings. First, they would lose hours of work if they had to take an unpaid meal break. Secondly, because the meal break is an unpaid entitlement, they intended to return home for the period of their break, with the result that junior employees working in the Store would not have adequate supervision during evening shifts.

[19] Ms Rawson and Ms McMaster suggested that Mr Punton could hire another Supervisor to cover their unpaid meal breaks. Mr Punton said that it would not be operationally viable to do so. Mr Punton also said that Supervisors could leave the Store during an unpaid meal break to obtain food from the nearby takeaway store so long as they took their mobile phone with them while they were out of the Store so they could be contacted by junior staff.

[20] The ideas of reducing shifts to five hours in length or providing a paid break were also discussed at the meeting on 22 May 2024. However, Mr Punton's understanding of the GRIA was that employees were *obliged* to take an unpaid 30 minute meal break if they worked for more than five hours. Mr Punton obviously did not understand that the 30 minute meal break is an *entitlement* for employees under the GRIA, which an employee could agree to waive in exchange for payment and an arrangement whereby they would remain in the Store during the break and attend to an issue if it arose during the break period. In this way, staff would still receive a reasonable respite from work during the paid break and thereby ensure health and safety obligations were met.

[21] At the time of the meeting on 22 May 2024, Mr Punton understood that if a Supervisor was on a 30 minute unpaid meal break they were entitled to leave the Store or do whatever they wanted to do during their meal break. Notwithstanding this, Mr Punton and Ms Campbell accepted in their oral evidence that Mr Punton's preferred outcome to resolve the breaks issue was for Supervisors to remain at the Store during their unpaid meal break so that they could deal with any issues requiring their attention during their break. Mr Punton also accepted that it was a requirement for junior employees working in the Store to have their Supervisor approve about three or four different types of transactions at the till (e.g. the sale of a product which had been marked down on sale) by using the Supervisor's keys. It followed, so Mr Punton accepted, that it was not uncommon for junior employees to require assistance from their Supervisor

during their shift. Mr Punton was also clear in his evidence that most junior employees could not be left in the Store without a Supervisor, unless they were experienced and in the older age group of junior employees (e.g. a 17 year old junior with some years of experience working in the Store).

[22] According to Ms Rawson and Ms McMaster, at the meeting on 22 May 2024 Mr Punton repeatedly stated, in response to points raised by them about breaks, "then this isn't the job for you". For example, Ms McMaster said that if the break was to be unpaid, then she would go home during her break to see her daughter, to which Mr Punton said, "Well this isn't the job for you". A further example relates to where Ms McMaster said she was not worried about having her weekly hours reduced, she was worried about her legal rights on an unpaid break, as well as her concern for junior employees being left in the Store without supervision, to which Mr Punton said, "Well this isn't the job for you".

[23] Mr Punton and Ms Campbell deny that Mr Punton said, "This isn't the job for you", in response to Ms McMaster stating that she would go home during her 30 minute unpaid meal break. They contend that neither of them made any response to this comment by Ms McMaster. Mr Punton accepts that he said words to the effect, "This job is not for you" at the meeting on 22 May 2024, but says he did so in a context where a number of different solutions were discussed at the meeting but none of them were agreed. Mr Punton says that he did not mean this statement literally. He says he meant "let's get breaks in place and work through different solutions". Ms Campbell says that Mr Punton said something along the lines of, "If we can't all work together, maybe this is not the job for you".

[24] I do not accept that Mr Punton did not make any response to Ms McMaster's statement that she would return home to see her daughter during an unpaid meal break. If Ms McMaster did leave the Store during a break, it would cause a significant problem for Mr Punton because he would need to arrange for another Supervisor to cover for Ms McMaster during her break if, as was commonly the case, there were inexperienced, junior staff working in the Store (e.g. a 14 year old and a 15 year old). Further, Ms McMaster's proposal that she would go home during her 30 minute unpaid meal break was contrary to Mr Punton's preferred option of Supervisors remaining in the Store during their break so that they could deal with any issues that arose during their break. Having regard to this context, it does not ring true that Mr Punton would not make *any* response to Ms McMaster's statement. I consider it far more likely, and am satisfied on the balance of probabilities, that Mr Punton responded to Ms McMaster's statement that she would return home to see her daughter during an unpaid meal break by saying, "This isn't the job for you". By doing so, I consider that Mr Punton made clear to Ms McMaster and Ms Rawson that he was not prepared to comply with his legal obligation under the GRIA to provide Supervisors with an unpaid 30 minute meal break, during which time they could leave the Store, if they worked a shift of more than five hours in duration.

[25] Ms Campbell says that Mr Punton was assertive and 'to the point' during the meeting on 22 May 2024, but he was not aggressive. Ms Campbell also says that she was a personal friend of the applicants, particularly Ms Rawson, and she would have spoken up during the meeting if she believed that Mr Punton was being rude, unfair or unreasonable towards Ms Rawson or Ms McMaster at the meeting on 22 May 2024.

[26] Mr Punton denies behaving in an aggressive or unreasonable manner during the meeting on 22 May 2024.

[27] Ms Campbell says that Ms Rawson and Ms McMaster were defensive throughout the meeting on 22 May 2024, they used a direct and forceful tone, and they looked angry. Ms Campbell says that Ms Rawson and Ms McMaster rejected all the suggestions put forward by Mr Punton and Ms Campbell, including the suggestion to rework the rosters so that there was no need to roster any unpaid breaks for Ms Rawson or Ms McMaster.

[28] I am satisfied on the balance of probabilities that Mr Punton did say, on numerous occasions during the meeting on 22 May 2024, "This isn't the job for you", in an aggressive manner in response to points and concerns raised by Ms McMaster and Ms Rawson. Making such statements in response to proposals with which Mr Punton did not agree is consistent with Mr Punton's preferred option of having Supervisors remain in the Store during their unpaid meal breaks, save for leaving the Store (with their mobile phone on) for a short amount of time to collect food. The making of such statements by Mr Punton also explains, in part, why Ms McMaster and Ms Rawson were so upset when they left the meeting. Further, the relatively contemporaneous messages sent by Ms McMaster and Ms Rawson following the meeting on 22 May 2024 (set out below) support their evidence that Mr Punton repeatedly made threats that "This isn't the job for you" during the meeting.

[29] I accept that Ms McMaster felt very intimidated by Mr Punton's manner during the meeting on 22 May 2024. Ms McMaster left the meeting feeling terribly upset, confused and distressed. I also accept that Ms Rawson felt intimidated and threatened by Mr Punton during the meeting on 22 May 2024. Ms McMaster and Ms Rawson say that Mr Punton was standing up during the meeting and shut them down as soon as they said anything. I accept this evidence. Both Ms McMaster and Ms Rawson were so upset by what happened at the meeting that they said they would not be prepared to work again in the Store until the issue was resolved. This was a significant step for them to take, given the financial hardship which they endured as a result of not working their regular shifts in the Store.

[30] At the end of the meeting on 22 May 2024, Mr Punton invited the Supervisors to let him know if they had any other solutions to the issue concerning meal breaks.

[31] After the meeting on 22 May 2024, Ms McMaster contacted the Fair Work Ombudsman and was told that during a 30 minute unpaid meal break she could leave the Store and do as she pleased, however if she was required to stay in the Store then it became a paid break. A few hours after the meeting, Ms McMaster had a missed call from Ms Campbell, followed by a text message to see how she was feeling after the meeting. Ms McMaster was extremely upset and was unable to sleep that night following the meeting.

[32] At 1:33pm on 22 May 2024, Ms Rawson messaged Ms Campbell to inform her that she was unavailable to work her shift on 23 May 2024 but would be right for her shift on Saturday. Ms Campbell attempted to call Ms Rawson on the afternoon of 22 May 2024. Ms Rawson sent a message in response to Ms Campbell, requesting that she be given "space".

[33] At 7:57am on 23 May 2024, Ms McMaster posted the following message on the Supervisors' group chat:

> "Given yesterday's meeting I watched a great team not supported or heard and a lot of staff upset. Under fair works, yes we are to have our breaks, also under safety for our juniors we have an obligation to ensure their safety during a shift and that there's a supervisor installed at all times. I'm very sure there would be a lot of parents upset if there wasn't a supervisor present at all times. Under fair works if we are on unpaid break we are allowed to come home for our half hour, we can do as we please, Shane has told us to look for another job if we choose to do this as he is only allowing us to nick to LJ's as long as we have our phones on us and return back to the store. While he is wanting us to follow for works with having the break, if we follow what we are legally allowed to do on our breaks we have been told to find another job. What Shane is actually requiring of us is called a crib break, which we should be getting and have been getting since he took over, it's a paid break to ensure staff are physically and mentally having a break from the work but remaining on call and in store in case needed. I have a massive headache after the meeting as it was brutal. I won't be returning to work until it's resolved. Happy to supply a medical certificate and if I risk losing my job for speaking up, so be it."

[34] After posting this message to the Supervisors' group chat, Ms McMaster removed herself from the group chat to protect her mental health. Ms McMaster was also removed by her employer from the roster, which had previously shown that she was rostered to work her usual 24 hours a week the following week after the meeting on 22 May 2024.

[35] On 23 May 2024, Ms Rawson contacted the Fair Work Ombudsman to obtain advice about taking breaks under the GRIA. Ms Rawson was told that a 30 minute unpaid meal break was her free time to do as she pleased, including leaving her workplace.

[36] At 5:25pm on 23 May 2024, Ms Rawson posted the following message on the Supervisors' group chat:

> "The nature of our staff meeting on Wednesday was aggressive, threatening and unsupported by management. Fair Work Australia clearly states that if we can't leave our place of work or need to resume work during our break it is deemed a "PAID BREAK".
>
> Fair Work Australia is put in place to protect both Employers and Employees.
>
> I feel like if I return to work the issues raised shall be swept under the carpet and not resolved, therefore, I shall NOT be returning to work until this matter is resolved.
>
> I look forward to this being resolved so we can all move forward and get back to work as a team."

[37] On Friday, 24 May 2024, a message was posted on the Supervisors' group chat to say that Ms Campbell had removed herself from the group chat and Supervisors were to contact Ms Campbell directly on her mobile phone. Ms Campbell took the step of removing herself from the Supervisors' group chat because the communications on that group chat about the breaks issue were causing her stress.

[38] On Friday, 24 May 2024, Ms Rawson and Ms Campbell exchanged the following text messages:

> Ms Rawson: "The nature of our staff meeting on Wednesday was aggressive, threatening and unsupported by management. Fair Work Australia

clearly states that if we can't leave our place of work or need to resume work during our break it is deemed a "PAID BREAK".

Fair Work Australia is put in place to protect both Employers and Employees.

I feel like if I return to work the issues raised shall be swept under the carpet and not resolved, therefore, I shall NOT be returning to work until this matter is resolved.

I look forward to this being resolved so we can all move forward and get back to work as a team."

Ms Campbell: "Hey Kath I received your message, I really think it's probably best we chat in person, are you able to come in for a chat on Tuesday, around 1 PM would be good after I have finished the load?"

[39] At the time Ms Rawson sent her text message to Ms Campbell on the afternoon of 24 May 2024, her usual shifts had been included on the work roster for the following week. When Ms Rawson checked the roster again on Friday evening, all her shifts for the following week had been removed from the roster.

[40] On Monday, 27 May 2024, Ms Rawson and Ms Campbell continued their text message communications:

Ms Rawson: "I'm not comfortable with that arrangement. Feeling lost, if you have anything you want to say just message me."

Ms Campbell: "Hey Kath,
I take it from your message you don't want to come in and chat further?"

Ms Rawson: "Happy to communicate by message at this stage."

[41] Because both Ms Rawson and Ms McMaster had informed Ms Campbell that they were not willing to work any shifts at the Store until the breaks issue was resolved, Ms Campbell quickly hired an additional casual Supervisor to keep the Store running. The new casual Supervisor needed her own set of keys to undertake her duties at the Store.

[42] On Tuesday, 28 May 2024, the text message communications between Ms Rawson and Ms Campbell continued:

Ms Campbell: "Hey Kath
With you not wanting to come in and chat it is probably best we get you to drop keys off as we need to use them please."

Ms Rawson: "I have asked for this issue to be resolved by message as it's our line of communication. Why am I asked to return keys when I am still employed by the company in a supervisor role."

Ms Campbell: "Hey Katho
I've tried to call you also to arrange to talk with you a number of times in person to no avail, I don't see how anything can move forward by text.

As we needed to fill your shifts in your absence we need the keys to be returned asap please."

Ms Rawson: "I am just confirming that I have not resigned from my position as [sic] Anna Bay Spar.

I'm not comfortable attending any meeting due to being unsupported by yourself. The meeting was aggressive, threatening and intimidating by Shane.

As my previous message stated I am happy to communicate via message.

I have contacted Fair Works on two occasions and both times have been told that if we are on call during our shift outbreaks are to be a paid break. Unpaid breaks we can leave for the duration of our break.

This could have been resolved earlier but instead you have caused myself a lot of stress by delaying contact and removing myself permanently from the roster, where I have consistently had 30 hours a week as agreed to when I started.

If my employment has been terminated I will require a separation certificate and hang [sic] my keys in."

[43] On 28 May 2024, Ms McMaster and Ms Campbell exchanged the following text messages:

Ms Campbell: "hey Michelle,
Sorry I haven't got back to you. Is it something you want to come in and chat further."

Ms McMaster: "Has my employment at spar been terminated? I need a separation certificate if this is the case."

Ms Campbell: "Hey Michelle,

After our meeting and the message I received from you it seemed like you didn't want to come back.

That's why I asked if you would like to talk further regarding this situation.

As far as I know at this point your position still exists."

Ms McMaster: "Why am I getting messages at 9.30 at night, this could have been resolved Thursday after my original message was sent. Fair works are

> very informative on information regards breaks in retail. It's taken 6 days for a reply, I've been stressed, not sleeping and full of anxiety over the situation. My shifts were this wk were one till shift and 3 closes, all removed from roster and next wk no shifts given at all because I spoke up about our legal rights with breaks which I clarified with fair works. The way it has been handled would imply my job has been terminated."

[44] On 29 May 2024, Ms McMaster and Ms Campbell exchanged the following further text messages:

Ms Campbell: "Hey michelle

So sorry it's my fault I can get back to you so sorry about that.

And about texting so late, sorry.

Is it something you would like to come in and have a chat about?"

Ms McMaster: "Last meeting was dealt with aggression, threats and intimidation so happy to discuss this via message. As I explained in my first message I wouldn't return until this was resolved, at no point did I resign, I rang fair works that same day and was informed, that on half an hour unpaid break we can leave for the entire time and do as we please, if we are required to stay in store or on call this becomes a paid break. Also on an 8 hour shift we are entitled to 2 10 min pay breaks. Shane or yourself could have phoned fair trading the same day to have this resolved quickly, instead I was ignored for 6 days causing a lot of stress, removed from the roster completely when I have consistently had 20-24 hrs a week. Contacted late at night with another night of very little sleep over this. If my employment has been terminated I will return my keys and pick up my separation certificate."

[45] On Thursday, 30 May 2024, Ms Rawson received the following text message from Mr Punton:

"Gday Kath,

We have tried to rectify this matter in a timely manner, whilst also trying to find a solution to best meet both your needs and that of SPAR.

We do not feel we have been given ample opportunity to seek the required advice to appropriately resolve this.

You have also requested space in your messages and have chosen not to show up to your shifts which has supported the above.

You have stated you would not return to work until this issue was resolved. We have since been in contact to have a discussion regarding the issue and a potential solution. You have made this difficult as you refuse to attend the workplace for a meeting or answer your phone.

Due to this we will not be supplying a separation certificate.

> This matter is not one that can be resolved through messages and will not be conducted in that manner.
>
> No further communication will be performed by text message regarding this matter.
>
> We request that all SPAR property such as keys is returned in the next 48 hours to ensure supervisor shifts can be fulfilled."

[46] Ms Rawson takes issue with the following parts of this message from Mr Punton:

- Ms Rawson disagrees with the assertion that her employer tried to rectify the matter in a timely manner;
- Ms Rawson denies that she did not show up to her shifts. Ms Rawson informed Ms Campbell by text message that she would not be attending further shifts until the issue was resolved; and
- Ms Rawson agrees that she refused to attend the workplace for a meeting as result of Mr Punton's intimidating and threatening behaviour at the meeting on 22 May 2024, but says she only received one call from Ms Campbell on the day of the meeting and no phone calls from Mr Punton at all.

[47] On Thursday, 30 May 2024, Ms McMaster received the following text message from Mr Punton:

> "We have tried to rectify this matter in a timely manner, whilst also trying to find a solution to best meet both your needs and that of SPAR. We do not feel we have been given ample opportunity to seek the required advice to appropriately resolve this.
>
> You choosing not to show up to your roster shifts which has supported the above.
>
> You have stated you would not return to work until this issue is resolved. We have since been in contact to have a discussion regarding the issue and a potential solution. You have made this difficult as you refuse to attend the workplace for a meeting or answer your phone.
>
> Due to this we will not be supplying a separation certificate.
>
> This matter is not one that can be resolved through messages and will not be conducted in that manner.
>
> No further communication will be performed by text message regarding this matter.
>
> We request that all SPAR property such as keys is returned in the next 48 hours to ensure supervisor shifts can be fulfilled."

[48] Ms McMaster takes issue with the following parts of this message from Mr Punton:

- Ms McMaster disagrees with the assertion that her employer tried to rectify the matter in a timely manner. Ms McMaster says that the workplace culture required by

management has been to skip breaks and continue working for the entirety of a rostered shift. Ms McMaster also says that the issue could have been easily resolved if Mr Punton had contacted the Fair Work Ombudsman on the day of the meeting on 22 May 2024 to clarify the rules relating to paid and unpaid breaks;

- Ms McMaster denies that she did not show up to her shifts. Ms McMaster informed Ms Campbell by a message posted to the Supervisors' group chat that she would not be attending further shifts until the issue was resolved. In addition, Ms McMaster advised that she was prepared to provide a medical certificate to verify that she was unwell and unfit to work. More importantly, Ms McMaster says that her shifts were removed from the work roster by Mr Punton;

- Ms McMaster denies that she did not answer telephone calls. She says that she did not receive any further telephone calls following the message she posted to the Supervisors' group chat on 23 May 2024; and

- Ms McMaster agrees that she refused to attend the workplace for a meeting as result of Mr Punton's intimidating and threatening behaviour at the meeting on 22 May 2024, as well as the lack of any communication from Ms Campbell or Mr Punton for six days. Ms McMaster says that she was fully prepared to resolve the problem by messages in accordance with the usual form of communication used in the workplace.

[49] On Friday, 31 May 2024, Ms Rawson and Ms McMaster attended the Store. They had a discussion with Ms Campbell. There is a dispute as to what was said during that discussion. Ms Rawson and Ms McMaster say that:

- Ms Campbell apologised for not being able to resolve the matter and wished things could have worked out.

- Ms Rawson and Ms McMaster informed Ms Campbell that they had not resigned from their positions.

- Ms Campbell said she had her daughter looking into the breaks issue, but she couldn't believe they were carrying on like this over a 30 minute break.

- Ms McMaster said, "It's our entitlement and the law".

- Ms Campbell responded by saying, "I know but I don't give a fuck about breaks, and you don't work like me". Ms Campbell then said that she ceased communication with Ms Rawson and Ms McMaster following the initial meeting because her husband had told her to leave them alone.

- Ms McMaster then said the best thing you could have done was to rectify the situation immediately instead of causing so much stress, anxiety and sleepless nights. Ms Rawson informed Ms Campbell that she had contacted Fair Work herself to find out the rules and regulations regarding breaks. She was advised that if they were to remain in the Store it became a paid break and they were entitled to two 10 minute paid breaks

as well as a 30 minute unpaid break, but they were only ever told to have one ten minute break.

- Ms Campbell said that she did not know how to fix this.

- Ms McMaster replied by saying give us our entitlements which we should have been getting the whole time.

- Ms Rawson and Ms McMaster returned their work jackets and work keys. Ms Rawson also returned her work shirts. Ms Rawson and Ms McMaster sought, and were provided with, a refund of $30 by Ms Campbell for part of the cost they incurred in purchasing a work jacket to wear while on shift at the Store.

[50] Ms Campbell says that the following events occurred when Ms Rawson and Ms McMaster attended the Store, without prior notice, on 31 May 2024:

- Both Ms Rawson and Ms McMaster returned their Store keys to Ms Campbell, who then said words to the effect, "I do not know what to do to resolve this, that's why I've asked Shane to meet with you to try to reach a resolution".

- Ms Rawson and Ms McMaster said they believed that Ms Campbell did not have "their backs" and that Mr Punton had been aggressive towards them during the meeting on 22 May 2024. They also said that they would not remain at the Store during their breaks if they were unpaid.

- Ms Campbell told Ms Rawson and Ms McMaster that she just wanted to help them resolve their concerns. She told them that it was not reasonable to demand that the employer employ another Supervisor, and she did not think that Mr Punton had acted aggressively during the meeting. Both Ms Rawson and Ms McMaster responded by saying, "See, you don't have our backs".

- Ms McMaster said words to the effect, "I'm not doing any more of my shifts, I have anxiety".

- Ms Rawson said, "I want my money back from my jacket" and gave Ms Campbell her work jacket in a bag. Ms Campbell responded by saying words to the effect, "Why? You're not sacked. We don't want to lose you, you're a good worker". Ms Rawson then said words to the effect, "I just want the money".

- Ms Rawson handed Ms Campbell her work jacket and Ms Campbell felt like she could not say no to the exchange. Ms Campbell then gave Ms Rawson $30 and both Ms Rawson and Ms Campbell left the Store. Ms Rawson returned about one minute later and requested that Ms Campbell also give her $30 for Ms McMaster's jacket. Ms McMaster had not given Ms Campbell her jacket, but Ms Campbell felt that it would be unfair to refuse to provide a refund because Ms McMaster had told her that she did not intend to return to work. Ms Campbell gave Ms Rawson $30 for Ms McMasters jacket and Ms Rawson left the Store.

[51] Ms Rawson and Ms McMaster deny that Ms McMaster said to Ms Campbell "I'm not doing any more shifts, I have anxiety". They say that Ms McMaster informed Ms Campbell that she was going to the doctors to undergo a mental health plan as she was suffering from high levels of anxiety and stress over the matter.

[52] Ms Rawson and Ms McMaster say that they both handed over their jackets to Ms Campbell at the same time. Ms Rawson also says that her work shirts, together with her work jacket, were in the bag she handed to Ms Campbell. It is agreed that Ms McMaster became upset and left through the back door lock. Ms Rawson says that she waited in the back dock area of the Store to collect the $30 refund for each of herself and Ms McMaster.

[53] Ms Rawson also denies that Ms Campbell said that she did not want to lose her as a staff member or that she was a good worker.

[54] Ms Campbell accepted in her oral evidence that she said to Ms Rawson and Ms McMaster on 31 May 2024, "I do not give a fuck about breaks". Ms Campbell claims that she said this in relation to herself because she does not care for breaks at work.

[55] I prefer the evidence given by Ms Rawson and Ms McMaster over the evidence given by Ms Campbell in relation to their interaction at the Store on 31 May 2024, to the extent that such evidence is inconsistent. It is very difficult to accept Ms Campbell's evidence that Ms McMaster said to her, "I'm not doing any more of my shifts, I have anxiety". Notwithstanding the fact that Ms McMaster's mental health had suffered as a consequence of the meeting on 22 May 2024 and the communications with Ms Campbell and Mr Punton thereafter, Ms McMaster maintained the consistent position that she wanted to return to work at the Store and was willing to do so provided her employer complied with its legal obligations under the GRIA to allow her to leave the Store, or do whatever she wished to do, during an unpaid 30 minute break. I accept her evidence in that regard. Ms McMaster was suffering financial hardship as a result of not working at the Store since the meeting on 22 May 2024. She needed to return to work. She had repeatedly stated that she had not resigned. What Ms McMaster was seeking was confirmation that her employer would comply with its legal obligations concerning unpaid meal breaks. This was important to Ms McMaster because if she was required to take an unpaid meal break during a shift at the Store, she wished to return to her (nearby) home during her break to see her young daughter. I also consider it most unlikely that Ms McMaster attended the Store on 31 May 2024 without her work jacket to return, as contended for by Ms Campbell. Ms McMaster had been instructed by Mr Punton to return *all* her employer's property. That was the purpose of her visit to the Store on 31 May 2024. The fact that Ms Campbell provided a $30 refund for each of Ms Rawson and Ms McMaster in respect of the return of their work jackets also supports Ms McMaster's evidence that she returned her work jacket on 31 May 2024. Further, as a general observation, I accept that Ms Campbell is caught between her long-term friendship with Ms Rawson and her duties of loyalty to her employer, but I consider that her evidence has been coloured in an endeavour to support her employer's defence of the unfair dismissal claims brought by Ms Rawson and Ms McMaster.

[56] Ms Rawson sent the following text message to Mr Punton and Ms Campbell in response to Mr Punton's text message received on 30 May 2024:

> "Shane and Cheryl

I just want to clarify a few things in response to your message.

You have stated I chose to not turn up for my shifts. I messaged Cheryl prior to those shifts and informed her I wouldn't be attending.

Also I have not received multiple phone calls to discuss this issue which should have been resolved the following day. I have had only 1 call on the day of the meeting. I can provide my call log to back this up.

I had a meeting with Cheryl the following day you asked me to return ALL Spar property. There was still no outcome from the meeting.

I would appreciate my Separation Certificate for termination of employment ASAP.

Please email to …

Kathy"

[57] Ms McMaster sent the following text message to Mr Punton in response to Mr Punton's text message received on 30 May 2024:

"In response to previous communication, on the 28th of May I requested a separation certificate in regards to my termination of employment. This is required by Centrelink and legally has to be given within a 14 day period of being asked for. Also in response to Shane's previous message, I posted in supervisor group chat on 24 May advising I wouldn't be attending my shifts, giving reasons why and offered to provide a medical certificate, which I am still able to supply, supervisor group chat has always been our formal way of communication the whole time I have been employed at spar and Cheryl was still active on messenger that day, didn't remove herself from message until next day and my message was seen by staff whilst on shift with Cheryl. I did not just not turn up for my shifts, I notified management and offered a medical certificate. As far as admitting multiple calls I didn't receive ANY calls from the date I posted my message on the 24th, I can provide my call history to show this. Reasons for not attending meetings were also communicated in my messages, was happy to resolve by message at that stage, as was already stressed how the first meeting had been handled and the lack of communication since that meeting. Under the spar enterprise agreement, any dispute should be actioned within a 48hr period, I was not contacted for nearly a week, with a message coming through 9.30 at night. This should have been resolved immediately by contacting fair works yourselves in regards to the rules and regulations around staff breaks, but instead there was no communication for nearly a wk, all shifts removed, advised keys and any property of spar be returned that I had. I would appreciate my separation certificate for termination of employment that I requested on the 28th be forwarded ASAP.

Thanks Michelle."

[58] On 7 June 2024, Ms Rawson and Ms McMaster were provided with Employment Separation Certificates by Darton, which indicated that the reason for separation was "employee ceasing work voluntarily", including the explanation that "employee ceased attending shifts".

Submissions on dismissal

[59] Ms Rawson and Ms McMaster submit that they did not resign. They do not contend that they were forced to resign by any conduct on the part of Darton. Instead, they submit that they were terminated at the initiative of Darton.

[60] Darton submits that it did not terminate the employment of Ms Rawson or Ms McMaster at its initiative. Darton submits that its conduct should be considered to have been solely motivated to ensure that it complied with the legal obligations it owed Ms Rawson and Ms McMaster.

[61] Darton submits that it reassured Ms Rawson and Ms McMaster that they had not been dismissed and their employment had not been adversely affected, and attempted to actively engage and consult with them to resolve their concerns and facilitate their return to work. These steps, so Darton contends, signalled a preference for the employment relationships to continue.

[62] Darton submits that its attempts to correct its compliance with the GRIA were reasonable, respectful, conciliatory, and demonstrate that Ms Rawson and Ms McMaster were not exposed to conduct which placed them in a position where they had no effective or real choice but to resign from their employment. Further, in light of the fact that Ms Dawkings continues to work for Darton, it is submitted that an inference can be drawn that she has taken a different view to that taken by Ms Rawson and Ms McMaster as to whether they had no effective or real choice but to resign.

[63] Darton submits that its reluctance to accept the preference of Ms Rawson and Ms McMaster not to comply with the GRIA or their otherwise unreasonable and economically unviable options is not a termination at the employer's initiative.

[64] Darton submits that the conduct of Ms Rawson and Ms McMaster allows for an inference to be drawn that they had either resigned from their employment or abandoned their employment, or repudiated their contract of employment, which was subsequently accepted by Darton. The following conduct is relied on by Darton to support this submission:

(a) Ms Rawson and Ms McMaster refused to meet with Darton's management to address a dispute in accordance with their obligation under clause 36 of the GRIA.

(b) Ms Rawson and Ms McMaster unreasonably, and without lawful excuse, refused to report for their rostered shifts, especially in circumstances where they were required to do so.

(c) Ms McMaster voluntarily left the Supervisors' group chat on Facebook messenger.

(d) Ms Rawson and Ms McMaster returned their uniforms in exchange for compensation, allowing an inference to be drawn that they had decided, on their own initiative, to no longer work for Darton.

(e) Ms Rawson and Ms McMaster requested that Darton issue them with Employment Separation Certificates, allowing an inference to be drawn that they no longer wished to work with Darton and avail themselves of the opportunity to address their concern by meeting with management and ultimately returning to the workplace.

[65] Darton submits that Ms Rawson and Ms McMaster were clearly displeased with the decision by Darton to comply with its legal obligations and ceased work in response, effectively taking the first step in electing to bring their employment with Darton to an end. In accordance with the decision in *Bruce v Fingal Glen Pty Ltd*,[9] Darton submits that the displeasure (or annoyance or disillusionment) of Ms Rawson and Ms McMaster is not in itself evidence that Darton had dismissed them. It is submitted that Ms Rawson and Ms McMaster were availed of many other superior options instead of ending their employment with Darton. They could have met with Darton to discuss alternative rostering arrangements or sought the assistance of the Commission or the Fair Work Ombudsman to resolve their dispute with Darton.

[66] Darton submits that it was the free choice of Ms Rawson and Ms McMaster to cease their employment with Darton and Darton's conduct did not cause Ms Rawson and Ms McMaster to be dismissed from their employment.

Consideration re dismissal

[67] I am satisfied that neither Ms Rawson nor Ms McMaster resigned from their employment with Darton. They did not say that they were resigning. They repeatedly stated that they were not resigning. Nor did their conduct objectively suggest or demonstrate that they were resigning or had resigned from their employment. Both Ms Rawson and Ms McMaster informed Darton that they were not willing to return to work until the dispute concerning breaks was resolved. They did not state that they were not willing to return to work at all. They remained willing to have communications with management about the breaks issue, albeit they wanted those communications to take place in writing because they felt intimidated and threatened during the meeting on 22 May 2024. They returned their uniforms and work keys to Ms Campbell, but did so in compliance with the written instruction from Mr Punton that they return "all SPAR property" within 48 hours. They also requested Employment Separation Certificates, but that was because they believed their employment had been terminated by Darton. While Ms McMaster left the Supervisors' group chat, she did so to protect her mental health, as did Ms Campbell. Ms McMaster could easily have been added back into the Supervisors' group chat if the breaks issue had been resolved. Although neither Ms Rawson nor Ms McMaster sought the assistance of the Commission to resolve their dispute with Darton about breaks, they did contact the Fair Work Ombudsman and seek advice about unpaid meal breaks. It was also open to Darton to seek the assistance of the Commission to deal with its dispute with Ms Rawson and Ms McMaster about breaks. Neither party took that option.

[68] Because Ms Rawson and Ms McMaster did not resign, there is no need to consider whether they were forced to resign by conduct, or a course of conduct, engaged in by Darton.

[69] Turning now to s 386(1)(a), I am satisfied that the following conduct on the part of Darton was the principal contributing factor which resulted, directly or consequentially, in the termination of the employment of Ms Rawson and Ms McMaster:

(a) Mr Punton did not communicate to Ms Rawson and Ms McMaster, either at the meeting on 22 May 2024 or thereafter, that Supervisors were entitled to leave the Store, or do whatever they wished to do, during a 30 minute unpaid break under the GRIA. This was so notwithstanding Mr Punton's understanding that the Supervisors had such a right.

Given that Mr Punton had this understanding, I consider it was disingenuous of Mr Punton to state in his messages to Ms Rawson and Ms McMaster on 30 May 2024 that: "We do not feel we have been given ample opportunity to seek the required advice to appropriately resolve this".

(b) Mr Punton refused to discuss the breaks issue with Ms Rawson or Ms McMaster in writing after the meeting on 22 May 2024. Ordinarily I accept that it would be reasonable for an employer to require an employee to participate in an oral discussion to try to resolve an issue in the workplace. However, I have found that Ms Rawson and Ms McMaster felt intimidated and threatened with the loss of their jobs at the meeting on 22 May 2024. This had a significant impact on Ms Rawson and Ms McMaster. As a result, they did not wish to engage in further oral discussions with management about the breaks issue. Having regard to the circumstances, I consider that this was a reasonable position for Ms Rawson and Ms McMaster to adopt, as was their willingness to communicate in writing with their employer about the breaks issue. Mr Punton knew that Ms Rawson and Ms McMaster were not willing to engage in further oral discussions about the breaks issue. Mr Punton's decision, as communicated to Ms Rawson and Ms McMaster in his messages to them on 30 May 2024, that he would not discuss the breaks issue with them in writing meant that there would be no further communications between the parties about the breaks issue.

(c) Darton did not roster Ms Rawson or Ms McMaster to work any shifts after the meeting on 22 May 2024. They could have been rostered to work a shift of five hours or less, in which case the breaks issue would not have arisen. Or they could have been rostered to work a shift exceeding five hours' duration and been informed that they would be entitled to take a 30 minute unpaid meal break during their shift, at which time they could leave the Store.

(d) Mr Punton instructed Ms Rawson and Ms McMaster to return "all SPAR property such as keys … in the next 48 hours to ensure supervisor shifts can be fulfilled". I accept that an instruction to return work keys so that an alternative Supervisor can work in the Store does not necessarily indicate that the employment relationship is at an end. However, an instruction to return *all* property belonging to the employer, which in this case included work uniforms and work keys, is a strong objective indicator that the employment relationship is at an end.

[70] I do not accept Darton's contention that Ms Rawson or Ms McMaster repudiated their employment contract with Darton. Neither Ms Rawson nor Ms McMaster had a written contract of employment. They were engaged as casual employees. They did not have any obligation to work particular hours or shifts. There was no conduct on the part of Ms Rawson or Ms McMaster which evinced an intention no longer to be bound by their contract or to fulfil it only in a manner substantially inconsistent with the party's obligations, nor has it been established that Ms Rawson or Ms McMaster breached their contract of employment in such a way to justify termination by Darton.[10] It was Mr Punton who demonstrated an unwillingness (on the part of Darton) to be bound by its obligations under the GRIA when he told Ms McMaster that it was "not the job for" her in response to her statement that she would go home during an unpaid 30 minute break.

[71] I also do not accept Darton's contention that Ms Rawson or Ms McMaster abandoned their employment with Darton. Abandonment of employment occurs where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract.[11] Ms Rawson and Ms McMaster had a reasonable excuse for not attending shifts until the breaks issue was resolved. It was reasonable for them not to attend work after feeling intimidated and threatened with the loss of their job at the meeting on 22 May 2024, particularly in circumstances where their employer had clearly indicated that it was not willing to comply with its obligation to permit Supervisors to go home during an unpaid meal break. Moreover, as casual employees, they did not have an obligation to work particular hours or shifts.

[72] For the reasons given, I am satisfied that the employment of Ms Rawson and Ms McMaster with Darton was terminated on Darton's initiative. It follows that Ms Rawson and Ms McMaster were dismissed within the meaning of s 386(1)(a) of the Act.

Were the dismissals harsh, unjust or unreasonable?

[73] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Davidson's dismissal was harsh, unjust or unreasonable. I will address each of these matters in turn below.

Valid reason (s 387(a))

General principles

[74] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.[12] In order to be "valid", the reason for the dismissal should be "sound, defensible and well founded"[13] and should not be "capricious, fanciful, spiteful or prejudiced."[14]

[75] 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.[15] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[16]

[76] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[17] It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[18]

[77] The question of whether there was a valid reason must be assessed by reference to facts which existed at the time of the dismissal, even if they did not come to light until after the dismissal.[19]

[78] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.[20] In cases such as the present where allegations of serious misconduct are made, the

Briginshaw standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.[21]

[79] A reason will be 'related to the capacity' of the applicant where the reason is associated or connected with the ability of the employee to do his or his job.[22] The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.[23]

Consideration re valid reason

[80] Darton contends that Ms Rawson and Ms McMaster acted unreasonably in connection with the breaks issue, particularly insofar as they refused to attend further meetings with management to discuss the issue or to move from their position about being able to leave the Store during their breaks. For the reasons explained above, I do not accept that Ms Rawson or Ms McMaster acted unreasonably in relation to the breaks issue. It was not unreasonable for the employees to require their employer to comply with its obligations under the GRIA and permit them to leave the Store during an unpaid meal break. Nor was it unreasonable in the circumstances for Ms Rawson and Ms McMaster to not agree to attend further meetings in person to discuss the breaks issue and instead want those communications to be in writing. Those circumstances included Ms Rawson and Ms McMaster feeling intimidated and threatened at the meeting on 22 May 2024. Ms McMaster sought medical assistance following that meeting to address the anxiety and stress she was experiencing. Ms Rawson was also very upset following the meeting on 22 May 2024.

[81] Apart from the dispute concerning unpaid meal breaks, Darton does not contend that it had any other valid reason to terminate the employment of Ms Rawson or Ms McMaster. This position is consistent with Mr Punton's evidence that, had the employment of Ms Rawson and Ms McMaster not come to an end when it did, there was no end to their employment with Darton in Mr Punton's mind because he thought very highly of both employees.

[82] Having regard to all the circumstances, I am satisfied that Darton did not have a valid reason to terminate the employment of Ms Rawson or Ms McMaster.

Notification of reason (s 387(b))

[83] Because there was no valid reason for the dismissal of Ms Rawson or Ms McMaster, they were not notified of any valid reason.

Opportunity to respond (s 387(c))

[84] Again, because there was no valid reason for the dismissal of Ms Rawson or Ms McMaster, they were no given an opportunity to respond to any reason related to their capacity or conduct.

Unreasonable refusal to allow a support person (s 387(d))

[85] There was no unreasonable refusal by Darton to allow Ms Rawson or Ms McMaster to have a support person present to assist at any discussions relating to their dismissal.

Warnings of unsatisfactory performance (s 387(e))

[86] The dismissal of Ms Rawson and Ms McMaster did not relate to any unsatisfactory performance by either of them. Accordingly, this is a neutral consideration.

Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))

[87] Darton conducts a relatively small business. It does not have any dedicated human resource management specialists or expertise available. I am satisfied that these matters had an impact on the procedures followed in effecting the dismissal of Ms Rawson and Ms McMaster. This weighs to some extent against the proposition that the dismissals were harsh, unjust and unreasonable.

Other relevant matters

[88] Ms Rawson and Ms McMaster were both highly regarded employees in Darton's business. Ms Rawson was employed by Darton for about 16 months prior to her dismissal. Ms McMaster was employed by Darton for about 18 months prior to her dismissal.

[89] I do not consider that there are any other relevant matters.

Conclusion on whether a harsh, unjust or unreasonable dismissal

[90] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that Darton's dismissal of Ms Rawson and Ms McMaster was harsh, unjust and unreasonable. There was no valid reason for their dismissal. Darton attempted by its conduct to pressure Ms Rawson and Ms McMaster to accept a position whereby they were required to remain at the Store (save for a short departure to obtain food) and available to perform work during their unpaid meal breaks. This was inconsistent with the right which Ms Rawson and Ms McMaster had under the GRIA to a complete break from work during their 30 minute unpaid meal break. If Darton had any other proposals it wished to put to Ms Rawson and Ms McMaster to resolve the breaks issue, it could have done so in writing. It elected not to do so and instead refused to communicate further with Ms Rawson and Ms McMaster in writing. This was unreasonable in all the circumstances. I am satisfied that Ms Rawson and Ms McMaster acted reasonably throughout the dispute in relation to unpaid meal breaks.

Remedy

[91] Having found that Ms Rawson and Ms McMaster were protected from unfair dismissal, and that their dismissals were unfair, it is necessary to consider what, if any, remedy should be granted to the employees. Neither Ms Rawson nor Ms McMaster wishes to be reinstated to employment with Darton. That is a reasonable position for them to take given the breakdown in their relationship with Mr Punton. In all the circumstances, I am satisfied that it would be inappropriate to reinstate Ms Rawson or Ms McMaster.

[92] Section 390(3)(b) of the Act provides the Commission may only issue an order for compensation if it is appropriate in all the circumstances. A compensation remedy is designed

to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal within the bounds of the statutory cap on compensation that is to be applied.[24]

[93] Having regard to all the circumstances of the case, including the fact that Ms Rawson and Ms McMaster have each suffered financial loss as a result of their unfair dismissal, I consider that an order for payment of compensation to each of them is appropriate.

[94] It is necessary therefore for me to assess the amount of compensation that should be ordered to be paid to Ms Rawson and Ms McMaster. In assessing compensation, I am required by s 392(2) of the Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of this subsection.

[95] I will use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket*[25] and applied and elaborated upon in the context of the current Act by Full Benches of the Commission in a number of cases.[26] The approach to calculating compensation in accordance with these authorities 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.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount she or she would have received if they had continued in their employment.
>
> Step 5: Apply the legislative cap on compensation.

<u>Remuneration Ms Rawson and Ms McMaster would have received, or would have been likely to receive, if they had not been dismissed (s 392(2)(c))</u>

[96] Like all calculations of damages or compensation, there is an element of speculation in determining an employee's anticipated period of employment because the task involves an assessment of what would have been likely to happen in the future had the employee not been dismissed.[27]

[97] Both Ms Rawson and Ms McMaster believe that they would have remained in employment with Darton for many years, perhaps until their retirement, if they had not been dismissed. Similarly, Mr Punton saw no end to the employment of Ms Rawson and Ms McMaster with Darton, but for the breaks issue.

[98] I find on the balance of probabilities that if Ms Rawson and Ms McMaster had not been dismissed on 7 June 2024, they each would have remained employed by Darton for a further period of 12 months. This assessment takes into account the expectations of ongoing

employment by each of the employees and Mr Punton, together with the fact that each of Ms Rawson and Ms McMaster had been employed for between one and two years by Darton.

[99] I am satisfied that Ms Rawson and Ms McMaster would have continued to work their regular weekly hours of 30 for Ms Rawson and about 22 for Ms McMaster if they had remained employed by Darton after 7 June 2024. Ms McMaster gave evidence that she consistently worked between 20 and 24 hours in the Store each week.[28] I have used the average figure of 22 hours.

[100] The pay time sheets tendered by Ms Rawson show that, in the 12 months prior to 22 May 2024,[29] she earned gross income (not including laundry allowances) of $59,654.13 from her employment at the Store. This equates to average gross weekly earnings of $1,147.19. I consider it appropriate to use Ms Rawson's average weekly rate because she did not work a fixed roster. Instead, Ms Rawson worked a variety of hours in the Store, including weekday hours before 6pm, weekday hours after 6pm, Saturdays, Sundays, and public holidays, all of which were paid at different rates under the GRIA.

[101] The pay time sheets tendered by Ms McMaster show that, in the 12 months prior to 21 May 2024,[30] she earned gross income (not including laundry allowances) of $41,275.39 from her employment at the Store. This equates to average gross weekly earnings of $793.76. I consider it appropriate to use Ms Rawson's average weekly rate because she did not work a fixed roster. Instead, Ms Rawson worked a variety of hours in the Store, including weekday hours before 6pm, weekday hours after 6pm, Saturdays, Sundays, and public holidays, all of which were paid at different rates under the GRIA.

[102] Accordingly, I am satisfied that:

(a) $59,654.13 is the remuneration that Ms Rawson would have received, or would have been likely to receive, if she had not been dismissed; and

(b) $41,275.39 is the remuneration that Ms McMaster would have received, or would have been likely to receive, if she had not been dismissed.

Remuneration earned (s 392(2)(e)) and income reasonably likely to be earned (s 392(2)(f))

[103] I accept Ms Rawson's evidence that, apart from unemployment benefits, she has not received any income since her dismissal and is not likely to receive any income until she starts her new part-time job on 24 September 2024. Accordingly, the amount of remuneration earned by Ms Rawson from employment or other work during the period between her dismissal on 7 June 2024 and the making of the order for compensation will be zero. I consider that it is reasonably likely that the amount of income likely to be earned by Ms Rawson during the period between the making of the order for compensation and the actual compensation will be the same as Ms Rawson earned in her employment with Darton. I have made this assessment because Ms Rawson is due to start her new part-time job on 24 September 2024, working 25 hours per week at about the same pay rate as she received with Darton. I consider it very likely that a person with Ms Rawson's employment experience and skills will be able to either obtain more hours of work in her new part-time job, or obtain other casual employment, to bring her overall earnings in the period from 1 September 2024 until 6 June 2025 (i.e. the balance of the 12

month anticipated period of employment) to be the same as she would have received if she had remained in employment with Darton during that period. Accordingly, Ms Rawson has a period of financial loss from her dismissal on 7 June 2024 until the making of the order for compensation (30 August 2024). The loss incurred in that period is $13,766.28 (12 weeks from 7 June 2024 until 30 August 2024 x $1,147.19/week = $13,766.28). For the reasons given, I do not consider it to be likely that Ms Rawson will suffer an ongoing financial loss in the period from 1 September 2024 until 6 June 2025 (i.e. the balance of the 12 month anticipated period of employment).

[104] I accept Ms McMaster's evidence that, apart from unemployment benefits, she has not received any income since her dismissal and is not likely to receive any income until she (hopefully) starts her new casual employment on about 6 September 2024, being three weeks after the hearing on 16 August 2024. Accordingly, the amount of remuneration earned by Ms McMaster from employment or other work during the period between her dismissal on 7 June 2024 and the making of the order for compensation will be zero. I consider that it is reasonably likely that the amount of income likely to be earned by Ms McMaster during the period between the making of the order for compensation and the actual compensation will be the same as Ms McMaster earned in her employment with Darton. I have made this assessment because Ms McMaster considers it likely that she will start new casual employment on about 6 September 2024, working about 15 to 20 hours per week. However, Ms McMaster accepted in her evidence that as summer approaches she is likely to pick up additional hours of work. Having regard to Ms McMaster's employment experience and the high regard in which she was held by Darton prior to the breaks issue, I consider it very likely that Ms McMaster will be able to obtain additional work so that her overall earnings in the period from 1 September 2024 until until 6 June 2025 (i.e. the balance of the 12 month anticipated period of employment) will be the same as she would have received if she had remained in employment with Darton. Accordingly, Ms McMaster has a period of financial loss from her dismissal on 7 June 2024 until the making of the order for compensation (30 August 2024). The loss incurred in that period is $9,525.12 (12 weeks from 7 June 2024 until 30 August 2024 x $793.76/week = $9,525.12). For the reasons given, I do not consider it to be likely that Ms Rawson will suffer an ongoing financial loss in the period from 1 September 2024 until 6 June 2025 (i.e. the balance of the 12 month anticipated period of employment).

Viability (s 392(2)(a))

[105] No submission was made on behalf of Darton that any particular amount of compensation would affect the viability of Darton's enterprise.

[106] My view is that no adjustment will be made on this account.

Length of service (s 392(2)(b))

[107] My view is that the period of service of Ms Rawson and Ms McMaster with Darton does not justify any adjustment to the amount of compensation.

Mitigation efforts (s 392(2)(d))

[108] Ms Rawson started applying for jobs on seek.com as soon as her employment with Darton came to an end. She applied for in excess of 20 jobs before securing part-time employment at Newcastle Airport, commencing on 24 September 2024.

[109] Ms McMaster applied for a number of jobs following her dismissal from Darton. At the time of the hearing (16 August 2024), Ms McMaster had three job interviews lined up and believed she was likely to obtain casual employment about three weeks after the hearing, initially working 15 to 20 hours per week.

[110] In all the circumstances, I am satisfied that Ms Rawson and Ms McMaster acted reasonably to mitigate the loss suffered by them because of their dismissal and I do not consider it appropriate to reduce the compensation to be awarded to them on this account.

Any other relevant matter (s 392(2)(g))

[111] It is necessary to consider whether to discount the remaining amount for 'contingencies'. This step is a means of taking into account the possibility that the occurrence of contingencies to which Ms Rawson and Ms McMaster may be subject might bring about some change in earning capacity or earnings.[31]

[112] Any discount for contingencies should only be applied in respect to an 'anticipated period of employment' that is not actually known, that is a period that is prospective to the date of the decision.[32] There is no discount for the period that is actually known.

[113] In these cases, the anticipated period of employment that is not known is from 1 September 2024 until 6 June 2025. I have assessed the loss in that period for each of Ms Rawson and Ms McMaster to be zero. Accordingly, I do not consider that it is appropriate to discount the compensation amounts I have calculated for Ms Rawson and Ms McMaster.

[114] Save for the matters referred to in this decision, my view is that there are no other matters which I consider relevant to the task of determining an amount for the purposes of an order under s 392(1) of the Act.

[115] I have considered the impact of taxation, but my view is that I prefer to determine compensation as a gross amount and leave taxation for determination.

Misconduct (s 392(3))

[116] Neither Ms Rawson nor Ms McMaster engaged in any misconduct. Accordingly, there will be no reduction to the amount of compensation on the basis of misconduct.

Shock, distress or humiliation, or other analogous hurt (s 392(4))

[117] I note that in accordance with s 392(4) of the Act, the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap (s 392(5)-(6))

[118] The amounts of $13,766.28 and $9,525.12 are less than half the amount of the high income threshold immediately before the dismissals of Ms Rawson and Ms McMaster. They are also less than the total amount of remuneration to which Ms Rawson and Ms McMaster were respectively entitled in their employment with Darton during the 26 weeks immediately before their dismissal. In those circumstances, my view is that there is no basis to reduce the amounts of $13,766.28 (for Ms Rawson) and $9,525.12 (for Ms McMaster) by reason of s 392(5) of the Act.

Instalments (s 393)

[119] No application has been made to date by Darton for any amount of compensation awarded to be paid in the form of instalments.

Conclusion on compensation

[120] In my view, the application of the *Sprigg* formula does not, in this case, yield an amount that is clearly excessive or clearly inadequate. Accordingly, my view is that there is no basis for me to reassess the assumptions made in reaching the amount of $13,766.28 (for Ms Rawson) and $9,525.12 (for Ms McMaster).[33]

[121] For the reasons I have given, my view is that remedies of compensation in the sum of $13,766.28, less taxation as required by law, for Ms Rawson and $9,525.12, less taxation as required by law, for Ms McMaster are appropriate in the circumstances of these cases. Orders will be made to that effect.

DEPUTY PRESIDENT

Appearances:

Mrs K Rawson and Mrs M McMaster, Applicants
Mr. M. Stirling, Head of Legal, Master Grocers Australia, for the Respondent

Hearing details:

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[1] *NSW Trains v James* [2022] FWCFB 55 at [45]

[2] *Mohazab v Dick Smith Electronics Pty Ltd* [1995] IRCA 625; (1995) 62 IR 200

[3] *Mohazab v Dick Smith Electronics Pty Ltd* [1995] IRCA 625; (1995) 62 IR 200

[4] *Koutalis v Pollett* [2015] FCA 1165 at [43]; *Canberra Urology Pty Ltd v Lancaster* [2021] FWCFB 1704 at [30]

[5] *Koutalis v Pollett* [2015] FCA 1165 at [43]; *Canberra Urology Pty Ltd v Lancaster* [2021] FWCFB 1704 at [30]

[6] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [47(2)]

[7] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [47(2)]

[8] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [45], applying *Koutalis v Pollett* [2015] FCA 1165; 235 FCR 370 at [43]

[9] [2013] FWCFB 5279

[10] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61 at [44]

[11] *Abandonment of Employment* [2018] FWCFB 139 at [21]

[12] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

[13] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

[14] Ibid

[15] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[16] Ibid

[17] *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24]

[18] Ibid

[19] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [99]

[20] Ibid

[21] *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J

[22] *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]

[23] *Crozie v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 at [62]

[24] *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 at [17]

[25] (1998) 88 IR 21

[26] *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762*; Bowden v Ottrey Homes Cobram* [2013] FWCFB 431

[27] *Double N Equipment Hire Pty Ltd v Humphries* [2016] FWCFB 7206 at [16]-[17]

[28] Ms McMaster's text message to Ms Campbell sent at 2:33pm on 29 May 2024 (part of Ex A8)

[29] Ms Rawson's last shift in the Store was on 21 May 2024

[30] Ms McMaster's last shift in the Store was 20 May 2024

[31] *Ellawala v Australian Postal Corporation* Print S5109 at [36]

[32] *Enhance Systems Pty Ltd v Cox* PR910779 at [39]

[33] *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at [32]