DECISION

Fair Work Act 2009
s.365—General protections

Adam Rytenskild
v
Tabcorp Holdings Limited
(C2024/3721)

DEPUTY PRESIDENT BOYCE SYDNEY, 19 NOVEMBER 2024

Application to deal with contraventions involving dismissal – whether Application filed out of time (or more than 21 days after the Applicant's dismissal took effect) – Application not filed out of time - jurisdictional objection - whether there was a "dismissal" within the meaning of s.386(1)(b) of the Fair Work Act 2009 – whether Applicant was forced to resign – conduct of Respondent considered – whether absence procedural fairness and inability to obtain adequate legal advice relevant – focus is upon Respondent's conduct and effect of that conduct not necessarily matters of procedural fairness and inability to obtain legal advice - Applicant was forced to resign – Respondent's jurisdictional objection fails – Application made within jurisdiction.

Introduction

[1] Mr Adam Rytenskild (**Applicant**) has filed a general protections involving dismissal application (**Application**) under s.365 of the *Fair Work Act 2009* (**Act**). The Applicant alleges that he was dismissed by his former employer, Tabcorp Holdings Pty Ltd (**Tabcorp**), in contravention of Part 3-1 of the Act.

[2] Tabcorp has raised an objection that the Application has been filed out of time. Tabcorp also raises a jurisdictional objection to the Application, namely, that the Applicant voluntarily resigned from his employment with Tabcorp, and was not "dismissed".

[3] Whilst the Applicant accepts that he resigned, he says that he was forced to do so because of conduct, or a course of conduct, engaged in by Tabcorp, meaning that his resignation was a "dismissal" within the meaning of s.386(1)(b) of the Act. The Applicant also rejects any suggestion that his Application has been filed out of time, and says that his Application was filed within 21 days of the date that his dismissal took effect (as required by s.366(1)(a) of the Act).

[4] A hearing was conducted to resolve Tabcorp's objections. At the hearing, the Applicant was represented (with permission) by Mr *Kim Anderson,* of Counsel, instructed by Ms *Rebekah Giles,* Principal, Giles George lawyers, and Tabcorp was represented (with permission) by Ms

Vanja Bulut, of Counsel, instructed by Mr *Henry Skene*, Partner, Seyfarth Shaw Australia lawyers.

Tabcorp

[5] Tabcorp operates a portfolio of leading Australian brands across wagering, media and integrity services, with national scale and reach, together with complementary international wagering and broadcasting businesses. It is a major player in the Australian market, and one of the largest wagering companies in the world. It has been listed on the Australian Securities Exchange (**ASX**) since 1994, and has a market capitalisation in excess of $1.5 billion AUD.

[6] Tabcorp conducts its business in a highly regulated industry, with requirements to satisfy industry regulators in each of the jurisdictions in which it operates, and with its directors, officers, and key employees needing to constantly meet probity requirements. Accordingly, Tabcorp has committed to implementing and maintaining leading corporate governance practices, which it considers to be essential to the long-term sustainability of the company, including its ability to win and retain its gaming and other licences in the markets in which it operates.

Mr Rytenskild

[7] The Applicant is an experienced businessman and executive, and holds a Master of Business Administration (2004). He attended the 'Senior Executive Program' at the London Business School in 2013, and the Egon Zehnder Consulting 'Executive Breakthrough Program' in 2018.

[8] The Applicant was employed by Tabcorp for 24 years (since April 2000). For the 24 years that he was employed by Tabcorp, he holds an unblemished and exemplary service record. There is no evidence of any complaints or concerns being raised in respect of the Applicant's performance or conduct during his tenure with Tabcorp.

[9] Working his way up through Tabcorp's ranks, from June 2022 onwards, the Applicant was Tabcorp's Managing Director and Chief Executive Officer (**CEO**). As CEO, the Applicant reported directly to the Tabcorp Board, and was responsible for the day-to-day management of Tabcorp, as well as implementing Tabcorp's objectives, plans and budgets (as approved by the Board).

Factual findings

[10] On the basis of the evidence that was tendered at the hearing, and the cross-examination of the Applicant, I make the factual findings that follow in paragraphs [11] to [28] below.

[11] At 3:30pm on 13 March 2024, a Tabcorp Board Sub-Committee meeting (at which the Applicant was not present) occurred. Tabcorp's legal representative was present at this meeting.[1] During this meeting, the terms and conditions pertaining to the ending of the Applicant's employment contract (by way of termination or resignation) were discussed. Also discussed was a communications plan, including key messaging, with two ASX announcements

drafted based upon two alternative scenarios (the Applicant resigning, or Tabcorp terminating the Applicant's employment) for the full Tabcorp Board's consideration.[2]

[12] At around 8:00am on 14 March 2024, the Applicant attended upon Tabcorp's offices in Melbourne to set-up and prepare for prescheduled Board Sub-Committee meetings that day, the first to commence at 8:30am. I note that the Applicant resides in Sydney, New South Wales.

[13] Unbeknown to the Applicant, the full Tabcorp Board was also separately meeting at 8:00am at another location (a couple of blocks up the street), with its legal representative.[3] At this meeting, it was determined by the Tabcorp Board that the Applicant's employment with Tabcorp was to be brought to an end that day.[4] It was also determined that any unvested equity awards notionally payable to the Applicant upon his employment coming to an end would lapse or be forfeited, and that further work on progressing the (already commenced) communications plan and media response to the announcement of the Applicant's employment ending would continue (with final form documents ready to issue at or around 4pm). All Tabcorp Board Sub-Committee meetings previously scheduled for that day were to be cancelled, with the full Board 'formally' meeting again at 4:00pm.

[14] At 8:25am, unclear as to why no one had yet showed up for the first Board Sub-Committee meeting at Tabcorp's Melbourne offices, the Applicant enquired with a colleague as to what was happening. He was advised that Mr David Gallop (Tabcorp Board Member, and Chairman of the Tabcorp Remuneration Committee) had travel delays, and that the Board Sub-Committee meeting would be starting at 9:00am. Mr Gallop was not delayed. Rather, he was already in attendance at the full Tabcorp Board meeting just up the street.

[15] At 9:17am, the Applicant received a text message from Mr Bruce Akhurst (Tabcorp Chairman), asking him to meet at the offices of Korda Mentha (an advisory, consulting and investment business) at 11:00am that day (**11am Meeting**).[5] The Applicant's subsequent calls and texts to Mr Akhurst (seeking clarification as to the purpose of the 11am Meeting) went unanswered, as did his calls to Mr John Fitzgerald (Chief Legal and Risk Officer). There is no suggestion on the evidence that there were any issues with the telephones of Mr Akhurst or Mr Fitzgerald. I infer that their refusal or failure to communicate with the Applicant (or return the Applicant's calls or messages) was intentional, with the result that the Applicant was told absolutely nothing about the content or purpose of the 11am Meeting prior to its commencement.

[16] Upon attending Korda Mentha's offices, the Applicant saw Mr Fitzgerald, who looked "sheepish" (defined as, showing embarrassment from shame) and stated (what I interpret to be words to the effect of): "I'm sorry this has happened, I can't say anything further, see you upstairs".[6] I note that the Applicant would not be meeting at all with Mr Fitzgerald that day.

[17] The Applicant was then met by Mr Gallop, who had been waiting outside the lift exit for him on the meeting room floor. Mr Gallop led the Applicant to a meeting room at which Mr Akhurst and Ms Raelene Murphy (Tabcorp Director, Chair of the Tabcorp Audit Committee, and member of the Risk Compliance and Sustainability Committee, and the Nomination Committee) were present.

[18] The Applicant was advised first up that Tabcorp's lawyers were sitting in a separate room in the Korda Mentha building.[7]

[19] I summarise my findings as to the discussion that occurred at the 11am Meeting, as follows:

a) The Applicant was advised that sometime in August 2023 he was in a closed door (work) meeting with two male colleagues, being Mr Fitzgerald and Mr Joel Williams (Tabcorp Head of Regulatory),[8] at which he allegedly made an inappropriate comment about the female CEO of the Victorian Gambling and Casino Control Commission (**Allegation**).[9]

b) The Board had already investigated the Allegation, considered it substantiated, and had determined to terminate his employment immediately.

c) Despite denying the Allegation, the Applicant was advised that the Board considered there to be no other way forward, or that the Board had no option, but to terminate his employment.[10]

d) The Applicant was advised that there was now no time to discuss the Allegation further as there was an urgent need to disclose the Applicant's termination (including the general reason for his termination) to the ASX (and make it public).[11]

e) During the meeting, the Applicant noticed that Mr Gallop had a printed single page document face down on the desk. When the Applicant inquired as to whether the document was a termination letter, no one responded.

f) When Mr Akhurst asked the Applicant (words to the effect of): "What do you think we should do?", the Applicant responded by suggesting alternatives to his termination, such as a warning and/or a penalty, and/or him making a public statement about the Allegation, and/or him providing a personal apology to the CEO of the Victorian Gambling and Casino Control Commission. Mr Akhurst advised that none of these options would likely be acceptable to the Board.[12]

g) The Applicant then stated (words to the effect) of: "If you are going to terminate me, is it an option for me to resign?"

h) Mr Akhurst responded by stating that any decision as to the Applicant being able to resign was a matter for the full Tabcorp Board, who would need more time to confer about it. Mr Akhurst, Mr Gallop and Ms Murphy then got up and left the Applicant in the meeting room. Upon their return, they (or one of them) advised the Applicant that they had spoken to or convened with the full Tabcorp Board and Tabcorp's lawyers, and were prepared to allow him to resign, but they needed to know if he was indeed resigning by 3:00pm that day, otherwise the full Board would meet at 4:00pm and 'likely' terminate his employment. The Applicant's evidence (which I accept) is that throughout the 11am Meeting terms such as "likely" and "would" were used interchangeably by Mr Akhurst before the words "terminate you" or "terminate your employment".[13] It follows that for the purposes of this decision

nothing of any practical substance turns upon any asserted nuance between the phrases "likely terminate" and "will or would terminate" as it concerns any communications or interactions between the Applicant and Tabcorp (or Tabcorp Board members) on 14 March 2024. In this regard, I find that the core or essential message conveyed to the Applicant at the 11am Meeting was that his employment would be ending that day, one way or another.

i) The 11am Meeting finished at about 12:00pm (or lasted in total for about an hour, including a break).

[20] At 1:23pm, Mr Akhurst sent the Applicant an email confirming the Tabcorp Board's "two options" for him. Option One was resignation (6 months' notice), and Option Two was termination (with 12 months' notice, or without any notice at all). That email reads:

"Adam, attached is a letter which sets out our discussions this morning. As discussed, the board is convening at 4pm today to finalise the matter. You will see that the 2 options boil down to resignation - under which your contact provides for 6 months notice to be given and paid, or the alternatives of termination which require either no notice for summary dismissal or otherwise 12 months notice or payment in lieu.

I look forward to hearing back by 3pm as to your preferred option.

Bruce"[14]

[21] Attached to Mr Akhurst's email is a letter addressed to the Applicant, which reads:

"PERSONAL & CONFIDENTIAL
WITHOUT PREJUDICE

14 March 2024

Mr Adam Rytenskild
[address withheld]

Dear Adam,

Cessation of employment

As discussed with you today, the Board of Tabcorp Holdings Limited (**Tabcorp**) has recently become aware of an inappropriate and offensive comment made by you in the workplace.

As you know, Tabcorp expects that its leaders demonstrate its values at all times. The Board has received sufficient evidence to support the view that the conduct occurred. While we have taken into account that it was an apparent aberration on your part, the Board considers that this conduct was fundamentally inconsistent with our values and your obligations as an employee and exposes the company to substantial reputational

risk. Subject to hearing anything from you that changes this view, our position it that the conduct is inconsistent with you continuing to lead the company.

In these circumstances, the Board is evaluating whether it is appropriate to end your tenure as Chief Executive Officer with immediate effect, in which case, it will exercise its discretion that all unvested equity awards lapse or are forfeited (as applicable).

We understand that this decision has significant implications for you. Absent any additional information you can provide by 3.00pm that changes our position, the Board is likely to move to terminate your employment effective immediately on the above basis when it reconvenes at around 4.00pm today to further consider these matters.

We are prepared to allow you the opportunity to resign should you wish to do so. In this scenario:

- We would both acknowledge your conduct and agree that it is appropriate that you stand down with immediate effect;

- The termination of your employment would be characterised as a resignation;

- You must also immediately resign as a director of all relevant Tabcorp Group entities, failing which the Company Secretary will effect your resignation on your behalf;

- You would stand down from your role immediately and commence a two month period of garden leave during which you would not be required to attend the office, perform any duties or represent the company in any way, but would be available to deal with me and the Board to support transition pending appointment of a new CEO. The remainder of your 6 month notice period would be paid out in lieu; and

- Any unvested equity awards granted to you under the STI Plan and LTI Plan will immediately lapse or be forfeited (as applicable).

If you wish to take up this option, please confirm your resignation to me in writing before **3.00pm** today so that an announcement can be finalised on these terms and lodged with the ASX as soon as practicable. If you do not do so, and absent additional material information you can provide that changes our position, it is likely the Board will proceed to make a decision on termination of your employment in accordance with your contract and announce this to ASX. As you will appreciate, given the sensitive nature of this decision we are required to move as quickly as practicable.

On a personal note, I regret that your employment is ending in these circumstances and want to make sure that you have support available to you if needed. You may access our Employee Assistance Program on a confidential basis at 1800 808 374. Alternatively, please do not hesitate to contact me directly. As you will appreciate, we require that this matter be kept strictly confidential and not disclosed to anyone else internally or externally (other than legal advisers on an confidential basis).

Yours sincerely

[signature]
Bruce Akhurst
Chairman
Tabcorp Holdings Limited"[15]

[22] At 2:35pm the Applicant emailed Mr Akhurst advising that he had not been able to get any advice, and requesting that he be given until 12:00pm tomorrow (15 March 2024) to speak to someone.[16]

[23] At 3:04pm, Mr Akhurst replied to the Applicant's email request for more time, and advised the Applicant that he had until 4:00pm (only) that day to advise of his position.[17]

[24] Post the foregoing email from Mr Akhurst, at 3:28pm on 14 March 2024, the Applicant sent an email response to Mr Akhurst, which reads:

"That being the case I regrettably agree to resign.

Can I please have input into the comms as I have a family to consider.

Adam"[18]

[25] Post supplying his resignation, the Applicant was provided with the opportunity to include some words into the ASX Announcement that would be made by Tabcorp (if the full Board agreed to the Applicant's words). The Applicant did not see the ASX Announcement before it was issued, or have any collaborative input into its overall drafting.[19]

[26] Around 4:30pm on 14 March 2024, Tabcorp issued an ASX Announcement, which reads:

"14 March 2024

ASX Market Announcements
Australian Securities Exchange
20 Bridge Street Sydney NSW 2000

Managing Director and Chief Executive Officer to leave Tabcorp

Tabcorp Holdings Limited (**Tabcorp**) announced today that Adam Rytenskild has resigned and is stepping down as Managing Director and Chief Executive Officer (**MD & CEO)** of Tabcorp.

The Tabcorp Board became aware of inappropriate and offensive language used by Mr Rytenskild in the workplace. The Board considered the language to be inconsistent with Mr Rytenskild's continued leadership of the organisation and following discussion with the Board, Mr Rytenskild has tendered his resignation and will step down immediately.

> Mr Rytenskild will receive only the termination payments required by law and under his contract and will forfeit all his unvested short term incentive and long term incentive awards.
>
> Tabcorp expects its leaders to uphold company values at all times and will not hesitate to take action to uphold expected standards of conduct.
>
> To protect the privacy of those involved, Tabcorp does not intend to make any further comment in relation to the conduct.
>
> The Board has appointed Maritana Partners to commence a global search for a new MD & CEO.
>
> Mr Bruce Akhurst has agreed to take on additional duties as Executive Chairman with immediate effect (subject to any applicable regulatory approvals) while the search for a new MD & CEO is conducted. The material terms of Mr Akhurst's appointment are set out in the attached. Mr Akhurst's appointment as Executive Chairman is intended to continue until a permanent MD&CEO commences in the role.
>
> Tabcorp Chairman, Bruce Akhurst said:
>
> "The Board regrets that Mr Rytenskild's employment has ended in this way and acknowledges his commitment to Tabcorp's growth over more than two decades, including the last two years as MD & CEO and his contribution to the tranformation (sic) of the company.
>
> Today's change does not impact the strategic direction of the company. We have the depth and capability across the executive and the senior leadership team to continue our transformation.
>
> "We remain focused on executing our strategy at pace, transforming our competitiveness, growing market share, levelling the playing field for fees, taxes and regulation, and reshaping the business to deliver a more efficient and effective organisation. Tabcorp is on track to deliver this and create a growing and more valuable company for shareholders."
>
> Mr Adam Rytenskild said: "I don't recall making the alleged comment and it's not language I would usually use, but I have regrettably agreed to resign. Tabcorp has been an enormous part of my life for many years and I believe in the journey the company is on."
>
> This announcement was authorised for release by the Tabcorp Board."[20]

[27] The Applicant's requested words (unamended by Tabcorp) are contained in the second last paragraph of the foregoing ASX Announcement.[21]

[28] On 15 March 2024, the Applicant received a letter (signed by Mr Akhurst), which reads:

"PRIVATE & CONFIDENTIAL

15 March 2024

Mr Adam Rytenskild
[address withheld]

Dear Adam,

Cessation of employment: transition arrangements

We refer to your resignation provided to the Chairman of Tabcorp Holdings Limited (**Tabcorp** or **Company**) by email on 14 March 2024 and the Tabcorp Board's decision that you will step down immediately as Managing Director & Chief Executive Officer (**MD & CEO**).

As you are aware, your contract of employment requires that you provide the company with 6 months' notice of termination.

In the circumstances, the Company has decided to exercise its rights under the contract to implement the following transitional arrangement during the notice period:

- You will commence "garden leave" for a period that is presently intended to be 2 months (Transition Period).

- During the Transition Period, you will remain employed by the Company but you will be required not to attend company premises, not perform any duties (other than those expressly requested by the Executive Chairman in accordance with the below) and will not represent the Company in any capacity or hold yourself out as its MD & CEO.

- You should not have any contact with other employees or persons associated with your employment other than with the prior express permission of the Executive Chairman in writing.

- You will remain available during business hours to assist the Executive Chairman on request to provide debriefing or other assistance within your skills and experience. This may include a requirement to render assistance in relation to any investigation, claim or litigation which may affect the Company or and group entity during this period.

- You must immediately return to the Company all property belonging to the Company, its related entities, clients and employees, which is currently in your possession or control.

- You must not make any media or other public comment in relation to Company on any matter. You must not engage in any media activity including but not limited

to any interview, background pieces, or off the record discussions.

- Your employment obligations otherwise continue to apply in accordance with the contract, including without limitation your duty to act in the best interests of the company at all times and to comply with our lawful and reasonable directions. You are expressly on notice of your ongoing obligations not to use or disclose confidential information under your contract, the Corporations Act and the common law.

- You continue to be bound by the obligations in your Employment Contract dated 31 May 20022 [sic] that survive the termination of your employment and which continue to operate after the End Date in accordance with their terms – in particular, those obligations you have to the Company regarding confidentiality, intellectual property and your post-employment restraints on pages 9-10 and 18-20 of your Employment Contract.

You should also be aware that the Company may choose to alter these arrangements or to vary the Transition Period at any time in accordance with its rights under the contract. Further, that Board may decide to terminate your employment immediately if it becomes aware of any failure to comply with the above arrangements or the terms of your contract of employment.

At the conclusion of the Transition Period (or any variation of this period determined by the Company), your employment will end and you will be paid in lieu of the remainder of the notice period. You will also receive payment of any unpaid salary and accrued but untaken statutory leave entitlements, less applicable tax, calculated as at that date

The above payments will be made immediately after the conclusion of the Transition Period into the bank account into which you presently receive your salary payments. Please note that the termination payments set out above are subject to appropriate withholdings for taxes and superannuation.

All unvested equity awards granted to you under the STI Plan and the LTI Plan have lapsed or are forfeited.

We reiterate that we require that this matter be kept strictly confidential and not disclosed to anyone else internally or externally (other than legal advisers on a confidential basis). If you have any questions please direct them to me personally.

Yours sincerely

[signature]
Bruce Akhurst
Chairman
Tabcorp Holdings Limited"[22]

Interactions between lawyers

[29] From 27 March 2024, the lawyers for the Applicant and Tabcorp exchanged various pieces of open correspondence. In this regard, the Applicant's lawyers wrote to Tabcorp's lawyers, raising various concerns with Tabcorp's conduct, including:

a) the Tabcorp's Board's:

i) lack of transparency;

ii) unjustified non-disclosure practices;

iii) flawed decision-making rationale;

iv) underhanded and covert investigation processes; and

v) double standards, nepotism and hypocrisy (having regard to the past conduct of other Tabcorp Board members that has been (and remains), unaddressed, being conduct that is contrary to Tabcorp's stated values, virtues, and conduct standards);

b) breaches of contract;

c) breaches of statute (including breaches of Director's duties);

d) forced resignation (including a request for the Applicant to be permitted to withdraw his resignation); and

e) acting upon, or in furtherance of, defamatory conduct by a third party.[23]

[30] By way of response dated 4 April 2024, Tabcorp's lawyers, for the first time, advised that it was an informant (or asserted "protected whistle-blower") who lodged a hearsay complaint with Tabcorp about the Applicant, and planted the seed for an investigation. It was also explained that whilst the initial complaint from this informant was erroneous, the investigation into the complaint had determined that the Allegation (ultimately put to the Applicant on 14 March 2024) was sustained.[24]

[31] Tabcorp has not made submissions, or led any evidence, setting out how the informant (who made the initial complaint against the Applicant) squarely fits within the definition of an "eligible whistleblower" under Part 9.4AAA of the *Corporations Act 2001* (Cth) (or any other legislation), or the basis upon which the informant's complaint (or the Allegation born out of that hearsay complaint) fits within the definition of a "disclosure" that enlivens relevant whistleblower protections. This is in circumstances where the initial complaint and/or the Allegation, even if proven or otherwise sustained (wrongly) due to a *bona fide* mistake of fact, amount to no more than a one-off occurrence said in a private closed door work meeting.[25]

[32] Prior to the filing of the Application the subject of these proceedings, the Applicant's lawyers also raised with Tabcorp's lawyers various (what might best be described as) natural

justice and procedural unfairness concerns visited upon the Applicant by Tabcorp, both generally and specifically, in circumstances where the Applicant had not been:

a) advised of the specific circumstances in which Tabcorp (or an officer or employee of Tabcorp) was first approached by the informant, and who was first approached;

b) advised of the specific actions that the person or persons who first came into contact with the informant initially took, and exactly what occurred in the lead up to the commissioning of an investigation;

c) told the exact scope and parameters of the investigation, and why and in what circumstances such scope and parameters had been chosen, and whether the scope or nature of the investigation changed to a broader footing after it was confirmed that the informant's initial complaint was factually erroneous;

d) told the basis upon which the timeframe to deliver the investigation report was chosen by Tabcorp;

e) advised whether the informant was a "protected whistleblower" at the time they made their initial complaint, or was subsequently reclassified or recalibrated as a protected whistleblower for the purposes of the investigation;

f) involved in, or interviewed as part of, the investigation, or told why he had not been involved in, or interviewed as part of, the investigation;

g) advised as to why he had not been immediately stood down on pay by the Tabcorp Board pending the outcome of an investigation, but instead allowed to continue as normal in his CEO role whilst (unbeknown to him) the investigation was occurring (i.e. in circumstances where Tabcorp has chosen to label the initial information provided by the informant (and/or the Allegation itself) as so "serious" that it undoubtedly warranted his immediate termination);

h) provided with a copy of the investigation report, or a copy of witness statements or records of interview presumably relied upon in the investigation report;

i) told how the informant says that they received or were provided with the information that formed the substance of their complaint;

j) told whether the informant came across the information that formed the substance of their complaint via a mistake (e.g. a systems/process failure), or via an intentional 'leak' by a Tabcorp officer or employee (including a former and/or disgruntled employee of Tabcorp);

k) told exactly what the informant's initial complaint was;

l) told how long the informant took (after they became aware of the information that formed the substance of their complaint) before they decided to inform Tabcorp (or

a relevant officer or employee of Tabcorp) about same, and why they made their complaint at the specific time they did;

m) told the identity of the informant, and the informant's motives (or likely motives). For example, was the informant simply a good and conscientious citizen, or did they have other general or specific motivations?;

n) told the specifics of the assertion that the Allegation was about to be made public, and by whom, noting that the informant was only in possession of (or should have only been in possession of) their own erroneous information; and

o) told whether the Tabcorp Board was being pressured or "played" by the informant, that gave rise to a leadership meltdown and/or an unwillingness by the Tabcorp Board to do other than placate and appease the informant.[26]

[33] Tabcorp's lawyers responded to the matters raised by the Applicant's lawyers by way of denial, refusal, dismissal and/or justification, and advised that Tabcorp would not consent to the Applicant withdrawing his resignation and/or continuing to be employed by Tabcorp post 14 May 2024.[27]

'Dismissal' under ss.12, 365 and 386(1) of the Act

[34] Section 365 of the Act reads:

"Application for the FWC to deal with a dismissal dispute

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute."

[35] Aside from consent arbitration, the Commission's only role in a general protections involving dismissal application made under s.365 of the Act is to conduct a conference between the relevant parties (so as to assist them in attempting to resolve their dispute by agreement), or issue a certificate if a resolution is unable to be agreed (a certificate is a prerequisite to being able to progress a claim onto an eligible court for judicial determination). That said, the power to conduct such a conference and issue a certificate is provided for under the Act, and the Commission has no jurisdiction to conduct a conference, or issue a certificate post that conference (where resolution is unable to be reached), unless a 'valid' (or within jurisdiction) general protections involving dismissal application has been made. It is for the Commission to resolve any disputes or issues as to its jurisdiction in this regard for itself.[28]

[36] Consistent with case law, I agree that the meaning of the term "dismissed" under s.365(a) of the Act is to be defined in accordance with the meaning of that term under s.12 and s.386(1) of the Act, and the applicable case law authorities in respect of same.[29]

[37] Section 386(1) of the Act reads:

> "(1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

Terminated at the employer's initiative – s.386(1)(a) of the Act

[38] The phrase "terminated on the employer's initiative" under s.386(1)(a) of the Act is treated as a termination in which the action of the employer is the principal contributing factor (directly or consequentially) that leads to (or has the objective probable result of leading to) the termination of the employment relationship. That is, had the employer not taken the action that it did, the employee would have remained employed.[30]

[39] The Full Bench majority in *NSW Trains v James*[31] determined that the expression "*employment … has been terminated*" (in s.386(1)(a) of the Act) refers to termination of the employment relationship and/or termination of the contract of employment.[32]

[40] In *Quirk v Construction, Forestry, Maritime, Mining and Energy Union*[33] (**Quirk**), a decision by the Divisional Executive of a union to remove two employees from their elected positions, which consequently caused their employment to be terminated, was found to constitute a "dismissal" for the purposes of section 386(1)(a) of the Act. After pointing out that a termination will be at the employer's initiative if the act of the employer directly or consequentially results in termination,[34] Perram J stated:

> "218. The Applicants submitted that the act of the Divisional Executive in removing them from office under Rule 11 [of the union's rules] was the principal contributing factor to the termination of their employment. The [Divisional Executive] Respondents, on the other hand, denied that the employment relationship had been terminated at all. In their submission, what had in fact happened was that the employment relationship had ended by operation of law on their removal from office.
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> …
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> 221. I do not think that it can be doubted that the actions of the Divisional Executive are directly linked in a causal sense to the *ending* of the relationship of employment. The question which arises is whether it can be said in terms of s.386(1) that the *ending* of the employment relationship in that way falls within the expression 'has been terminated on [the Federal Union's, i.e. employer's] initiative'.

> 222. It is established that the use of the passive verb 'terminated' does not require the legal event which ends the relationship to be the employers. Thus in *Mohazab*, the employer accused the employee of the theft of an item of stock. It invited him to resign otherwise the police would be called in to investigate. The employee resigned. The question was whether the termination of the employment relationship was at the initiative of the employer. It was held, notwithstanding the fact that it was the employee who had brought the employment relationship to an end by resigning, that what had occurred was a termination of the employment at the initiative of the employer (and hence a dismissal). The correctness of this analysis was affirmed in a considered obiter dictum by the Full Court of this Court (Jessup, Tracey and Barker JJ) in *Mahony*[35] at [21].
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> 223. The question at hand is the meaning of the word 'terminated' in s.386(1). What that provision requires is two things: (a) an initiative of the employer; that (b) results in the termination of the employment relationship. The provision does not require the employer to pull the trigger but only to load the gun. In my view, the provision is expressed in such a way that it is agnostic as to the precise means by which the employment relationship comes to an end. Its focus is upon, however it might have ended, at whose initiative this occurred."[36]

Voluntary resignations, and Heat of the moment resignations

[41] In normal circumstances, where unequivocal words of resignation are used or conveyed by an employee, an employer is entitled to immediately acknowledge the resignation (without further question) and act (or move on) accordingly.[37] Where a contract provides for resignation on notice, and a resignation is provided on notice, there is no requirement for an employer to 'accept' the resignation before it takes effect, i.e. a contractual right to bring a contract to an end on notice is exercisable unilaterally.

[42] Once proffered, a resignation may not be withdrawn unilaterally by an employee; it may only be withdrawn with the mutual consent of the employer. In other words, a resignation cannot be proffered by an employee and then unilaterally withdrawn – the employer must always consent to its withdrawal.[38]

[43] A communication of a resignation may not be legally effective (and instead be a "dismissal" within the meaning of s.386(1)(a) of the Act) where the resignation is made by an employee in a state of stress (or in the heat of the moment), and acted upon by an employer without confirmation of the employee's intention within a reasonable time. [39]

'Forced' resignation – s.386(1)(b) of the Act

[44] Under s.386(1)(b) of the Act, a forced resignation essentially occurs where an employee has no other realistic choice but to resign. The onus is upon an employee to prove that their resignation was 'forced' by their employer.[40] In other words, an employee must be able to prove on the balance of probabilities that his or her employer took relevant action/s with the intent, or objectively probable result, of bringing the employment relationship to an end.[41] The fact that a resignation may have been foreseeable, or a reasonable response to the actions of an employer, is not the test. Rather, the focus is upon whether the employee's resignation was the

"objective"[42] probable result of his or her employer's action/s having regard to, or in light of, other avenues or options equally open or available to the employee (i.e. other than resignation).

[45] Where an employer raises an allegation of misconduct against an employee, without a clear indication that dismissal is likely, and provides an employee with time to prepare or consider their response, and the employee resigns prior to providing that response, or prior to an employer making a determination as to the misconduct and/or its consequences, this will ordinarily fall well short of being a 'forced' resignation.[43] Importantly, an employer engaging in or conducting an investigation, including a disciplinary investigation, is not of itself sufficient to 'force' an employee's resignation.[44]

[46] In relation to case law principles that apply when considering whether or not a resignation falls within s.386(1)(b) of the Act, the Full Bench of the Commission in *Bupa Aged Care Australia Pty Ltd v Tavassoli*[45] (**Bupa**) stated:

> "It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd*, that "The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the then Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No. 1)* and summarised by the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*" (footnotes omitted). The body of pre-FW Act decisions concerning "forced" resignations, including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen Pty Ltd (in Liq)*; *Ryan v ISS Integrated Facility Services Pty Ltd*; *Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust*."[46]

[47] In *Wray v Essential Personnel*[47], the Full Bench of the Australian Industrial Relations Commission (**AIRC**) stated:

> "No attack was made on Duncan DP's adoption of the principle crystallised in *Mohazab*. That principle is that for a resignation from employment to be conceived to be a termination of employment at the initiative of the employer, it is necessary that the act or conduct of the employer results directly or consequentially in the termination of the employment, and that the employment relationship is not voluntarily left by the employee. Notwithstanding the voluntary character of a resignation, the termination may be taken to be at the initiative of the employer if, had the employer not taken the action it did, the employee would have remained in the employment relationship, and if, because of the action or conduct of the employer, the employee had no effective or real choice but to resign."[48]

[48] In Doumit v ABB Engineering Construction Pty Ltd[49], the Full Bench of the AIRC stated:

> "Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the

employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination. The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary."[50]

[49] In Rheinberger v Huxley Marketing Pty Ltd[51], Justice Moore stated:

"However it is plain from these passages [in *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200] that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable result of the employer's conduct".[52]

[50] Whilst in *O'Meara v Stanley Works Pty Ltd*[53], the Full Bench of the AIRC stated:

"In our view the full statement of reasons in *Mohazab* which we have set out together with the further explanation by Moore J in *Rheinberger* and the decisions of Full Benches of this Commission in *Pawel* and *ABB Engineering* require that there... be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether "the act of the employer [resulted] directly or consequentially in the termination of the employment." Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in *Mohazab*. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign."[54]

[51] After examining in detail the case law underpinning s.386(1)(b) of the Act, the Full Bench of the Commission in *Bupa* stated:

> "A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s 386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probabl[e] result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element."[55]

[52] As to the issue of s.386(1)(a) or (b) of the Act encompassing the concept of "constructive dismissal" (essentially based upon the acceptance of repudiatory conduct) the Full Bench in *Bupa* said:

> "[49] We do not consider it is particularly helpful in applying s.386(1) to refer to the concept of "constructive dismissal" - an expression nowhere used in the FW Act. In saying this, we acknowledge that the expression has been used in a number of the authorities and also in the passage from the explanatory memorandum earlier quoted. However, as explained by Greg McCarry in his 1994 article "*Constructive Dismissal of Employment in Australia*", the concept of "constructive dismissal" in UK law was not a development of the common law, but rather a description of a statutory extension to the ordinary meaning of dismissal to encompass a situation where "the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct". That is a much wider concept than just "forced" dismissal and is conducive of confusion, as McCarry warned:
>
> > 'If the forced resignation is now to be regarded as a dismissal, at least under some statutes, then so be it. But it is not and should not be called a "constructive dismissal", nor should that term come to be regarded as a separate concept in its own right, as may be happening. To regard "dismissal" as including constructive dismissal without the aid of a definition of extension is reading a lot into a statute by English and Australian standards of statutory interpretation, although as we shall see American courts have had no trouble doing just that. Moreover, unnecessary or loose use of the phrase "constructive dismissal" brings with it the inevitable, and erroneous, tendency to draw on English judicial pronouncements and examples which arise in the quite different situation adverted to earlier. Given the way the extended definition in England is to be interpreted, all kinds of breaches of contract and repudiatory conduct, as determined by the common law rules, can legitimately come within the statutory extension. There are good reasons for arguing that similar definitions should be inserted into our statutes, but at the moment they are not there. So care is needed that decisions on the English regime are not misunderstood or misapplied.'
>
> [50] In the different statutory context of the NSW unfair dismissal scheme in the *Industrial Relations Act 1991*, a Full Bench of the Industrial Relations Commission similarly warned in *Allison v Bega Valley Council*, in relation to forced dismissal, that the term "constructive dismissal" could "deflect attention from the real inquiry ... Did the employer behave in such a way so as to render the employer's conduct the real and

> effective initiator of the termination of the contract of employment and was this so despite on the face of it the employee appears to have given his or her resignation?" In the current statutory context of s.386(1), the breadth of the concept of "constructive dismissal" may cause confusion and deflect attention away from whether a dismissal within the meaning of paragraph (a) or paragraph (b) is being considered. That occurred in this case."[56]

[53] The foregoing conclusion of the Full Bench is consistent with the principle that a finding as to a forced resignation under s.386(1)(b) of the Act need not necessarily involve a repudiation, or even a breach of contract. As was stated by Anderson DP in *Mariam Jarouche v Lipa Pharmaceuticals*[57] (upheld on appeal in *Lipa Pharmaceuticals v Mariam Jarouche*[58]):

> **"**Conduct or a course of conduct forcing a resignation is not required to be repudiatory or unlawful. It could, depending on the circumstances, simply be conduct such that, in an objective sense, it forced the employee's resignation."[59]

What date did the Applicant's employment with Tab come to an end?

[54] Consistent with the Full Bench decision in *Lipa Pharmaceuticals Ltd v Mariam Jarouche*[60], given that an out of time objection has been raised by Tabcorp, the first issue to be resolved in these proceedings is the date upon which the Applicant's employment with Tabcorp came to an end, i.e. the date upon which the ending of the Applicant's employment with Tabcorp "took effect" per s.366(1)(a) of the Act.[61] In short, an out of time objection needs to be resolved before moving on to resolve other types of objections, e.g. prior to resolving a jurisdictional objection as to whether or not an employee whose employment came to an 'end' occurred by way of dismissal (including forced resignation).[62]

[55] Section 366(1)(a) of the Act assumes that a dismissal has occurred. However, for the purposes of commencing the countdown to the 21 day statutory time limit, s.366(1)(a) asks when such a dismissal "took effect". The issue to be resolved under s.366(1)(a) is not focused upon when a dismissal was notified (which is of course important). Rather, the focus is upon when the dismissal (or purported dismissal) became operative (which may be a date subsequent to the date that an employee was first notified of their dismissal). For example, an employee that is dismissed on 1 May 2024 on one month's notice (that is worked out in time and not paid out in lieu) takes effect on 1 June 2024 (this date being the employee's last day of 'employment', which is one month after 1 May 2024). Conversely, if the same employee (dismissed on 1 May 2024 on one month's notice) is not required to work (or remain employed) during the one month notice period, and is instead paid out their notice in lieu, their dismissal will take effect on 1 May 2024 (because their last day of employment (or work/service) at the employer was 1 May 2024).[63]

[56] Another way of determining when a dismissal took effect is to resolve both when the relevant employment relationship came to an end, and when the relevant contract of employment came to an end. The employment relationship and the employment contract may well come to an end on different dates.[64] Where a constructive dismissal occurs, by way of repudiatory breach and the acceptance of same, the underlying employment contract between the parties is brought to an end. But the parties may well decide to continue the employment relationship under some form of agreed arrangement (or new contract) akin to, for example, a

notice period (i.e. whereby the employee continues to work for a further agreed period of time, or remains employed, but is placed on gardening leave for an agreed period of time). In such a case, the employment relationship will end (or its ending will have 'took effect') when the agreed extended period of employment ends, notwithstanding that the original employment contract came to an end because of the constructive dismissal.

[57] The Applicant's Application was filed on 4 June 2024, exactly 21 days after 14 May 2024.

[58] Tabcorp says that the Applicant's employment ended (and took effect) on the day that he resigned, i.e. 14 March 2024 (meaning that the Application has been filed out of time).[65] As I understand it, Tabcorp advances this contention on a counterfactual basis, such that if the Applicant's case is that he was forced to resign (and thus dismissed), such a dismissal is essentially a 'constructive dismissal', whereby well settled common law principles as to repudiation are to be applied.[66] In other words, the Applicant's forced resignation is an acceptance by him of Tabcorp's repudiatory conduct, meaning that his employment came to an end at the moment he accepted Tabcorp's repudiation (via resignation on 14 March 2024).

[59] In part of its reply submissions, Tabcorp also seeks to label and characterise the Applicant's resignation as an offer by Tabcorp to resign accepted by the Applicant,[67] that is said to take effect at the time of acceptance (i.e. 14 March 2024). Again, as I understand it, Tabcorp says that the Applicant's employment came to an end by way of agreement (i.e. the Applicant's acceptance of Tabcorp's resignation offer, as set out in the 14 March Letter).[68]

[60] The Applicant says that his employment came to an end (or took effect) on his last day of employment with Tabcorp, i.e. his employment continued during the initial two month period of notice whilst he was on paid gardening leave, and ended when he was paid out in lieu for the remainder of his notice period (4 months) on 14 May 2024. It follows that the Application in this case has not been filed out of time, but within 21 days after the Applicant's "dismissal [forced resignation] took effect" (s.366(1)(a)).

[61] It is not in dispute that the Applicant:

a) resigned from his employment with Tabcorp on 14 March 2024, and provided six months' notice (i.e. as required under the Applicant's employment contract with Tabcorp);[69] and

b) was placed on "gardening leave" for two months (from 14 March 2024) at Tabcorp's direction, with the Applicant's last day of gardening leave with Tabcorp being 14 May 2024. The remaining four months' notice period was then paid out in lieu to the Applicant, on or shortly after 14 May 2024. The Applicant's six months' notice period thus comprised of two months paid gardening leave, and four months payment in lieu of notice. The treatment of the Applicant's notice period by Tabcorp is wholly consistent with the terms of the Applicant's employment contract.[70]

[62] Tabcorp's submissions as to the time that the Applicant's dismissal took effect, based upon a constructive dismissal, are not only wholly counterfactual, but theoretical. Such submissions do not properly engage with a genuine analysis of the specific facts and

circumstances of this case, or the actual events that have happened. Further, the submissions mischaracterise the employment status of an employee directed by their employer to be on paid gardening leave.[71]

[63] In my view, Tabcorp's counterfactual contentions, based primarily upon the elementary laws of constructive dismissal (including repudiation), which ultimately assert that the Applicant's employment ended on the specific date of his 'forced resignation', are without foundation and wrong in this case.[72] The Applicant's employment ended with Tabcorp (or took effect) when the Applicant ceased to be an employee of Tabcorp, i.e. when his remaining notice period was paid out to him in lieu (14 May 2024).[73] This is confirmed by Tabcorp's own correspondence to the Applicant on 15 March 2024, which is in unambiguous terms.[74] The Applicant's written and oral submissions on this issue properly encapsulate the application of the correct legal principles to the facts of this case, including as to an asserted repudiation (or acceptance of same) not necessarily ending the employment relationship as at the specific time that acceptance of repudiatory conduct occurs.[75]

[64] As to Tabcorp's contention that the Applicant's employment ended by way of agreement (offer and acceptance), I do not understand it to be seriously pressed as a matter that, even on a counterfactual basis, is determinative of the date that the ending of the Applicant's employment "took effect".[76] However, to the extent that it is pressed, it again fails to engage with the actual events that have happened, or the specific facts and circumstances of this case. Relevantly, the witness statement and related documentary evidence identifies that after tendering his resignation, the Applicant was placed on a period of "gardening leave", whereby his employment would continue until 14 May 2024. There is no support at law for the submission that because an employee is placed upon a paid period of gardening leave, and not required to work (or attend the workplace) unless advised otherwise, the employment relationship comes to an end. Rather, the core purpose of an employee being placed upon gardening leave is to keep them employed, and thus ensure that the employee continues to be required to follow an employer's reasonable and lawful directions (e.g. stay home, do not make public comment, do not interact with staff), and also remains bound by the full suite of contractual and equitable obligations that apply during an employment relationship, that do not continue once the employment relationship has ended.[77]

[65] I find that the Applicant's employment (under the employment relationship and/or the employment contract) with Tabcorp came to an end (or took effect) on 14 May 2024, and that the Application has not been filed out of time. It is now necessary to determine whether a "dismissal" for the purposes of s.386(1)(b) of the Act has occurred.

Tabcorp's Submissions – Forced resignation

[66] Tabcorp made the following written[78] and oral submissions:

a) The Applicant's resignation is in writing and has been made in unambiguous terms. Tabcorp was entitled to accept it, or act on the basis that it was both voluntary and operative, which it did.

b) Tabcorp did not request, suggest, excite, proffer or encourage the Applicant to resign (directly or indirectly). Indeed, it was the Applicant himself that first raised the

option of resignation. No ultimatum, such as resign or be sacked, was ever put by Tabcorp to the Applicant.

c) The choice or option to resign was one that Tabcorp particularised to the Applicant (prior to him making his decision) by reference to, and consistent with, the terms of the Applicant's employment contract (i.e. six months' notice to be provided, stand down on pay (gardening leave) for two months (with handover assistance to be provided if or when required), and the remaining four months of the notice period paid in lieu).

d) By reference to the ordinary meaning of the word "forced",[79] the important element of 'compulsion', required to be present under s.386(1)(b) of the Act when an employee is forced to resign, is not present in this case. The Applicant has not pointed to any specific element of compulsion, or negation of choice, such that Tabcorp can be said to have brought about his resignation (or caused him to resign).

e) Even if an employee voluntarily resigns on notice, an employer may still summarily dismiss the employee during such notice period. In other words, notwithstanding that the Applicant resigned on notice which did not require acceptance by Tabcorp, Tabcorp might still have exercised its rights under the employment contract to summarily dismiss him post the receipt of his resignation, but did not do so. As I understand it, Tabcorp seeks to make the point here that because Tabcorp was content for the Applicant to resign on notice (as an alternative to summary dismissal with or without notice), the Applicant's resignation was a free choice of his, or a voluntary option that the Applicant exercised absent compulsion by Tabcorp (i.e. in circumstances where Tabcorp had free reign to simply dismiss the Applicant at any time pre or post his resignation, but did not do so).

f) Tabcorp accepts that what was conveyed to the Applicant on 14 March 2024 was that it was likely he would be dismissed at the full Tabcorp Board meeting (at 4:00pm) that day. But the Applicant (wrongly) takes this fact one step further and says that because the likely outcome of the full Tabcorp Board meeting was dismissal, the Applicant's resignation must have been forced.

g) The decision (or choice) by the Applicant to voluntarily resign was not one just of form, but also substance. He weighed up both the financial implications, and his own personal reputational risks, before he made his decision to resign. For the Applicant, a public resignation had a particular inference or message to it, that he determined he wanted to embrace. This was especially so given the nature of his role as the CEO of a multi-billion dollar company, and his future job prospects in like or similar roles.

h) Prior to resigning, the Applicant sought no clarification from Mr Akhurst in respect of the 1:23pm email or the 14 March Letter (set out at paragraphs [20] and [21] of this decision). If the Applicant was confused or unclear about anything in Mr Akhurst's email or letter, all he had to do was ask for clarification, but he never did so.

i) Whilst the Applicant did not have a copy of his employment contract in front of him on 14 March 2024, he never asked for a copy. Further, the Applicant did not need to actually read his employment contract prior to making his decision to resign as Mr Akhurst's 1:23pm email and 14 March Letter explains the Applicant's contractual position to him anyway.

j) The Tabcorp Board was upfront and frank with the Applicant about what they considered to be the likely outcome of their 4:00pm meeting, and their need to act so as to comply with ASX requirements and market obligations. They remained open (or stayed listening) to the Applicant's suggestions, and responded in clear terms when rejecting his alternative proposals to the sanction of dismissal.

k) The Applicant is an experienced and sophisticated businessman, with knowledge of the workings and decision-making processes of the Tabcorp Board, and the ASX rules. These attributes highlight that the Applicant was an individual capable of making a reasonable and rational decision to resign in the circumstances that he found himself in. He had the benefit of talking to his wife and his friend about his options, and getting their view on whether or not he should resign, as well as the implications of him doing so, over a period of some four hours. He had the opportunity to speak to anyone he wanted to during this four hour period, and get legal advice, and he did speak to a lawyer before he resigned (albeit the evidence does not disclose what advice he got, or if he got any advice at all). There is no case law that supports the proposition that because someone who resigns does not get legal advice, or did not have the opportunity to obtain legal advice, their resignation is forced.

l) The fact that the Tabcorp Board prepared two ASX announcements on 13 March 2024 (being the day before the 11am Meeting on 14 March 2024) does not support an inference that Tabcorp would be seeking to induce (force) the Applicant to resign on 14 March 2024. Rather, Tabcorp was simply preparing itself for two possible scenarios, termination or resignation.[80]

Applicant's Submissions – Forced resignation

[67] The Applicant made the following written[81] and oral submissions:

a) Having regard to the evidence before the Commission, the irreducible facts are these:

i) on 14 March 2024, the Applicant was summoned to an unscheduled meeting, and confronted by Tabcorp, without any prior notice whatsoever, with the Allegation;

ii) despite the Applicant's denial of the Allegation, in express terms, as well as by reference to his recollection, and without providing the Applicant with any meaningful opportunity to question the basis for the Allegation, or marshal material that might rebut the Allegation, and despite explicitly acknowledging the Applicant's outstanding performance in his role, Tabcorp expressly indicated

to the Applicant that, in the absence of his resignation, it would be terminating his employment at a Tabcorp Board meeting at 4:00pm that afternoon; and

iii) resignation, or termination, were both expressly presented to the Applicant as the only two options available to him with no indication of any other outcome in which the Applicant might continue in an employment relationship with Tabcorp.[82]

b) The Applicant's choice between the two options (resignation or dismissal) on 14 March 2024 was subject to an arbitrary time limit (set by Tabcorp) of "before 4pm" (noting the original 3pm deadline, was extended). The Applicant's request for further time to consider his position, until 12pm the next day (15 March 2024), was refused by Tabcorp.

c) In the circumstances confronting the Applicant, the submission by Tabcorp that it was essentially taken by surprise, or had not previously contemplated, that a resignation may come into play in the scenario that the Applicant was being confronted with, is contrary to the evidence. Tabcorp had calculated, gamed out and strategically prepared for the potential for two different outcomes on 14 March 2024, both resulting in the Applicant's employment coming to an end (see the minutes of the Tabcorp Board Sub-Committee meeting on 13 March 2024).[83]

d) The ending of the Applicant's employment was not a 'likely' or probable outcome on 14 March 2024, it was a "practical certainty". The Applicant's evidence is clear as to what Mr Akhurst said to him on 14 March 2024 (noting that the Applicant was the only witness who gave evidence at the hearing that was actually present at the 11am Meeting). The Applicant's evidence as to Mr Akhurst's language at the 11am Meeting on 14 March 2024 is that Mr Akhurst's words switched between words to the effect that the Applicant "will be terminated that day", or "will 'likely' be terminated that day". Occasionally throwing the cursory word 'likely' into the conversation at the 11am Meeting does not create some sort of "panacea" that detracts from the practical reality of what, as a matter of fact, actually happened.

e) The same point is to be made in relation to the qualifying words put to the Applicant after he was first notified of the Allegation at the 11am Meeting on 14 March 2024, i.e. 'Subject to any response or anything else you might want to say by 3pm'. The practical reality is that, in such a small timeframe or window, all that the Applicant could do was deny the Allegation. Mr Akhurst indicated early on that a denial was not going to change anything. The evidence before the Commission as to the 11am Meeting is that an investigation had been conducted and completed (absent any involvement or input from the Applicant), and that the findings of this investigation had been accepted (or adopted) by the whole of the Tabcorp Board. This is not a case where an employee has been confronted by an allegation of misconduct, with the outcome of any finding as to misconduct one of a number of possibilities (i.e. the only outcome on 14 March 2024 was always going to be the Applicant's employment coming to an end).

f) Mr Akhurst's email of 1:23pm on 14 March 2024 only sets out the contractual parameters of the Applicant's employment coming to an end. It gives no indication of the Tabcorp Board's position on whether or not any notice is intended to, or will, be paid to the Applicant if he is dismissed by Tabcorp. It is hardly unreasonable for a person in the Applicant's position to be confused and unclear as to whether his dismissal might or might not contain a notice period.

g) The Tabcorp Board minutes of 13 and 14 March 2024 both identify that the cessation of the Applicant's employment would occur (or was inevitable) on 14 March 2024.

h) The contention that a forced resignation will not occur where an employee weighs up their options is not supported by case law. The focus is upon the nature of the options available to be weighed, not the mere fact that the employee considered such options.[84]

i) A resignation will not cease to be a forced resignation because an employee has two options to choose from (i.e. termination or resignation). Further, and more importantly and relevantly, a forced resignation will occur where the employee has only been given two options, and is forced to choose one of them, i.e. Do you want us to terminate you, or do you want to resign instead?

j) There is no suggestion on the evidence that the Applicant ever wanted to leave his employment with Tabcorp, or have it brought to an end. That said, all the discussions (or negotiations) on 14 March 2024 went 'solely' to that end. The evidence fails to support any kind of counterfactual possibility that would give rise to the Applicant's employment not ending on 14 March 2024.

k) The Tabcorp Board minutes of 13 and 14 March 2024 both identify that the cessation of the Applicant's employment would occur (or would inevitably occur) on 14 March 2024.

l) Simply because an employee may have a choice as to monetary outcomes prior to resigning does not mean that their resignation will not be forced.[85]

m) If the ordinary (and proper) legal tests are applied to Tabcorp's conduct in this case, it leads inexorably to the conclusion that Tabcorp forced the Applicant to resign. One starts with the clear intention by Tabcorp to end the Applicant's employment (including as reflected in Tabcorp's Board minutes), and then follows on with the conduct engaged in by Tabcorp to bring the Applicant's employment to an end. No option presented to the Applicant by Tabcorp gave rise to anything other than the Applicant's employment coming to an end, with the only two options presented to the Applicant, dismissal or resignation, producing that result.[86]

Consideration – Was the Applicant 'forced' to resign ("dismissed") by Tabcorp?

[68] The substantive issue to be resolved in this case is whether or not, in the events that have happened, the Applicant was forced to resign because Tabcorp engaged in conduct with the intention of bringing the Applicant's employment to an end, or because of conduct, or a course

of conduct, engaged in by Tabcorp, such that the Applicant had no effective or real choice but to resign.[87] In this regard, the focus is upon Tabcorp's conduct, i.e. as that conduct concerns or weaves into the events leading up to the time that the Applicant tendered his resignation on 14 March 2024.

[69] Before resolving the question as to whether or not the Applicant was forced to resign in the facts and circumstances of this case, it is appropriate to note that I found the Applicant to be a truthful and credible witness. The findings of fact that I have made in this decision rely in part upon the Applicant's witness statement evidence, and the answers he gave to questions during cross-examination, which I consider to be consistent with the contemporaneous documentary evidence.[88]

[70] At 11:00am on 14 March 2024 the Applicant attended a meeting at which three other Tabcorp Board members blindsided him with the Allegation.[89] He was asked to respond to the Allegation there and then, or within very short compass thereafter. Further, whilst the Applicant was asked to respond to the Allegation, he was told that the Allegation was already considered by the full Tabcorp Board to have been substantiated. It is also the case that the full Tabcorp Board had already determined that the Applicant's employment would not be continuing with Tabcorp in any capacity.[90] The short point is that the Tabcorp Board had determined prior to the 11am Meeting that the Applicant was (for want of a better term) 'guilty', with the reference in the Tabcorp Board meeting minutes to "subject to speaking with [the Applicant] and any additional new material information he may provide" reflective of the Applicant being offered an opportunity to appeal or overturn his guilt, but only to the extent that he might be able to do so with 'new' and 'material' information, in circumstances where the Applicant had not even sighted the investigation report that had concluded him culpable.

[71] Tabcorp correctly points out that the Applicant had no 'right' to procedural fairness, or legal advice/representation, prior to Tabcorp exercising its contractual rights to terminate his employment.[91] However, Tabcorp's case is that it did not exercise its contractual right to terminate the Applicant's employment. It follows that the issue before me does not require a finding, or involve a determination as to whether or not, for example, a breach of contract, or an absence of procedural fairness or natural justice, leading to the Applicant's resignation, or in effecting the Applicant's termination, has occurred. Rather, the issue before me concerns whether or not the conduct of Tabcorp, or a course of conduct engaged in by Tabcorp, forced the Applicant to resign (i.e. bringing an end to his otherwise on-going employment relationship with Tabcorp).[92] Such conduct may or may not be unfair or unjust, but that is beside the point. It is the conduct itself, and the effect of that conduct, in all of the circumstances of the case, that is the focus, i.e. not how such conduct might be categorised or labelled, or whether or not it involves a breach of contract, or the denial of a right.

[72] The Applicant's ability to respond to the Allegation at the 11am Meeting (or shortly thereafter) was severely constrained. In this regard, the manner in which Tabcorp put the Allegation to the Applicant intentionally channelled the focus to what Tabcorp framed as a singular strict liability issue, i.e. Did you, or did you not, say certain words at a private closed door work meeting attended by two other male work colleagues some six months ago? But simply focusing upon that answer detracted from the Applicant's ability to properly respond to an Allegation that concerns a much broader issue, i.e. the ending of the Applicant's 24 years of employment based upon a one off asserted breach of corporate 'values'. From the Applicant's

perspective, this was never a zero sum situation that boiled down to his response to a single question.[93]

[73] It is also appropriate to identify that the Tabcorp Board members who attended the 11am Meeting were only in attendance to put the Allegation to the Applicant, advise him that the full Board considered the Allegation substantiated, and find out if the Applicant had any new and material information to provide. In other words, the Tabcorp Board members in attendance were there as a go between or buffer, essentially running an errand for the full Tabcorp Board, and had no authority (there and then) to make decisions, or enter into direct discussions or negotiations around alternatives to the cessation of the Applicant's employment with Tabcorp. In my view, it is an approach designed and structured to be off-putting to the person on the receiving end (in this case the Applicant), who never gets to engage directly with the decision-maker/s, leaves maximum flexibility for the decision-maker/s to pivot from one position to another, and removes any requirement for the decision-maker/s to have to explain or justify on a face to face or other basis the position that they have adopted.

[74] At the time that the Applicant was formally advised that he had two options, resign or be terminated, it was 1:23pm. He was thus provided with only two hours to make his choice. Again, his choice was one of only two options, resign or be terminated.[94] Despite requesting that he be given another 24 hours to consider his response or make his choice, this was rejected.[95] Tabcorp advances its 'rush, rush, rush' approach by reference (in part) to:

a) its continuous disclosure obligations to the ASX; and

b) an apparent threat or concern that the Allegation was very 'shortly' about to be made public.

[75] Tabcorp's evidence and submissions are not clear as to, or do not engage with, what Tabcorp's continuous disclosure obligations to the ASX actually were, or otherwise entailed. For example:

a) was Tabcorp required to notify the ASX (or issue a statement to the ASX) on or about 29 February 2024, when it says that it first become aware of a serious allegation as it concerns the on-going tenure of its CEO;

b) could Tabcorp have issued a holding statement at some point during the period 29 February to 14 March 2024, notifying the ASX that it had become aware of a serious allegation as it concerns the on-going tenure of its CEO, was or would be investigating the allegation, or had investigated the allegation, and would be making a further announcement in that regard by 4pm on 15 March 2024;

c) further to (b), why did Tabcorp's continuous disclosure obligations require Tabcorp to make a 'definite decision' as to the Applicant's tenure as the CEO on 14 March 2024, and not the day after, or the day after that (again, post the issuing of a holding statement, or otherwise).

[76] Tabcorp's evidence is equally unclear as to whether or not there was an actual or specific threat from an individual (including the informant), or an organisation, to make the Allegation

public, or if it was just a prediction or theory based upon unverified and unparticularised reports of scuttlebutt and gossip.

[77] What I conclude from the evidence that is before me is that the strict and limited timeframe that was adopted by the Tabcorp Board did not 'necessarily' flow from its continuous disclosure obligations to ASX, or because of the imminent likelihood of public disclosure, but because the Tabcorp Board had consciously and strategically determined that it was going to act, and (more importantly) wanted to be seen to act, quickly and conclusively. That said, whatever the reason for the strict and limited timeframe imposed upon the Applicant by Tabcorp, and whatever way it might be said to be justified, the application of this strict and limited timeframe forms part of the conduct, or the course of conduct, that objectively weighs against a finding that the Applicant voluntarily determined (without pressure or compulsion) to resign.[96]

[78] The Applicant was extensively cross-examined as to what he did post the 11am Meeting, and prior to submitting his resignation. However, I do not consider the evidence arising from that cross-examination to be particularly helpful, or otherwise directly determinative of the ultimate issue in these proceedings (as to forced resignation) for two reasons. Firstly, the focus is upon Tabcorp's conduct, and secondly, the content of the Applicant's text messages and phone calls identify no more than he was at all times playing only with the cards that he had been dealt with by Tabcorp.

[79] Both during cross-examination, and in its submissions, Tabcorp contended that because the Applicant was an experienced and sophisticated businessman, he was in a better position than an unsophisticated employee, to make his choice as to resignation on an informed basis. It was further said by Tabcorp that because the Applicant was able to communicate with his wife (by all accounts, a senior, experienced and accomplished human resources professional and businesswoman in her own right), that he had yet a further 'edge' (on the ordinary person without that kind of wife or partner) in respect of his ability to make an informed choice to resign on short notice. In my view, none of these submissions are relevant. The Applicant is no doubt an experienced and sophisticated businessman, but from the Applicant's perspective, this was not a business deal, and he is not an employment lawyer. The Tabcorp Board, not content to rely upon their own collective inhouse business acumen and inhouse lawyer, engaged not one, but two, top tier law firms to advise them. Further, the fact that a man might speak to his wife about the cessation of his employment, and/or obtain her advice as a 'wife' in the context of their family unit, is unextraordinary.[97]

[80] Whatever the Applicant's business experience might have been, Tabcorp was intentionally ambiguous as to what the Applicant, if he did not resign, would receive upon termination. As Mr Akhurst's email of 1:23pm states, if the Applicant did not choose to resign, he may receive (at Tabcorp's discretion, to be decided at the 4pm full Tabcorp Board meeting) "either no notice for summary dismissal or otherwise 12 months notice or payment in lieu". Unexplained in Tabcorp's evidence is the reason for it not being upfront with the Applicant as to what notice (if any) he would receive upon termination. It is an approach designed to create uncertainty, with the Applicant's evidence that he was confused and uncertain as to the position or outcome in terms of what he would receive if he did not resign well founded. Indeed, it seems incredulous that Tabcorp, being advised by two law firms, and conducting meetings to resolve that the Applicant would not be receiving his unvested short term incentive and long

term incentive awards, could not be clear, precise and upfront with the Applicant at the 11am Meeting, or at any time prior to 4pm on 14 March 2024, as to whether or not the Applicant would be terminated with or without his contractual notice period.

[81] The ambiguity around the termination notice period, stands in contrast to the question raised at the 11am Meeting as to whether or not the full Tabcorp Board would permit (or allow) the Applicant to resign. Indeed, Mr Akhurst, Mr Gallop and Ms Murphy left the 11am Meeting to apparently confer with the full Tabcorp Board as to whether or not the full Board would permit the Applicant to resign. When they returned, presumably having conferred with the full Board, they advised that the Applicant would be permitted to resign.[98] The short point being, if Mr Akhurst, Mr Gallop and Ms Murphy were indeed able to confer with the full Board on the issue of whether or not the Applicant would be permitted to resign, why did the Applicant have to wait until 4pm (apparently so that the full Board could meet and decide) to find out if he was going to receive a notice period. In my view, the only way to describe the situation on the evidence before me is that of 'smoke and mirrors'.

[82] When the Applicant submitted his resignation, by way of email at 3:28pm on 14 March 2024, the following facts and circumstances were in play:

a) without prior notice, the Applicant's normal work schedule that day had been cancelled, and he was directed to attend a meeting at another office location to which he was not advised as to its purpose or content;

b) at the meeting (the 11am Meeting) the Applicant was advised that (in short, or in summary):

   i) Tabcorp's lawyers were in the building, supporting Tabcorp;

   ii) a serious (in Tabcorp's view) allegation had been made against him;

   iii) the Allegation had already been investigated by or on behalf of Tabcorp, with findings made;

   iv) there was no (real) time to discuss the Allegation, or provide any further information around, or arising from, the investigation into the Allegation, or the investigation findings;

   v) the Tabcorp Board (collectively) considered the Allegation to be substantiated, and the Applicant's denial of the Allegation, and/or his inability to recall saying the words that form the basis of the Allegation, was not considered by Tabcorp to be new or material information such that the Applicant's culpability was to be doubted or reversed;

   vi) the Tabcorp Board (collectively) had already taken the position that the Applicant's employment with Tabcorp could not, and would not, be continuing past 4pm that day;

vii) Tabcorp wanted the Applicant's employment to be at an end by 4pm that day as it would shortly thereafter be making a statement to the ASX that the Applicant's tenure as CEO had ended;

viii) options or alternatives, to the Applicant's employment coming to an end at 4pm that day, were not going to be acceptable, let alone up for further exploration;

ix) the full Tabcorp Board may allow the Applicant to resign, subject to advice from its lawyers, but if this 'resignation option" (or choice) was to be put on the table, there could be no mucking around (i.e. the Applicant would need to make a final decision as to his resignation very quickly, and if he did not resign, there is no reason as to why the Tabcorp Board would not be terminating his employment at 4pm, and he may receive contractual notice, or he may not).

c) Unlike the Tabcorp Board, the Applicant was thoroughly unprepared for the situation that confronted him. Left to his own devices, he made a few telephone calls, but essentially found himself reaching out and touching nothing. The reality was that even if he was in a position to engage a lawyer, he did not have a copy of his employment contract, and knew nothing about the investigation report that Tabcorp was holding tightly in its possession. In any event, no prudent lawyer would be in a position to adequately advise their client over the telephone as to their rights, strategy, or prospects in such circumstances. Realistically, the only sound legal advice to be provided would be to ask for more time, which the Applicant did, but his request was rejected.

d) It was also apparent to the Applicant that the Tabcorp Board would not be satisfied with simply terminating his employment for purported serious misconduct. In other words, the Tabcorp Board would also be seeking to occupy the moral high ground, publicly framing or casting their decision to terminate the Applicant's employment as an example of the Tabcorp Board's unapologetic leadership style, and a feather in the cap to Tabcorp's corporate governance credentials. Understandably, having denied the Allegation, the Applicant was anxious and concerned in relation to his own reputation, and that of his family. In this regard, I accept the Applicant's evidence that his concerns about his reputation, and how Tabcorp was going to frame the ending of his employment publicly, placed significant pressure on him, and impacted his ability to think clearly and resolutely on 14 March 2024, including to the extent that he was asked to respond to the Allegation on no (or very short) notice, and to the extent that he was being asked to make a quick decision as to his resignation.

[83] I concur with Mr *Anderson's* submission (on behalf of the Applicant) that the so-called 'choice' that the Applicant was provided with by Tabcorp at 1:23pm on 14 March 2024 (resign, or be terminated) is appropriately characterised as a "Hobson's Choice" (i.e. a choice that on its face is a 'free' or voluntary choice, but in reality is merely the illusion that a choice exists). Such a choice might also be labelled as a "Morton's Fork" (i.e. a false choice between two different options, with each option having the same equally undesirable outcome), or be said to

be consistent with the idiom "all roads lead to Rome" (i.e. there being multiple ways to achieve the same outcome, in this case, the ending of the Applicant's employment).

[84] Contrary to Tabcorp's submissions, I do not accept that there is an evidentiary foundation to support a finding that:

a) the ending of the Applicant's employment by Tabcorp on 14 March 2024 was something other than a forgone conclusion that day; or

b) the two options put to the Applicant represented something other than an 'ultimatum' (being a final demand or proposition for something to be done, the rejection of which will result in a breakdown in relations or other repercussion).

[85] The evidence is clear that both of the options (or choices) put to the Applicant on 14 March 2024 were a means to the same end. As Mr *Anderson* submitted, there was no scenario or option put to the Applicant by Tabcorp that would result in his continued employment with Tabcorp post 4pm on 14 March 2024.

[86] In its submissions, Tabcorp repeatedly made reference to the case of *Jodie Moore v Woolworths Group Limited*[99] (**Moore**), a decision of Lake DP, whilst at the same time acknowledging the trite proposition that each case turns upon its own facts and circumstances. The facts in *Moore* are not the facts of this case.[100] It follows that the outcome of the case in *Moore* is but one of a litany cases dealing with an allegation of forced resignation.

[87] Having regard to the objective evidence, the submissions of the parties, and the factual findings that I have set out throughout this decision, I make the following two ultimate findings:

a) *Firstly*, the minutes of the Tabcorp Board meetings on 13 and 14 March 2024 identify that Tabcorp had determined (and intended) to bring the Applicant's employment to an end by 4pm on 14 March 2024 (whether that end was to occur by way of termination, or the Applicant's resignation). Whilst there would be a carefully stage managed 'process' between 11am and 4pm to bring the Applicant's employment to a conclusion so that an AXS statement (press release) could say that the Applicant had been spoken to and asked for his response to the Allegation, no one at Tabcorp was drafting ASX statements to the effect that the Applicant would be continuing in his employment with Tabcorp after 14 March 2024. I note that the issue of 'intention' is not about an intention to have an employee 'resign', it is the intention to bring about the end of the employment, a resignation simply being the by-product or outcome of that intention.

b) *Secondly*, Tabcorp's conduct on 14 March 2024 leads to the inescapable conclusion that such conduct caused, resulted directly or consequentially in, or had the objective probable result of, the termination of the Applicant's employment, and that the Applicant did not voluntarily resign, or have any real or effective choice but to resign, and in the overall circumstances was forced (or compelled) to so resign. Such conduct consists of Tabcorp:

i) without prior notice, cancelling the Applicant's work schedule on 14 March 2024, and directing him to attend a meeting that day at 11am, without advising him what the meeting was about, and refusing to communicate with him prior to the 11am meeting;

ii) verbally confronting the Applicant with the Allegation at the 11am Meeting (absent any foundational documentation to support it), and framing the issue arising from the Allegation as simply an answer to a strict liability question;

iii) advising the Applicant that the Allegation was serious, already considered substantiated, and that Tabcorp had lawyers in the building to advise and support Tabcorp;

iv) rejecting all alternatives to the Applicant's employment being brought to an end that day, and making it clear that the Applicant would be terminated if he did not resign;

v) providing the Applicant with an option to resign, but placing a short and strict timeframe for him to make that decision, and refusing to extend the timeframe to make a decision (and/or come up with new and material information) beyond 4pm that day;

vi) telling the Applicant that Tabcorp had determined to make the fact that the Allegation had been reported to it public at 4pm that day via an ASX statement, and that when doing so would be detailing that the Applicant had been terminated or resigned, putting into play potentially significant reputational risk and uncertainty for the Applicant, and necessitating him to guess and hypothesise as to whether it might 'look better' if I just resign. In this regard, the 14 March Letter includes statements such as "We would both acknowledge your conduct and agree that it is appropriate that you stand down with immediate effect" and "The termination of your employment would be characterised as a resignation";

vii) being ambiguous as to whether or not the Applicant was to be terminated without notice (or payment in lieu), creating a financial incentive for the Applicant to resign on the basis that he would at least get the benefit of a resignation notice period (as opposed to potentially no notice period) if he chose to resign. The practical reality here being that the Applicant's employment would be ending that day in any event, and Tabcorp, through its offer to the Applicant to resign on notice:

- was simply putting forward monetary terms for the Applicant's inevitable departure (i.e. labelled as a resignation notice payment); and

- linking such monetary terms to conditions that would enable Tabcorp to continue to have the Applicant subject to its reasonable and lawful directions for another two months, and prevent (or gag) him from making

public comment about the Allegation and/or in respect of his own position/defence until such time as it became old news two months later.

[88] This is not a case in which the Applicant was responding to the circumstances as he subjectively perceived them. Indeed, I do not accept that the evidence identifies any choice to which the Applicant had in response to Tabcorp's conduct other than resignation. Tabcorp's evidence and submissions do not identify any such choice, or any situation by which the Applicant was to remain the CEO of Tabcorp post 14 March 2024.

[89] I find that the Applicant has proven on the balance of probabilities that the cessation of his employment with Tabcorp was a "dismissal" within the meaning of s.386(1)(b) of the Act.[101] An Order [PR781201] dismissing Tabcorp's jurisdictional objection will be issued contemporaneously with this decision, and a notice of listing setting the matter down for a conference between the Commission and the parties under s.368 of the Act will be issued in due course.

DEPUTY PRESIDENT

Appearances:

Mr *Kim Anderson*, of Counsel, instructed by Ms *Rebekah Giles*, Principal, Giles George lawyers, appeared for the Applicant.

Ms *Vanja Bulut*, of Counsel, instructed by Mr *Henry Skene*, Partner, Seyfarth Shaw Australia lawyers, appeared for the Respondent (Tabcorp Holdings Pty Ltd).

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1 CB pp.206-207.
2 Ibid.
3 CB pp.204-205.
4 Subject to "any additional new material information [the Applicant] may provide".
5 Chris Murphy Statement, at [11], CB pp. 42 and 161.
6 Rytenskild Statement, at [7], CB pp.88-89, and 164.
7 Ibid, at [8], CB p.89.
8 Transcript, PN160, and PN165-PN166.
9 The Allegation, or its substance, has not been disclosed to the Commission.
10 Transcript, PN156 and PN198.
11 Transcript, PN183.

[12] Transcript, PN225, and PN268-PN269.
[13] Transcript, PN176-PN177. Compare hearsay evidence of Mr Chris Murphy (see Chris Murphy Statement, at [13(vi)], CB p.43), Applicant's Submissions, 25 July 2024, at [6], CB, pp.74-75.
[14] Rytenskild Statement, Annexure AR-1, CB p.97. Transcript, PN204.
[15] Rytenskild Statement, Annexure AR-2, CB pp.98-99.
[16] Ibid, Annexure AR-1, CB p.95-96.
[17] Ibid, CB p.95.
[18] Ibid, CB p.94-95.
[19] Transcript, PN388 and PN400.
[20] Chris Murphy Statement, at [22], and Annexure CM-8, CB pp. 45, and 62-63.
[21] Ibid, at [19]-[21], CB p.45.
[22] Rytenskild Statement, Annexure AR-3, CB pp.100-101.
[23] CB pp.102-106, and 113. The Applicant's request to withdraw his resignation was rejected by Tabcorp.
[24] CB pp.117-120.
[25] I note that the scope and application of the specific words and terms contained under Part 9.4AAA of the *Corporations Act 2001* (Cth) have not been substantively considered by the courts.
[26] See CB, pp. 15-16, 27-28, 102-114.
[27] CB pp.115-123.
[28] See the decision of the Full Federal Court in *Coles Supply Chain v Milford* [2020] FCAFC 152, at [74]-[75], and *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101, at [3]-[4], and [23].
[29] In relation to the application of s.386 of the *Fair Work Act 2009* (**Act**) to general protections involving dismissal claims, see *Coles Supply Chain v Milford* (2020) 300 IR 146, and *Fair Work Ombudsman v Austrend International* (2018) 273 IR 439. See also the discussion in *Morris v Allied Express Transport* [2016] FCCA 1589, at [116] and [117], and *Searle v Moly Mines Limited* [2008] AIRCFB 1088; (2008) 174 IR 21, at [17].
[30] *Mohazab v Dick Smith Electronics* (2005) 62 IR 200, at 205 to 206. See also: *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496, at [19] to [23]; *Mahony v White* [2016] FCAFC 160, at [23]; *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, at [75]; *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154, at 160.
[31] [2022] FWCFB 55; (2022) 316 IR 1.
[32] Ibid, at [45]. See also *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162; (2017) 273 IR 44, at 75(1), and [124]-[126].
[33] [2021] FCA 1587. Note appeal in *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 16. Endorsed in *Alouani-Roby v National Rugby League Limited* [2022] FWCFB 171; (2022) 318 IR 389.
[34] Ibid, at [216], citing, *Mahony v White* [2016] FCAFC 160; 262 IR 221, at [22], which in turn cited *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 625; (1995) 62 IR 200, at 205-206.
[35] *Mahony v White* [2016] FCAFC 160; 262 IR 221.
[36] [2021] FCA 1587, at [218], and [221]-[223].
[37] *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447; [1984] FCA 378. See also *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375, Print R7005, AIRCFB (McIntrye VP, Marsh SDP and Harrison C), 7 July 1999, and the authorities cited at 377-378, [12]-[16]; *Koutalis v Pollett* [2015] FCA 1165; (2015) 235 FCR 370, at [44], citing *Sovereign House Security Services Limited v Savage* [1989] IRLR 115, at 116; *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [35]; *Mohazab v Dick Smith Electronics* (1995) 62 IR 195, at 198.
[38] *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447, at 458. See also *Saddington v Building Workers Industrial Union of Australia* (1993) 49 IR 323, at 336-337; *Emery v Commonwealth* [1963] VR 586; *Australian Wool Selling Brokers Employers' Federation v Federated Storemen and Packers Union of Australia* (1976) 176 CAR 884.
[39] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [35] (see also at [36]-[47]).
[40] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245. See also *Bruce v Fingal Glen Pty Ltd (in Liq)* [2013] FWCFB 5279, and *Australian Hearing v Perry* [2009] AIRCFB 680; (2009) 185 IR 359, at 367-368.
[41] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [44] and [47]; *Kylie Bruce v Fingal Glen Pty Ltd (in Liq)* [2013] FWCFB 5279; *Pawel v Advanced Precast Pty Ltd* AIRC (FB), Print S5904 (12 May 2000).

[42] *McGregor v Melbourne Equine Veterinary Group* [2012] FWA 6712, at [37]; *Morley v Intelitec Pacific Pty Ltd* [2015] FWC 3168, at [40].

[43] *Tanaya Kar v Action Drill & Blast Pty Ltd* [2023] FWCFB 204; *Moore v Woolworths Group Limited T/A Big W* [2020] FWC 963; *Davidson v Commonwealth* [2011] FWA 3610, at [97]-[98], and [104]; *Davidson v Commonwealth* [2011] FWAFB 6265; *Love v Alcoa of Australia Limited* [2012] FWAFB 6754; (2012) 224 IR 50; *McGregor v Melbourne Equine Veterinary Group* [2012] FWA 6712, at [40]-[41]; *Pacific National (NSW) Limited v Bell* [2008] AIRCFB 555; (2008) 175 IR 208; *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [47].

[44] Ibid.

[45] [2017] FWCFB 3941; (2017) 271 IR 245.

[46] Ibid, at [34], footnotes omitted.

[47] [1996] AIRC 1880, Print N5682 (Munro J, Harrison, Lawson C, 14 October 1996). This print does not contain page or paragraph numbers.

[48] Ibid.

[49] Unreported, Print N6999 (Munro J, Duncan DP, Merriman C, 9 December 1996). This print does not contain page or paragraph numbers.

[50] Ibid.

[51] (1996) 67 IR 154, 31 December 1996.

[52] Ibid, at 160-161.

[53] AIRC Print PR973462 (11 August 2006).

[54] Ibid, at [23]. The references to the extracts from cases such as *Rheinberger*, *Pawel*, *Mohazab* and *ABB Engineering* are found at [19]-[22] of *O'Meara v Stanley Works Pty Ltd*.

[55] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at 269, [47(2)].

[56] Ibid, at 269-270, [49]-[50], footnotes omitted. See also *Phillip Knight v Wattyl Australia Pty Ltd*, PR974876, Deegan C, 8 December 2006, at [47]-[49], noting that s.386(1)(b) is intended to reflect case law applying prior to the Work Choices amendments, and *Mariam Jarouche v Lipa Pharmaceuticals* [2023] FWC 493, at [106] (upheld on appeal in *Lipa Pharmaceuticals v Mariam Jarouche* [2023] FWCFB 101).

[57] [2023] FWC 493.

[58] [2023] FWCFB 101.

[59] [2023] FWC 493, at [106]. See also *Annette Megna v No 1 Riverside Quay (SEQ) Pty Ltd* [2006] AIRC 519 (PR973785), 24 August 2006, at [16].

[60] [2023] FWCFB 101, at [23].

[61] *Lisha Herc v Hays Specialist Recruitment (Australia) Pty Ltd* [2022] FWCFB 234, at [17].

[62] Ibid.

[63] Payment in lieu is not a payment in respect of wages as no work is performed in respect of such payment: *Delaney v Staples (t/a De Monfort Recruitment)* [1992] 1 All ER 944, at 947(c) to 948(c).

[64] *Byrne & Frew v Australian Airlines Ltd* (1985) 185 CLR 410, at 429 (per Brennan CJ, Dawson and Toohey JJ); *Saigian v Sanel* (1994) 1 IRCR 1, at 19; (1994) 54 IR 185, at 201 (as cited in *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200, at 205 to 206).

[65] Transcript, PN619-PN631, and PN870-PN884. Tabcorp's Submissions, 11 July 2024, at [15]-[24], CB pp.39-40. Tabcorp's Reply Submissions, 2 August 2024, at [32]-[35], CB, pp.151-152.

[66] See, for example, *Spencer and Dowling* [1996] VSC 51, [1997] 2 VR 127, at 116.

[67] Tabcorp's Reply Submissions, 2 August 2024, at [34], CB, pp.152.

[68] A copy of the 14 March Letter is found (in full) at paragraph [21] of this decision: "We are prepared to allow [offer] you the opportunity to resign should you wish to do so".

[69] Rytenskild Statement, Exhibit AR-12, CB pp.124-143, specifically under the heading "Termination - Pay in lieu of notice" at CB pp.134-135.

[70] Ibid. Also note reference to "End Date" in 15 March 2024 correspondence (CB pp.101), and the definition of "End Date" in the Applicant's post-employment restraint (CB p.141).

[71] Tabcorp's Reply Submissions, 2 August 2024, at [35], CB pp.152. Compare, *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, at [25].

[72] Also noting *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [49]-[50].

[73] *Delaney v Staples (t/a De Monfort Recruitment)* [1992] 1 AC 687; [1992] 1 All ER 944, at 947(e).

[74] CB pp.66-67. See also view of Mr Chris Murphy, as per his Witness Statement, at [25], CB pp.45.

[75] Applicant's Submissions, 25 July 2024, at [25]-[34]. CB pp.81-83. See also Transcript, PN777-PN825, and PN907-PN911.

[76] Indeed, this is a contention that appears to be predicated upon the suggestion that some form of estoppel applies, i.e. because the Applicant chose to resign, or took the benefit of being permitted to resign (as an alternative to termination by Tabcorp), he should not now be permitted to claim that he was dismissed.

[77] For example, see Applicant's Employment Contract, CB pp.124-143. Some of these contractual terms reflect or are akin to the employee Duties of Fidelity and Cooperation, which at common law, do not endure post the end of an employment relationship. The Applicant's period of gardening leave also extended the operative date of the restrictive post-employment covenant under his employment contract.

[78] Tabcorp's Submissions, 11 July 2024, at [4]-[14], CB pp.36-38. Tabcorp's Reply Submissions, 2 August 2024, at [10]-[31], CB pp.146-151.

[79] Tabcorp relies upon the *Pan Macmillan Australia (2024 Edition) Dictionary* as to the ordinary meaning of the adjective "forced" being: enforced, compulsory, strained, unnatural, affected, examples, a forced smile, subject to force, a forced landing in an emergency, mathematics "denoting a change in system caused by an outside agency". See also forcedly (adverb), and forcedness (noun).

[80] Transcript, PN830-PN850.

[81] Applicant's Submissions, 25 July 2024, at [15]-[24], CB pp.77-81.

[82] Transcript, PN646-PN647. See also at PN653-PN655.

[83] CB p.207. See also, Transcript, PN649, and PN658-PN662.

[84] Citing the Full Bench decision in *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [47(2)]. And see also Transcript, PN705-PN712, and the cases of *Jarouche v Lipa Pharmaceuticals* [2023] FWC 493, at [106], [114]-[115], and [117]-[118] (upheld on appeal in *Lipa Pharmaceuticals v Mariam Jarouche* [2023] FWCFB 101); *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200, at 207 to 208 (citing Cooke J in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, at 374).

[85] See also, Transcript, PN774.

[86] Transcript, PN703, PN713, and PN722-PN725.

[87] See s.386(1)(b) of the *Fair Work Act 2009*. *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at 269 [47(2)].

[88] Found at paragraphs [20]-[21], [24], [26], and [28] of this decision.

[89] The Allegation being that he had made an inappropriate comment at a private work meeting, attended only by the Applicant and two other male employees, some six months prior in August 2023.

[90] CB p.205, Tabcorp Board Minutes of meeting at 8:00am on 14 March 2024. See also Chris Murphy Statement, at [13(a)(vi)], CB pp.43. Note decision of Snaden J in *Pilbrow v University of Melbourne* [2024] FCA 1140, at [134]-[142].

[91] Tabcorp's Reply Submissions, 2 August 2024, at [27], CB pp.150-151.

[92] *Pawel v Advanced Precast Pty Ltd* AIRC (FB), Print S5904 (12 May 2000), at [13].

[93] For example, from a common law perspective, was the Allegation (even if substantiated) "serious misconduct", or was it simply (in all the circumstances) a one-off misconduct event in a closed as opposed to an open (albeit work) forum.

[94] See paragraphs [20]-[21] of this decision.

[95] See paragraphs [22]-[23] of this decision.

[96] *Pawel v Advanced Precast Pty Ltd* AIRC (FB), Print S5904 (12 May 2000), at [13].

[97] Transcript, PN121-PN136.

[98] See factual finding contained at paragraph [19(h)] of this decision.

[99] [2020] FWC 963.

[100] Ibid, at [18], and [31]-[33].

[101] Given this finding, there is no point or other utility in dealing with the Applicant's alternative argument that he was dismissed under s.386(1)(a) of the Act: see Transcript, PN688-PN690. I note that my findings under subparagraphs [87(a)] and/or [87(b)] of this decision, individually or together, meet the test set out in *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at 269 [47(2)].