



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Misheck Muza

v

Costco Wholesale Australia Pty Ltd

(U2024/10288)

DEPUTY PRESIDENT CROSS

SYDNEY, 12 FEBRUARY 2025

Application for an unfair dismissal remedy

[1] On 3 September 2024, Mr Misheck Muza (the Applicant) lodged an application (the Application) in the Fair Work Commission (the Commission) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act), for relief in respect of the termination of his employment by Costco Wholesale Australia Pty Ltd (the Respondent). The termination of the Applicant's employment occurred on 30 August 2024, by way of a letter emailed to the Applicant that stated the Applicant was being terminated because he did not have a legal right to work in Australia.

[2] On 12 August 2024, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). In response to the Directions each party filed materials, and the materials relied upon by the parties at the Hearing were:

- (a) For the Applicant, the Applicant's Outline of Arguments, and Applicant's Statement of Evidence, filed 31 October 2024;
- (b) For the Respondent, an Outline of Submissions, a witness statement of Mr Praveen Pawar, and a witness statement of a statement of Ms Fiona Chojnacki; and
- (c) For the Applicant in reply, the Applicant's Response to the Respondent's Outline of Arguments, the Applicant's Response to Praveen Pawar Statement, the Applicant's Response to Fiona Chojnacki Witness Statement, all filed on 22 November 2024.

[3] The matter was heard on 28 November 2024 (the Hearing). In the Hearing, the Applicant represented himself, and the Respondent was represented, with permission, by Mr Foran of Counsel, instructed by Maddocks Lawyers. At the Hearing, all deponents of witness statements were subject to cross-examination, and each party tendered various documents into evidence.

Background Facts

[4] Outlined below are the facts as I have found them to exist. The determination of some of those facts has involved determining facts where varying statements and assertions existed between the Applicant on one hand, and Ms Chojnacki on the other.

[5] I have preferred, where facts were contested, the evidence of Ms Chojnacki to that of the Applicant. My preference for the evidence of Ms Chojnacki was based on my observation of both the Applicant and Ms Chojnacki. Ms Chojnacki was considered in dealing with questions asked of her, giving responsive answers to questions asked.

[6] The Applicant, on the other hand, presented as someone who would attempt to evade the most basic propositions where acceptance of such propositions did not fit with the narrative he sought to advance. Examples of that propensity are identified below where chronologically relevant.

[7] The Applicant commenced employment with the Respondent on 2 August 2021. The Applicant was previously employed with Costco as:

- (a) a Fresh Supervisor at the Lake Macquarie Warehouse from 2 August 2021 until 2 January 2022;
- (b) a Stocker at the Lake Macquarie Warehouse from 3 January 2022 to 30 May 2022;
- (c) a Finance Intern (temporary position) at Costco's head office in Lidcombe from 1 June 2022 to 23 October 2022; and
- (d) a RTV Clerk at the Lake Macquarie Warehouse from 24 October 2022 to 8 May 2024.

[8] In his last position, the Applicant was employed in the position of Inventory Control Specialist, which was subject to an employment contract dated 3 May 2024 (the Contract). The Applicant reported directly to Jefferson Ly, Assistant Buyer, who then reported to Mr Pawar, Ms Sandi Cornthwaite, AVP/GMM – eCommerce, non-foods & Ancillary oversaw the department in which the Applicant was employed. Ms Cornthwaite was no longer an employee of the Respondent at the time of the Hearing.

[9] The Contract, titled "*Subject: Employment Offer – Hourly Employment*", provided the following provisions:

Clause 8 - "*You will need to provide evidence of your right to work in Australia, and if requested, any relevant professional/educational documentation.*"

Clause 13 – "*If you don't meet the conditions in clauses 5,6,7,8,9,10,11 and 12 of this letter, including if you fail or refuse to obey any reasonable and lawful direction given by Costco (including under clauses 5 and 6) the offer of employment lapses or if the offer has been accepted by you, your employment may be terminated by Costco with immediate effect, including after the commencement date, without any liability to Costco for any payment or compensation to you.*"

[10] While the Respondent raised performance issues that it said existed in all the Applicant's roles, it made clear at the Hearing that performance issues were not pressed in their case.¹ The Applicant also raised issues of alleged discrimination that were said to have occurred during the course of his employment.

[11] A number of the Respondent's employees are only able to work in Australia on certain visas, and so each time an employee is employed who has a visa, the Administrative team of the Respondent at the location the employee is employed at, is required to conduct a Visa Entitlement Verification Online check and input all relevant visa details (including when the visa expires) into the Respondent's people system.

[12] Ms Chojnacki undertakes a weekly check of a visas report to see which employees visas may be expiring within the 90 days, and she sends an email to each employee's Warehouse Manager or Executive to ask that they check with the relevant employee about their visa status.

[13] The Respondent does not allow employees to work without a visa, and in the last 12 months, the Respondent had terminated the employment of 3 employees (including the Applicant) because their visas had expired. Each employee, other than the Applicant, had their employment terminated within 9 days of their visas expiring.

[14] The Applicant was on various bridging visas while he was employed with the Respondent. His last visa was a short bridging visa that had been granted on 14 June 2024 and that expired on 14 August 2024. Mr Pawar sent an email to the Applicant at 2.38pm on 6 August 2024, in which he stated:

Hi Misheck,

Please help provide updated visa copy as the attached is expiring on 14th Aug 2024.

Thanks

[15] The Applicant replied at 15.24 on 6 August 2024, stating:

Noted with thanks.

I should get it this week and will forward it to you as soon as I receive it.

Misheck

[16] The Applicant made his visa renewal application on 7 August 2024.²

[17] On 14 August 2024, the Applicant's bridging visa expired. The Applicant knew that his visa was expiring on 14 August 2024.³

[18] The Applicant worked on 15 and 16 August 2024, without a visa. The Respondent submitted that the Applicant worked those days knowing that his visa had expired, and whether that contention of the Respondent was correct was a significant issue in the proceeding. The Applicant initially maintained in his evidence that he didn't know on 15 August 2024 that he did not have a visa.⁴ However, when tested regarding his knowledge of the visa process (which

he had been repeating every three months), and the inability to work without a visa, that assertion of lack of knowledge of visa status was disclosed to be without substance.⁵ The Applicant's evidence on this issue was eventually as follows:⁶

No. I asked you a direct question. If you were being hassled about your visa status, and come the 15th, you knew that you hadn't received the visa document, why wasn't the first thing that you did to call up Praveen and say, 'It hasn't come. I can't come to work'? -- Well, I don't know. I don't know what was happening there. You know, I - I'm not that powerful man to - you know, to see what happened on that because I knew it was something that was a focus on me because it was very important, and whether I - on 15th or what, I don't know, but I'll - I don't know. I didn't - I'm not - I can't remember. I don't know July. I don't know to (indistinct) because it's against my principles.

[19] I find that the Applicant worked on 15 and 16 August 2024, knowing he did not hold a visa. The Applicant was acutely aware of the visa process and only a week before had been advised to provide an updated visa.

[20] In the Applicant's Response to Fiona Chojnacki Witness Statement, in dealing with his attendance at work on 15 and 16 August 2024, and thereafter, the Applicant stated:

How did I get to work on the 15 and 16 August 2024 if Fiona had effectively and efficiently performed her role as a Risk Manager for Costco.

She should be fired first for not having managed the risk.

Praveen Kumar Pawar would have been the first to be terminated as he wanted me to come to work on the 19th August 2024 but I told him I could not until my visa is resolved.

My coming to work on 15 and 16th was not based on dishonesty but was motivated by my communications with the same very department that issues work Rights.

If Fiona was doing her job as a Risk manager then she should have written me to stop coming to work until further clarity. She did not.

They only woke from their slumber when I refused to come to work until `there is a clarity on my visa situation.`

[Emphasis added]

[21] The Applicant did not tell Mr Pawar that he "could not until my visa is resolved", or refuse "to come to work until `there is a clarity on my visa situation.`" On 19 August 2024 at 6:07am, the Applicant sent a text message to Mr Pawar, stating:

*Good morning Praveen. I will not be able to make it today due to a nasty cold. Headache, hard painful cough that hits your stomach and chest. I felt it at work on Friday but I thought it would go away. It didn't
Am on medication though*

[22] On 19 August 2024 at 8:05am, Ms Chojnacki emailed Ms Cornthwaite and the Assistant General Merchandise Manager advising:

Misheck's visa is still showing as expired please review so he doesnt show on the reports.

[23] At 8.23 and 8.29am respectively, on 19 August 2024, Mr Pawar sent the Applicant both an email and a text message asking the Applicant to send through a copy of his visa details as soon as possible. In response to that correspondence, the Applicant emailed Mr Pawar a copy of his visa application made on 7 August 2024.

[24] At 8.41am on 19 August 2024, Mr Pawar advised the Applicant:

*Hi Misheck,
Please update as soon as possible.
Payroll needs a valid visa copy.*

[25] At 8.45 am on 19 August 2024, the Applicant responded:

Will phone them and update you.

Am not sure why it did not automatically update on the 14th until I hear from them. It's the first time in my working life (more than 3years in Australia) where I have had to chase visas.

Will give you an update soon.

[26] In the characterisation referred to in paragraph [20] above, the Applicant claimed he refused to come to work until there was a clarity on his visa. That was untrue. The reason for non-attendance at work was alleged illness, and the Applicant was less than candid with disclosing his visa status.

[27] On 20 August 2024, Mr Pawar sent a further text message to the Applicant to ask whether he was still unwell and to inform the Applicant that he needed to call if he wanted to take time off. In response, the Applicant stated that he did not think he should be working until after he received his visa.

[28] I consider that prior to 20 August 2024, the Applicant took no steps to advise the Respondent of his visa status. Regarding the Respondent's knowledge of his visa status, the Applicant's evidence, that I consider unacceptable was, finally:

I'll ask this one more time. After you knew your visa had expired and before the text message on the 20th, did you tell anyone at Costco that your visa had expired and you didn't have another one? --- They knew it.

My question was whether you told anyone, not whether they knew it? --- I can't recall. I can't recall.

[29] Ms Chojnacki was unsure how long it would take for the Applicant to obtain a visa and given he could not perform work for the Respondent without a visa, she came to a preliminary decision to terminate the Applicant's employment because he had not been able to lawfully work in Australia since 14 August 2024.

[30] On 20 August 2024, the Applicant was provided with a show cause letter (the Show Cause Letter). The Applicant was asked to provide a response to the preliminary decision by 5pm on 27 August 2024. The Show Cause Letter provided:

Your employment with Costco Wholesale Australia Pty Ltd

The purpose of this letter is to inform you of a preliminary decision Costco has made in relation to your employment and to place you on unpaid authorised leave. This is an important letter. Please read it carefully.

Costco is aware that your bridging VISA expired on 14 August 2024 and as such, you currently are unable to lawfully work in Australia.

In light of this, I write to inform you that Costco has made a preliminary decision to terminate your employment and to ask you to show cause why Costco ought not terminate your employment.

The reasons for this preliminary decision are as follows:

1. *You have been employed with Costco since 28 May 2021. Most recently, you were employed in the position of an Inventory Control Specialist, which is subject to an employment contract dated 3 May 2024 (Contract). Relevantly, the Contract provides the following provisions:*
 - a. *Clause 8 – you will need to provide evidence of your right to work in Australia.*
 - b. *Clause 13 – if you do not meet the condition set out in clause 8, Costco may terminate your employment with immediate effect.*
2. *Costco undertook a Visa Entitlement Verification Online check and the results show that you have not held a VISA since 14 August 2024, and as such you cannot lawfully work in Australia.*

Costco has ultimately made a preliminary decision to terminate your employment (in line with clause 13 of the Contract) because you do not have a legal right to work in Australia and therefore, Costco cannot continue to employ you.

Opportunity to show cause

Before finalising any decision about your employment, Costco is providing you with an opportunity to show why Costco should not proceed to terminate your employment.

Costco invites you to provide any information that you consider would be relevant in coming to its final decision.

Please provide your response in writing to Sandi Cornthwaite by 5pm on 27 August 2024. Alternatively, if you would prefer to provide your response in person, please contact me to arrange a meeting time prior to the aforementioned date. If you elect to have a meeting you will of course be able to have a support person attend the meeting with you.

Costco confirms that it has not yet made any final decision regarding your employment and will carefully consider any response you wish to provide before it does so.

If you choose not to make any further comments, Costco may proceed to terminate your employment and conclude this matter without the benefit of your input.

Unpaid leave

As you are unable to lawfully perform work in Australia, Costco has made the decision to place you on unpaid authorised leave from today and until further notice.

Support

You can contact me on 0414 730 470 if you have any questions. Otherwise, I take this opportunity to inform you that confidential support is available through Costco's Employee Assistance Program conducted by ACCESS on 1800 81 87 28. Costco encourages you to access the independent, free support service provided for staff should you wish.

[31] At 9.13am on 26 August 2024, the Applicant responded to the Show Cause Letter. That response included the following:

I know you have been on leave and did not want to disturb your leave until today .

I have decided to bring this to your attention because i believe this is very serious to me. I have copied Fiona in this email in case i got your email wrong

Given your office is very busy and would not want to take much of your already busy time i will summarise.

- 1. Sandi Cornthwaite has written me a preliminary notice to terminate my services because my expired Work Rights. She has invited me to show cause why my services should not be terminated by tomorrow.***

Am going to respond to Sandi but i thought you and Fiona should know a bit of background of what is playing up and maybe you can help me out again (. I still heartily appreciate you offering me an opportunity to work at Home Office after being eluded or probably overlooked for years)

My permanent visa application to Australia is being handled by a Ministerial Office as recommended because of my National Sports Administration credentials. Besides being a State Chess Player with Accolades i also am a Board Member of the Australia Chess Federation and South Australia Chess Federation. Councillor. I am also the Assistant Treasurer to the National Board.- Australia Chess Federation

I have 5 Blood family members who are Australia Citizens but i decided on my own route to Australia Permanent Residence.

Now, the purpose of my Request to you is this:

- 1. Am humbly asking to get some more time to sort out my visa issues since they have told me it is being processed but since it is being handled by a higher Office they cannot do much.*
- 2. Instead of termination of my Services(which i think is harsh for someone who has worked hard , heartily and passionately and continuously for 3years for Costco) Maybe give me leave to apply elsewhere in Costco for transfer. (Maybe Canada or USA where i have relatives) I have got a Masters Degree in Business plus experience that might help and of course with your assistance.*
- 3. Maybe Sandi can postpone our Meeting to Wednesday or Thursday to give me more time to Research and consult accordingly.*

Please do also know that the Department of Home Affairs have acknowledged in writing that there are are processing my Visa.

I had actually made an initiative of applying 7 days before the renewal.

At 12.42pm on 26 August 2024, Ms Chojnacki responded to the Applicant stating that he could respond to the Show Cause Letter by 5pm on 29 August 2024, after which time the Respondent would be in touch with its final decision regarding his ongoing employment. The Respondent also made clear to the Applicant that he could meet with the Respondent rather than responding in writing.

[32] At 7:31am on 29 August 2024, the Applicant responded to the Show Cause Letter. That response was as follows:

Hi good morning Sandi

As i promised i would pen something ahead of our Meeting today. Do allow me to update on what I have done regarding this situation that has never happened to me before in my over 3years of working in Costco , Woolworth and then elsewhere in Australia.

Given that the issue of work Rights is also hitting my pocket and on advice I made my formal complaint to the Ombudsman . My Complaint was against the slow processing of the auto renewal of my Visa in a way that can affect my weekly bill paying ability because i am not currently working. My Commonwealth Ombudsman Complaint reference number is [omitted].

As a second ,I also formally made a request for priority processing and complaint to the Department of Home Affairs and my given reference number is [omitted].

During telephonic discussions with the various officials they all sympathised and agreed that situations like this would not be good as they affect a lot of other things .

I have also done other research into my situation but it's not necessary to mention it here except to say that I am pushing for all this because I love my Company , Costco and also my job. What has happened here is quite surprising and I have also written to the Ministerial Office dealing with the Application of my Permanent Residence et al to be updated on my current situation.

Since the Meeting Agenda is preliminary termination due to no work rights can i ask that Costco considers the following:

- 1. Whether considering such is not harsh, unjust and unreasonable.*

As someone who has worked all her life and for Costco i have worked in the following positions:

- a) Food Supervisor then Fresh Supervisor when Lake Macquarie opened.*
- b) In June 2022 i worked as a Finance Intern in the Vendor Maintenance Dept(TPDs, ATFs, Adjustments etc) for a record 5 months as i believe interns do only 3 months but i was seconded for a longer period because we were opening New Zealand at the time and there was a lot of Financial Year end work that needed to be done.*
- c) Then my current Inventory Control Specialist Role(Thanks to Chris)*

I know I have appealed to Chris to consider me elsewhere within Costco International other than the Termination route.

As a last i will humbly request if possible for a letter to the Department of Home Affairs highlighting my situation maybe that may expedite the process although i am confident from what i have heard so far that the matter is being looked at urgently.

Thank you, see you later today at 1030am (as advised) then.

Kindest Regards

Misheck Muza

[33] On 29 August 2024, at 11:30am, Ms Cornthwaite and Ms Chojnacki met with the Applicant to discuss his response and to provide him with a further opportunity to respond to the Show Cause Letter. The Applicant sought to assert that meeting was somehow a “preliminary” meeting, and he did not understand that his termination of employment may arise from that meeting.⁷ That assertion is of no substance, and belies the contents of the Show Cause Letter, the correspondence following that letter, and the discussions at the meeting. Even the Applicant’s evidence was, eventually, as follows:

Okay. So you've said that going into this meeting, you thought this was a serious meeting? --- Yes, definitely. It was. I mean if you're going to be fired, you know - you know because of - these are the guys who fire you. If they have to fire you.

[34] The Applicant also sought to assert he was advised that any termination would not occur before 2 September 2024. There is, again, no substance to that assertion and no basis, either written or oral, of such a commitment arising from the 29 August 2024 meeting or the surrounding documents.

[35] Ms Chojnacki provided by email a note of what was discussed at that meeting on 29 August 2024. That note, which was not the subject of challenge by the Applicant, was as follows:

FYI

Met with him on 29 August 2024 from 11:32pm to 12:40pm - Sandi Cornthwaite & Fiona Chojnacki, Misheck. Main points discussed:

- *he applied for the renewal of the bridging visa on 7 August 2024 on the advice of a lady (Charlie) at the Dept of Immigration (she said apply 7 days before)*
- *he did not think it would be an issue to renew as in the past it has renewed without any issue*
- *he received an acknowledgment email but it has not advised him on processing times, instructions on what to do in between now and approval*
- *he has contacted the dept of immigration 5 times and each time is told "we are processing it" and could not give him a timeline*
- *he was told to escalate to the Dept of Home Affairs - he has done that and they said they would get back to him in 2 days time (deadline is today - he still hasn't heard from them at the time of the meeting)*
- *He is affiliated with chess and the Chess association has written to the Minister seeking his approval for PR from the sports perspective - Minister at this time has not approved (and no timeframe given)*
- *Misheck has also gone to the Ombudsman to complain and awaiting their response - they said they need time to review*
- *He has a brother living in AU in SA and he is a citizen - he wanted to go down his own path for his accounting background*
- *his mother is 85, lives in the UK and is not well so he has not told his brother about his situation because his brother is going to the UK to check on their mum*
- *He was initially on a 407 visa and was sponsored by a company but dept of imm said he is over qualified, he went to another employer AAT and the same thing was told to him*
- *He said in June the dept of immigration changed his visa and how things were (he doesnt know why the change happened)*
- *currently awaiting approval for renewal of bridging visa & ministers approval*
- *he only got a automated response from the ministers office so far*
- *asked if he can work in Costco US or Canada as he has sisters living there*

- *we explained the work rights is not a Costco Policy, the Australian law requires employees to have the right to work*
- *he said he understood and was not asking Costco to give him work whilst he has no work rights*
- *he does not want to break the law and it goes against his personal values*
- *we told him we were sympathetic to his situation and offered EAP (including giving him a brochure) and he said he will call them*
- *he thanked Sandi and I for meeting with him*
- *he apologised for having to waste our time on this matter but he doesn't understand why he is in the situation and why the govt cannot give him more clarity on timeframes etc*
- *he said he will fight tomorrow if he doesn't hear today, talked about going to the Prime Minister*
- *we said we would consider his response and get back to him.*
- *Should Misheck receive any updates today he will email us to let us know.*

Attached is the only correspondence he has since submitting the renewal for his visa.

[36] On 30 August 2024, Ms Cornthwaite sent a letter to the Applicant informing him that Respondent had made the decision to terminate his employment because he did not have a legal right to work in Australia. That letter provided:

Dear Misheck

Your employment with Costco Wholesale Australia Pty Ltd

*I refer to my letter of 20 August 2024 (**Show Cause Letter**), your emails of 26 August 2024 and 29 August 2024 (collectively, **Responses**) and to our meeting yesterday morning.*

The purpose of this letter is to inform you that Costco has made the decision to terminate your employment.

Show cause process

*In accordance with clause 8 and clause 13 of your employment contract dated 3 May 2024 (**Contract**), you are required to provide evidence to Costco of your right to work in Australia and failing this, Costco may terminate your employment.*

You have not held a VISA since 14 August 2024, and as such you cannot lawfully work in Australia. Costco made a preliminary decision to terminate your employment on this basis and you were informed of this preliminary decision in the Show Cause Letter.

You were given an opportunity to provide a response to Costco's preliminary decision to terminate your employment and you did so in the Responses and in our meeting.

In the Responses and our meeting, you stated, among other things:

- *You have made a formal request to the Department of Home Affairs for your VISA renewal to be given priority when being processed.*
- *You asked Costco to consider whether any decision to terminate your employment would be harsh, unjust or unreasonable.*
- *You have asked that Costco not terminate your employment, and instead consider transferring you to an international role.*
- *You have asked Costco to delay its decision so that you can sort out the issues with your VISA.*
- *You have followed up multiple times with the Department of Home Affairs and have contacted other government organisations in relation to your application.*

Costco has carefully considered the Responses and also the matters raised by you in our meeting. As you would be aware, VISA renewals and applications can take quite some time to process (even when they are expedited). As such, Costco cannot delay its decision as there is no guarantee you will receive confirmation about your VISA renewal in the near future.

Costco is unable to transfer your employment to an international company or store. If you think you are suited for a particular role within Costco, that is based outside of Australia, you are welcome to apply for the role.

Costco's requirement that you have valid working rights in Australia is made clear in the Contract. This is a requirement in place from Australian laws. It is not unfair, unjust or unreasonable to require you to lawfully be able to work in Australia for Costco to continue your employment. This is an obligation imposed on Costco.

Costco's decision to terminate your employment

Costco has considered the Responses, your comments in our meeting yesterday and all relevant information and has made the decision to terminate your employment.

Importantly, Costco is terminating your employment (in line with clause 13 of the Contract) because you do not have a legal right to work in Australia and therefore, Costco cannot continue to employ you.

Notice of termination

Your employment will end today, and you will not receive payment in lieu of notice.

Payment of accrued leave

On termination of your employment, you will be paid all accrued but untaken annual leave (if any).

Support

I understand this may be a difficult time and as such, I would like to offer you access to Costco's Employee Assistance Program, if you feel that this would be of benefit to you, for a further two weeks. Costco's Employee Assistance Program is conducted by ACCESS on 1800 81 87 28. Costco encourages you to access the independent, free support service provided for staff should you wish.

I thank you for your contribution to Costco and wish you well in your future endeavors.

[37] On 3 September 2024, the Applicant sent the Respondent an email in which he stated:

Thanks for notifying me on the decision to terminate my Services.

Was a bit taken aback when I read the correspondence as I thought in the Meeting we had with Fiona the Company had said they were going to get back to me on Monday 2 September 2024 .

Secondly, the Company not paying me in lieu of Notice may be a bit harsh and I have accordingly engaged the Fair Work Commission to look into the Costco conduct to ascertain whether this Termination of my Services was not , Harsh, Unjust and Unreasonable.

Lastly, I would still want to appeal to Chris to please have my job back as my Visa rights were emailed back to me yesterday and the Visa even explains that my matter is with the Minister (as heavily explained to Sandi and Fiona in the 1 hour Meeting we had).

Yes, like Sandi explained in the Meeting , Costco does not do Visa Sponsorship but I felt it was a bit heavy handed not to wait for the Government department authorities and fire me before Monday as per your own words.

Lastly, if I do not get back to come and work for Costco again I will still want to thank Chris and Fiona for what they did for me in the past and Dev, here copied for being such a wise guard during the short time he has been our Boss in D23. I learnt a lot from Dev interactions.

For the avoidance of doubt I attach my work visa copy.

Yours Sincerely

Misheck Muza

[38] Later on 3 September 2024, the Respondent replied to the above correspondence as follows:

Costco terminated your employment on 30 August 2024 because you did not have work rights (your VISA expired on 14 August 2024) and it was a condition of your employment contract that you are required to have valid work rights. Costco will not be reversing its decision.

[39] On 5 September 2024, the Applicant wrote an email to the Human Resources Director regarding not being paid his termination payments within 7 days of having been terminated.

[40] On 12 September 2024, the Respondent wrote to the Applicant advising of termination payments.

[41] In the materials filed by the Applicant there were numerous allegations of discrimination suffered by the Applicant. Those allegations were not relied upon as being reasons for dismissal and were submitted to be “*background issues*”.⁸

[42] Although at the commencement of the Hearing the Applicant stated “*At this time, I don’t have a job yet*”, it became apparent during the Applicant’s closing submissions that he had been working for Doordash.⁹

Applicant’s Submissions

[43] The Applicant noted Section 387 of the Act deals with the criteria for determining whether a termination is harsh, unjust or unreasonable.

[44] The Applicant noted the Respondent terminated his employment (in line with clause 13 of the Contract) because he did not have legal right to work. He did not receive pay in lieu of notice.

[45] Regarding Section 387(a), valid reason, the Applicant submitted that the Respondent terminated his employment because of lack of work rights, however, the documentation supplied clearly mentioned that his visa was being processed albeit in a higher Ministerial Office. The Applicant submitted his conduct in his situation was limited, and he did what any reasonable person would have done as directed by the Government Federal Body that deals with the matter, and that was communicated to Costco at all times.

[46] When his visa was delayed despite getting the acknowledgment letter that the Department was processing it, the Applicant went to the Government Ombudsman who gave him a reference and advised him to write to the Department of Home Affairs regarding his pending dismissal and they put the matter on high priority processing, and they delivered his new visa the following day, being the Monday following the Friday dismissal.

[47] The Applicant submitted the only reason why the Respondent could not wait is because it became opportune for them to “*pull the trigger*” on a person who though working hard had a conscience to tell them to do the right thing. The valid reason for termination is not to be judged by a legal entitlement to terminate an employee, but by the existence of a reason for the exercise of that right related to the facts of the matter. The Respondent was informed of a time period of 2 days as his work rights were being processed, but they still fired him.

[48] The Applicant submitted that where an employee's capacity to perform the inherent requirements of their job is affected by the actions of a third party, the Respondent still has an obligation to treat an employee fairly.

[49] Regarding Section 387(b), notification of reason for dismissal, the Applicant submitted a Commission resource provided that notification of dismissal should not be made by text message or other electronic communication. The message of dismissal should be conveyed face to face. To do otherwise was unnecessarily callous.¹⁰ Yet that is what the Respondent did, which the Applicant submitted was very cruel and harsh.

[50] The Applicant submitted the dismissal was unreasonable due to the consequences for his personal and economic situation and referred to his email of 3 September 2024. The Applicant noted he had never been given any written warning, and never had any visa issues, so it was surprising that they would rush to terminate his services on an issue which may be described as supervening event.

[51] The Applicant submitted there was an indirect unreasonable refusal to allow a support person to assist him as the previous discussion with Ms Cornthwaite did not indicate that any termination that was going to take place, and the Meeting that happened on the 29 August 2024 was supposed to be an update Meeting for his understanding. If he knew prior that it was going to be the meeting that was going to decide his fate, he was going to insist on a witness or representative.

Respondent's Submissions

[52] The Respondent submitted it had a valid reason to dismiss the Applicant. While the Respondent only referred to capacity grounds in its letter of termination on 30 August 2024, it submitted that the dismissal was warranted on both capacity and conduct grounds.

[53] Regarding capacity, it was uncontroversial that at the time of dismissal the Applicant was not lawfully entitled to work in Australia, and he therefore lacked the legal capacity to do so. The Respondent could not be expected to anticipate if and when the Applicant would again become entitled to work or live in Australia.

[54] Regarding conduct, as an employee of the Respondent, the Applicant was obliged under clause 1 of the *Costco Wholesale Australia Enterprise Agreement 2023 – 2027* (the Enterprise Agreement) to obey the law. This required him to observe the requirements of the *Migration Act* which required him to maintain a valid visa to remain a "lawful non-citizen".

[55] The Applicant also had an express contractual obligation to provide evidence of his right to work in Australia. The Respondent submitted this gave rise to an obligation, or at the very least an expectation, that he would disclose to the Respondent the fact of him becoming ineligible to work and/or to lawfully remain in the country.

[56] The Applicant knew that that his entitlement to work in Australia ceased on 14 August 2024 when his visa expired. He did not disclose this to the Respondent, but then worked two shifts while ineligible to work and took paid personal leave for two other shifts telling the

Respondent that he was “*unwell*”. The Respondent submitted that it was only when the Applicant was asked for visa documentation that he decided to disclose his visa status to the Respondent.

[57] The Applicant’s conduct in failing to disclose his visa status and then working unlawfully constituted:

- (a) a breach of his contractual obligations;
- (b) a breach of the Enterprise Agreement; and
- (c) serious misconduct on the basis that it is wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment.

[58] The Applicant was notified of the reason for his dismissal (section 387(b)) in a letter dated 30 August 2024. That letter exhaustively set out the Respondent’s reasoning process. The Applicant was also given an opportunity to respond (section 387(c)) both in writing and orally in a meeting. He availed himself of both opportunities on 29 August 2024.

[59] The Respondent did not refuse Mr Muza’s request for a support person (section 387(d)). The Show Cause Letter clearly states that the Applicant was permitted a support person, stating “*[i]f you elect to have a meeting you will of course be able to have a support person attend the meeting with you.*”

[60] The Respondent noted that it is a large company and has a dedicated human resources department, and submitted there were no other relevant matters (section 387(h)) to be considered.

Further Written Submissions

[61] Arising from questioning by the Commission of the Respondent’s witnesses regarding the allegation of misconduct, and the disclosure of the Applicant having actually obtained alternative employment, the parties provided further written submissions.

(a) Respondent’s Further Written Submissions

[62] The Respondent conceded that it did not give the Applicant notice calculated in accordance with his years of service under s.117(2)(a) of the Act and did not make any payment to the Applicant in lieu of notice under s.117(2)(b) of the Act. The Respondent submitted that it was not required to provide notice because it had a power to terminate the Applicant’s employment without notice (or payment in lieu) for serious misconduct.

[63] The Respondent submitted that the Applicant knowingly working on 15 and 16 August 2024 without a visa entitling him to do so provided the Respondent with the power to terminate the Applicant’s employment without notice (or payment in lieu) for serious misconduct.

[64] The Respondent conceded the misconduct was not referred to in the termination letter to the Applicant on 30 August 2024, however the Respondent submitted the Commission can

nonetheless take it into account, in accordance with the orthodox principles confirmed most recently in *Pecker Maroo Verano Pty Ltd v Linda Margaret Stevens, Matthew Kenneth Stevens*¹¹:

It is well established that facts justifying dismissal, which existed at the time of the dismissal, should be considered even if the employer was unaware of those facts and did not rely on them at the time of dismissal. Ultimately, the Commission is bound to determine, whether on the evidence provided, facts existed at the time of termination that justified the dismissal. Further, the reason for dismissal need not be the one given by the employer and can be any reason underpinned by evidence provided to the Commission.

[65] The Respondent submitted this matter is analogous with the matter of *Kathryn Roy-Chowdhury v the Ivanhoe Girls' Grammar School*,¹² where the Commission found that payment in lieu of notice of termination was not payable in circumstances where, at the time of Ms Roy-Chowdhury's dismissal, she was not working any hours (due to not complying with the mandatory vaccination orders in place at the time).

[66] In addition to justifying the Respondent's approach to notice, the Applicant's misconduct can be taken into account by the Commission in accordance with s. 392(3) of the Act to reduce any compensation that would otherwise be payable to the Applicant.

[67] Regarding compensation in the event the Commission determines the dismissal was unfair, from the documents produced by the Applicant to the Commission, from 2 September 2024 until 25 November 2024, the Applicant received net payments of \$8,043.30 from DoorDash, being an average nett weekly payment of \$670.27.

[68] The Applicant's gross weekly salary from the Respondent, prior to termination, was \$1,292.00 (gross) and approximately \$944.00 nett. His weekly shortfall since termination was therefore approximately \$273.73, nett.

(b) Applicant's Further Written Submissions

[69] The Applicant submitted summary dismissal is the most severe form of termination of employment. The relevant test is whether the employee's conduct has been so inconsistent with his duties under the employment contract that it strikes down any reasonable suggestion that the employer-employee relationship can be continued in the future.

[70] The Respondent was liable to pay the Applicant at least 4 weeks in lieu of notice given that he was also 50 years of age. The Applicant submitted that it appeared the Respondent was more interested in terminating his services than investigating what had delayed his visa despite his request for Ms Chojnacki and Ms Cornthwaite to step in to assist.

[71] The Applicant submitted the Act defines serious misconduct, prescribed by the regulations, as:

1.07 Meaning of serious misconduct

(1) For the purposes of the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning. Examples of serious misconduct—employees

Examples of serious misconduct—employees

(2) For the purposes of subregulation (1), conduct that is serious misconduct includes the following conduct of an employee:

(a) wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business;

(c) engaging in theft, fraud, assault or sexual harassment in the course of the employee's employment;

(d) being intoxicated at work;

(e) refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(3) Paragraphs (2)(c) to (e) do not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

[72] The Applicant submitted the Respondent terminated his Contract on capacity and now they are relying on misconduct. The misconduct that is clear from the definitions above was the failure by the Respondent to manage the risk that comes with employee visa renewals.

[73] The Applicant submitted that the Respondent admitted in the Hearing that they had not given the Applicant time to respond to the misconduct allegations before they decided to terminate his services.

[74] The Applicant submitted the absence of notice or pay in lieu of notice actually weighs in favour of a finding that the dismissal was unfair as it is the first point he raised in his Application.

[75] The Applicant submitted it is misleading for the Respondent to say he received nett payments of \$8043.30 from DoorDash, as such calculations do not include fuel, insurance, wear and tear, and GST.

The Legislation

[76] Section 387 of the Act prescribes matters that the Commission must take into account when considering whether a dismissal was harsh, unjust or unreasonable. It provides:

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant."

Consideration

(a) Valid Reason

[77] The reason the Respondent dismissed the Applicant was that at the time of the dismissal he did not hold a valid visa that permitted him to work in Australia. In the Termination Letter, the Respondent clearly stated:

Importantly, Cosco is terminating your employment (in line with clause 13 of the Contract) because you do not have a legal right to work in Australia and therefore, Costco cannot continue to employ you.

[78] That reason for dismissal is a valid reason related to the Applicant's legal capacity to work in Australia. I particularly note that Section 245AG of the *Migration Act 1958* (Cth), titled "*Meaning of work and allows to work*", provides that a person allows a person to work if, among other things, "*the first person employs the second person under a contract of service*". That provision is reflected in the provisions of the Contract.

[79] Regarding conduct, as an employee of the Respondent, the Applicant was obliged to observe the requirements of the *Migration Act* which required him to maintain a valid visa to remain a lawful non-citizen. He also had an express contractual obligation to provide evidence of his right to work in Australia. I agree that both those statutory and contractual bases gave

rise to an obligation that that the Applicant would disclose to the Respondent his visa status and his becoming ineligible to work and/or to lawfully remain in the country.

[80] The Applicant knew that that his entitlement to work in Australia ceased on 14 August 2024 when his visa expired, however he did not disclose this to the Respondent, but rather worked two shifts while ineligible to work. As I have previously found, the Applicant worked on 15 and 16 August 2024, knowing he did not hold a visa. The Applicant only disclosed his visa status when he was asked for his visa documentation on the morning of 19 August 2024 when asked by Mr Pawar of his visa status.

[81] The Applicant's conduct in failing to disclose his visa status and then working unlawfully constituted breach of the Contract, the Agreement and the *Migration Act*, and constituted a valid reason for dismissal.

(b) Notification of Reason for Dismissal

[82] The Applicant clearly knew that he needed to have a valid visa to continue his employment beyond 14 August 2024, when it was due to expire. The Applicant's last visa was a short bridging visa that had been granted on 14 June 2024 and expired on 14 August 2024. Mr Pawar sent an email to the Applicant at 2.38pm on 6 August 2024, in which he stated, "*Please help provide updated visa copy as the attached is expiring on 14th Aug 2024*". Notwithstanding that he did not in fact make the visa application till the following day, the Applicant responded "*Noted with thanks. I should get it this week and will forward it to you as soon as I receive it.*" It is clear the Applicant understood that his continued employment relied on him having a valid visa that allowed him to work in Australia.

[83] In the Show Cause Letter, the Termination Letter, and the meeting on 29 August 2024, the reason for dismissal was clearly identified.

[84] While the Applicant submitted that notification of dismissal should not be made by text message or other electronic communication, and should be conveyed face to face, I do not consider any unfairness arises from sending the Termination Letter by email. The Applicant had availed himself of numerous opportunities to advance his position, and the Termination Letter merely advised the Applicant of the Respondent's decision consequent upon those communications.

(c) Opportunity to Respond

[85] The Applicant was afforded numerous opportunities to respond. The Applicant provided two written responses to the Show Cause Letter, at 9.13am on 26 August, and 7:31am on 29 August 2024. The Applicant also had an opportunity to respond at the meeting on 29 August 2024.

(d) Refusal to Allow Support Person

[86] There was no refusal to allow the Applicant to have a support person present during any discussions regarding his dismissal. The Show Cause Letter specifically provided "*If you elect*

to have a meeting you will of course be able to have a support person attend the meeting with you”.

[87] The Applicant’s submission that there was an indirect unreasonable refusal to allow a support person to assist him as the previous discussion with Ms Cornthwaite did not indicate that any termination that was going to take place, is without substance. The Show Cause Letter clearly outlined the possibility of termination being the result from the Meeting on the 29 August 2024.

(e) Warnings in Respect of Unsatisfactory Performance

[88] The dismissal had nothing to do with the Applicant’s performance.

(f/g) The Size of the Respondent’s Enterprise and the Existence of Human Resources Specialists

[89] The Respondent is a large employer and has dedicated Human Resource managers and specialists, and these factors have had no effect on the fairness of the dismissal.

(h) Other Relevant Matters

[90] I consider there are two competing other relevant matters that must be considered pursuant to s,387(h). They are:

- (1) The Applicant’s submission that the Respondent acted with undue haste, knowing that the Applicant was agitating issues with various government bodies regarding his visa renewal; and
- (2) The fact the Applicant at the time of his dismissal did not hold a valid visa that permitted him to work in Australia.

[91] As I have found above, the Applicant had been aware that his continued employment was expressly conditional upon his maintaining a valid visa.

[92] It is clear from the background facts that whatever delay the Applicant suffered was caused by his own inaction. When Mr Pawar enquired as to his visa on 6 August 2024, the Applicant had not lodged his renewal application, and did not do so till the following day, thereby allowing only seven days to process.

[93] On 26 August 2024, the Applicant advised the Respondent:

My permanent visa application to Australia is being handled by a Ministerial Office as recommended because of my National Sports Administration credentials.

.....

1. Am humbly asking to get some more time to sort out my visa issues since they have told me it is being processed but since it is being handled by a higher Office they cannot do much.

2. Instead of termination of my Services(which i think is harsh for someone who has worked hard , heartily and passionately and continuously for 3years for Costco) Maybe give me leave to apply elsewhere in Costco for transfer. (Maybe Canada or USA where i have relatives)

I have got a Masters Degree in Business plus experience that might help and of course with your assistance.

3. Maybe Sandi can postpone our Meeting to Wednesday or Thursday to give me more time to Research and consult accordingly.

Please do also know that the Department of Home Affairs have acknowledged in writing that there are processing my Visa.

[94] The above correspondence was remarkably vague as to when the Applicant’s visa would be resolved. Similarly, correspondence dated 29 August 2024 provided details of two complaints to the Commonwealth Ombudsman and the Department of Home Affairs respectively but gave no possible date of resolution.

[95] By the date of the dismissal, being a Friday, the Applicant was without a valid visa for 16 days. It was unknown that the Applicant would receive his three-month visa renewal the following Monday. Nonetheless, the Respondent had not acted with undue haste in terminating the Applicant. Eleven days elapsed between Ms Chojnacki emailing Ms Cornthwaite advising “*Misheck’s visa is still showing as expired please review so he doesnt show on the reports*”, at 8.05am on 19 August 2024, and the dismissal.

[96] Against that lack of urgency stands the fact that the Applicant had no capacity to work, with the *Migration Act* providing that a person allows a person to work if, among other things, “*the first person employs the second person under a contract of service*”.¹³ The fact that to continue to employ the Applicant after his visa expired on 14 August 2024, would likely have been a breach of the *Migration Act* and potentially exposed the Respondent to legal sanction, is a relevant matter for consideration.

[97] I further note that, had the Respondent not terminated the Applicant’s employment, the fact the Applicant did not have a valid visa after 14 August 2024, arguably would have brought the employment contract to an end automatically by virtue of frustration. In *Subash Giree v Jewels Restaurants T/A Restaurant*,¹⁴ Deputy President Bull held

For the purposes of his unfair dismissal application, Mr Giree was unable to fulfil his obligation to lawfully continue employment with his 457 sponsor. He had advance notice in September 2019 of the expiration of the two-year period of the visa and advised that it could not be renewed. He took time off to seek migration advice and, unfortunately, was not able to provide his employer with any evidence of his legal right to continue to work as a full-time cook in Australia on the expiration of his skilled visa. This is through no fault of Mr Giree, but unfortunately results in the frustration of his employment contract. An employer is not able to employ persons unless they have the relevant working rights.

As his work visa rights ended as at 11 October 2019, he is unable to fulfil a fundamental employment obligation being the right to work full-time as a cook in Australia. There has been no dismissal either by Jewel Restaurants Pty Ltd or Jewel of India Enterprises Pty Ltd or Jewel of India Admin Pty Ltd of his employment and on this basis the Commission lacks jurisdiction to deal with the matter, and the application for an unfair dismissal remedy must be dismissed.

Conclusion

[98] Considering all of the matters above, I find that this is an unfortunate case where the Applicant did not act sufficiently early to put in place a new visa that would have allowed him to lawfully work in Australia.

[99] The Applicant was aware that his continued employment was, expressly under the Contract, conditional upon him having a visa.

[100] The Respondent did not act with undue haste in terminating the Applicant. The Respondent had in fact first agitated the visa issue with the Applicant.

[101] I note that the Applicant did not receive any notice or pay in lieu of notice. I accept that that payment in lieu of notice of termination was not payable in circumstances where, at the time of the Applicant's dismissal, he was not working any hours resulting from him not possessing the appropriate visa allowing for work.

[102] In all the circumstances the Applicant has not persuaded me that his dismissal was either harsh, unjust or unreasonable.

[103] The Applicant's dismissal was not unfair. An order [PR783996](#) will now be issued dismissing the Application



DEPUTY PRESIDENT

Appearances:

Mr M Muza the Applicant.

Mr M Foran of Counsel, on behalf of the Respondent.

Ms K Sullivan instructing, on behalf of the Respondent.

Hearing details:

28 November 2024.
Sydney.
In-person.

Final written submissions:

Respondents Closing Submissions, filed on 5 December 2024.
Applicants Closing Submissions, filed on 10 December 2024.
Respondents Closing Submissions in Reply, filed on 19 December 2024.

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< PR783996 >

¹ Transcript PN 542.

² Transcript PN 180.

³ Transcript PN 179.

⁴ Transcript PN 183, and 207.

⁵ Transcript PN 185 to 206, and 209 to 220.

⁶ Transcript PN 253.

⁷ Transcript PN 297 to 312, and 359.

⁸ Transcript PN 33.

⁹ Transcript PN 932 to 938.

¹⁰ *Kurt Wallace v AFS Security 24/7 Pty Ltd* (U2019/1622)

¹¹ [\[2024\] FWCFB 147](#) at [61].

¹² [\[2022\] FWC 849](#).

¹³ S.245AG of the *Migration Act*.

¹⁴ [\[2020\] FWC 1055](#), at [26] and [27]; See also *Rathnayaka v YMCA Inc.* [\[2020\] FWC 3076](#).