DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Adela Werner
v
SkinKandy VIC Pty Ltd T/A SkinKandy
(U2024/9499)

COMMISSIONER CONNOLLY MELBOURNE, 11 FEBRUARY 2025

Application for an unfair dismissal remedy – whether resignation was forced due to the conduct, or a course of conduct, engaged by the employer – resignation found to be forced, resulting in constructive dismissal – reinstatement determined not appropriate – compensation ordered.

Introduction

[1] On 13 August 2024, Ms Adela Werner (the Applicant) made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that she was unfairly dismissed from her employer and that her dismissal on 6 August 2024 was harsh, unjust or unreasonable.

[2] Ms Werner's employer, SkinKandy Australia Pty Ltd (the Respondent), denies these allegations, raising a jurisdictional objection to Ms Werner's application contending that Ms Werner resigned from her employment.

[3] The matter was allocated to my Chambers on 26 September 2024 and on 10 October 2024 I issued directions for the jurisdictional objection and merits of Ms Werner's application to be determined jointly at a hearing on 20 and 21 November 2024.

[4] Having considered all the submissions and evidence submitted by the parties, I have found that the circumstances of this case are such that Ms Werner's resignation was the probable result of her employer's conduct such that she was left with no other effective or real choice but to resign.[1] On this basis, I have been satisfied Ms Werner has been constructively dismissed within the meaning of s.386 of the FW Act. The reasons for these findings are set out below and the consequences for both the Applicant and the Respondent are found at the conclusion of this decision.

When can the Commission Order a Remedy for unfair dismissal?

[5] Section 390 of the Act provides that the Commission may order remedy if:

(a) the FWC is satisfied that the Applicant was protected from unfair dismissal at the of being dismissed; and

(b) the person has been unfairly dismissed.

[6] Both limbs must be satisfied. Therefore, I am required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am so satisfied, next consider whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

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

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less that the high-income threshold.

When has a person been unfairly dismissed?

[8] Section 385 of the Act provides that a person has been ***unfairly dismissed*** if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy."

Background

[9] The factual background to this matter is as follows:

- The Respondent operates a series of businesses in the skin art and personal beauty at locations across Australia, including in Victoria, where Ms Werner lived and worked.

- Ms Werner commenced working for the Respondent as a casual body piercer and retail assistant in January 2022 at its Northland Store.

- In February 2023, Ms Werner unsuccessfully applied for the Store Manager position at the Northland Store.

- In March 2023, Ms Werner was offered and accepted a full-time position as the Respondent's Store Manager at its Northland Store.

- In May 2023, Ms Werner was promoted to the Respondent's Store Manager position at its Eastland Store.

- Toward the end of 2023, Ms Werner was granted a period of personal and compassionate leave to help assist her recovery from the loss of loved ones in the crisis unfolding in the Middle East.

- Ms Werner sought a period of extended compassionate leave to further assist her recovery from the impact of this crisis that was unable to be accommodated because of the nature of her role and the needs of the business.[2]

- Returning to work Ms Werner sought an understanding from her employer to allow her to allocate more time looking after her mental health and attending to her cultural and religious beliefs. As a person of Jewish faith, this including observing the Shabbat when possible.

- In early 2024, she believed she reached an agreement with her area manager, Mr Papandriopoulos, that she would work alternative Saturdays and be free to observe the Shabbat with her community every other week.

- In early March 2024, Mr Papandriopoulos moved to another position and Ms Sullivan replaced him in the role as Ms Werner's area manager.

- On taking up her role, Ms Sullivan sought to make it clear to Ms Werner that she expected her to return to normal work patterns and resume working every Saturday and no longer start her shifts at 8am. Ms Sullivan gave Ms Werner notice of these expectations.

- Ms Werner resisted these changes. She refused to alter her established shift patterns and sought a meeting with Ms Sullivan to explain the agreements she had in place to work alternative Saturdays and start early.

- Ms Werner believes an agreement was reached at this meeting that she could continue to work her established roster pattern and prove it had no negative impact on the business.

- Ms Sullivan did not give evidence. Her advice to a workers compensation investigator was that she agreed to a trial of an 8.30am start time but required Ms Werner to work Tuesdays-Saturdays if she wanted to remain in the Store Manager position.

- Ms Sullivan took steps to change Ms Werner's shifts accordingly. Ms Werner changed them back to her understanding of the agreement she had in place.

- She emailed her State Manager Mr Papandriopoulos, the National Manager and Ms Sullivan seeking to explain and resolve the situation.

- Ms Sullivan responded advising Ms Werner that she was required to work as rostered and advising she would follow up with her on returning to work.

- On 16 April 2024, Ms Werner says she became aware that Ms Sullivan had told colleagues she was going to get rid of Ms Werner even before she became her area manager.

- On 17 April 2024, Ms Werner lodged a workers compensation claim with WorkSafe Victoria on the basis she had suffered a mental injury from being bullied at work.

- At the same time, Ms Werner made a formal complaint to her employer's Human Resources team that she was being bullied at work and advised that consequently she was unfit for work until 11 August 2024. She sought medical and psychological treatment from this time and has been diagnosed with anxiety, depression and stress.

- On 17 May 2024, the Respondent's insurer advised that Ms Werner's work compensation claim had not been accepted.

- Ms Werner has suffered a loss of income and faced significant emotional and financial challenges since commencing her period of leave, seeking support from her community organisations.

- On 26 July 2024, her representatives sent a proposal to bring an amicable agreed end to her employment relationship.

- On 31 July 204, Ms Holland rejected this proposal, advising she understood Ms Werner had relocated to the Gold Coast and was seeking alternative work. Her reply correspondence advised she was "seek[ing] immediate clarification of Ms Werner's resignation from her position of Store Manager".[3]

- On 5 August 2024, Ms Werner emailed the Respondent advising of her resignation from her position, effective 2 September 2024.

- On 8 August 2024, Ms Werner emailed the Respondent seeking clarification if she was required to work out her period of notice. On the same day, Ms Holland, the Respondent's Human Resources Manager, advised Ms Werner she was required to provide 8 week's-notice, unless otherwise agreed.

- On 9 August 2024, Ms Holland emailed Ms Werner seeking clarification of her intention to return to work at the expiration of her period of sick leave and sought

assurances that Ms Werner was fit for duty. Ms Holland also advised Ms Werner that the Respondent was open to agreeing on a shorter period of notice if requested.

- Later that day, Ms Werner confirmed in an email to Ms Holland that she accepted the offer to finish up effective immediately without being required to work or be paid out her notice.

The hearing

[10] There being contested facts involved, the Commission is obliged by s.397 of the Act to conduct a conference or hold a hearing. Considering the views of the parties and the circumstances of this case, I determined a hearing was the most effective and efficient way to resolve the matters of contention.

[11] A hearing was conducted on 20 and 21 November 2024. At each instance Ms Werner represented herself and the Respondent was represented by Ms Sally Holland, Human Resources Manager.

Witnesses and submissions

[12] Ms Werner filed a series of written submissions alongside a series of emails and supporting documents. Ms Werner also gave sworn evidence during proceedings. Mr Dion Szer, Dr Brenton Lucas, Ms Emily Arnold, Mr Ryan Walters and Dr Ana Marinesco provided witness statements and gave sworn evidence in support of Ms Werner's case.

[13] The Respondent filed written submissions and documents in support of its position along with witness statements from Ms Sally Holland. Ms Holland represented the Respondent and provided sworn evidence in proceedings.

[14] A court book, containing all materials filed by the parties was compiled and distributed to the parties prior to the Hearing. I received the entirety of the court book into evidence, subject to appropriate weight being given to the evidence that was tainted by opinion, irrelevance or hearsay.

Initial matters to be considered

[15] Section 396 of the Act sets out the following:

"The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

(a) Whether the application was made within the period required in subsection 394(2);

(b) Whether the person was protected from unfair dismissal;

(c) Whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy."

[16] As set out above in s.396 of the Act, consideration as to whether the dismissal was unfair cannot occur unless the Commission is first satisfied that the provisions of s.396 have been met. In the present case, it is not contested, and I am satisfied that Ms Werner's application was filed on 13 August 2024 and is made within the required timeframe. It is not contested, and I am satisfied that Ms Werner was earning below the high-income threshold and is a person protected from unfair dismissal. It is also not contested, and I am satisfied, that the Respondent is not a small business. Nor is it asserted, and I am satisfied this is not a case of genuine redundancy.

[17] As I have been satisfied that the requirements of s.396 are met, I am required to consider the merits of whether Ms Werner's dismissal was harsh, unjust or unreasonable.

[18] SkinKandy does not accept that Ms Werner is a person who has been dismissed within the meaning of the FW Act as she resigned from her employment. Ms Werner contends she was forced to resign and that the provisions in s.386(1)(b) apply.

[19] Section 386 of the Act outlines the meaning of "dismissed":

"386 Meaning of *dismissed*

(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.

Was the Applicant forced to resign because of the conduct, or a course of conduct, engaged in by the Respondent?

The Applicant's case

[20] Ms Werner argues she was forced to resign because of the combined action and course of actions by her employer and its representatives. She identifies that commencing in the end of March 2024 she began being bullied, intimidated and humiliated by her area manager, Ms Sullivan. That she raised her concerns with Ms Sullivan and found her treatment and the situation only got worse, to the extent she became ill, suffering from stress and anxiety.

[21] She states she became aware of reports that Ms Sullivan was intent on getting "*rid of her*" and that this made things worse. That this made her fear she was going to be sacked and impacted her health to the extent she was unable to work from 17 April 2024. On the same day, she made a workers compensation claim for the conditions she was suffering. She also made a formal complaint about Ms Sullivan to the Respondent's Human Resources Manager, Ms Sally Holland.

[22] On 18 April 2024, Ms Werner was diagnosed by her treating doctor with anxiety, panic attacks and depression. Her doctor advised her not to return to work until after 22 April 2024. Ms Werner did not receive any initial acknowledgement or response from the Respondent about her workers compensation claim or bullying and harassment complaints. She was advised by her doctor to take a further 4 weeks off to help her condition improve.

[23] Ms Werner felt extremely anxious, unsafe and uncomfortable about returning to work and reporting to a manager who she felt was bullying her and actively trying to have her fired. She communicated these concerns to Ms Holland in making her complaint. She contacted WorkSafe Victoria to seek advice about how to procced while on sick leave because she says she did not feel safe to return to work until there was a resolution to her concerns.

[24] On 24 April 2024, Ms Werner asked Ms Holland for the meeting to deal with her complaints to be brought forward so her concerns could be dealt with and resolved before she returned to work. Mr Holland did not respond.

[25] On 30 April 2024, she again emailed Ms Holland seeking a response. On 2 May 2024, Ms Holland scheduled a Microsoft Teams meeting that convened the following day. Ms Werner used this meeting to convey to Ms Holland the gravity of her concerns and their impact on her health and safety. She says she left the meeting assured that her complaints would be treated with care and priority. But also concerned Ms Holland seemed focused on addressing a requirement for her to perform weekend work, and her suggestion she could consider an alternative position.

[26] On 15 May 2024, Ms Holland sent Ms Werner an email advising her she was commencing the process of investigating her bullying complaints. She also advised her a resolution needed to be found to Ms Werner's weekend availabilities and that Ms Werner was also under investigation and needed to provide Ms Holland with an explanation as to why she breached the SkinKandy code of conduct.

[27] Ms Werner says she was shocked by this correspondence. That she could not understand why the investigation into her complaints had not already commenced. She submits the people she contacted following her meeting with Ms Holland were witnesses to her bullying, and that she contacted them at Ms Holland's request for the purposes of her investigation. That being advised she was now being investigated made her anxiety and distress worse and led her to further feel she was being pushed out and ostracized.[4]

[28] During the same week, Ms Werner was advised by a former co-worker, Mr Levi Walters, that he was not surprised by her situation because he had been told by SkinKandy National Manager, Haley Krstevski, that she wanted Ms Werner "*gone*".[5] Co-workers of Ms Werner, Mr Lucas and Ms Miller, provided supporting evidence to this effect.[6] Hearing this only made Ms Werner's situation and condition worse. She says she was in severe distress and reached out to her community care organisation, Jewish Care, for support. This included psychological support for her mental health and anxiety.

[29] Additionally, this week Ms Werner was advised her workers compensation claim was being rejected. The reasons for this decision included a written warning she is supposed to have

received in January 2023, her refusal to work all Saturday shifts and that her employer's denial she had been subjected to bullying and harassment.

[30] Ms Werner denies she was ever provided with a written warning in January 2023 and that she was ever told or refused to work every Saturday shift. The refusal of her claim left her in state of severe emotional and financial panic and distress. She felt SkinKandy was now producing false documents and claims to justify their actions, terminate her employment and protect their behaviour.

[31] Making this worse, she also heard this week from a colleague, Ms Emily Arnold, that Ms Holland had been "*bragging*" to other managers that Ms Werner's workers compensation claim had been rejected. Another co-worker, Ms Miller, advised her Ms Sullivan had been doing the same thing. She says that the cumulative events of this week lead her to resolve to do everything she could to overturn the rejection of her compensation claim and fight her employer's abuse and bullying. Her doctor also advised her not to return to work.

[32] In the process of gathering all her documents and material she says she discovered her SkinKandy manager's email address account had been changed and that her company credit card had also been cancelled. These discoveries left her feeling that she had already been terminated, without notice, warning or reason.

[33] On 18 May 2024, Ms Werner sent Ms Holland an email asking for an update about her bullying complaints and advising she was open to participating in the company's investigation into her misconduct, which she denied. She also advised Ms Holland of her surprise at how quickly action could be taken against her, while her complaints had yet to be addressed. She also expressed her concern that rejection of her workers compensation claim had become known to other members of staff in breach of her confidentiality, asking this be investigated and advising she was going to seek legal advice.

[34] Ms Werner says Ms Holland never responded to this email. Subsequently, Jewish Care referred her to Everyday Justice who provided her a referral to Mills Oakley Lawyers.

[35] On 29 May 2024, Ms Holland emailed Ms Werner seeking to check in on her and discuss her formal complaint. She submits this email made her feel uncomfortable. Ms Holland had not responded to her previous email. At this stage, she did not believe SkinKandy could be trusted.

[36] Ms Werner sent Ms Holland a reply email on 6 June 2024 indicated she was still unwell and would reply with more detail when she could. Ms Holland emailed her again on 17 June 2024, informally asking if she would have time to connect for a "*chat soon*". Ms Werner again felt uncomfortable by this email and approach. She did not know what there was to "chat about". Her email of 18 May 2024 had still received no response or acknowledgment. She was anticipating a formal meeting to progress her complaints and was made to feel her complaints were still not being treated seriously and that Ms Holland was attempting to sweep them under the carpet.

[37] Ms Holland emailed again on 5 July 2024, asking Ms Werner to contact her as soon as possible to arrange a meeting. A meeting was held on 12 July 2024 with Ms Holland, Ms Werner and Ms Emily Arnold attending as Ms Werner's support person.

[38] Ms Werner says that at this meeting she expected and asked Ms Holland to provide her with an update of the investigation into her bullying complaint and a response to her email of 18 May 2024. Ms Holland said she wasn't aware of any email but wanted to talk about when Ms Werner would be returning to work. She said she was not willing to talk about or further the bullying investigation until Ms Werner returned to work – calling it a "*Catch 22*".

[39] Ms Holland went on to ask Ms Werner if she had been visiting any SkinKandy stores and taking pictures while on sick leave. Ms Werner's responses was that she had and that she had taken a picture of the staff notice board because her picture had been removed. She says she did this because it reinforced her suspicions the company had made the decision to get rid of her while she was on leave. She further told Ms Holland as far as she was aware she was still employed by SkinKandy and wasn't aware she wasn't supposed to be visiting company stores.

[40] Ms Werner says Ms Holland then asked her – "*so you don't intend to return to work*." At no time did Ms Werner say or indicate she was not returning to work. Her position is that she was seeking an update to her bullying complaint so it could be resolved, her condition could improve, and she could return to work. Ms Arnold provided sworn evidence supporting this evidence.

[41] Ms Werner goes on to say Ms Holland's response was to end the call and send a follow up email saying the meeting ended because Ms Werner refused to participate.

[42] On 22 July 2024, Ms Werner emailed Ms Holland back, again asking for an update to her complaint and seeking details of the written warning she was supposed to have received and the instruction she had been given to work Saturday shifts. Ms Holland did not respond.

[43] On 26 July 2024, Ms Werner agreed to her legal representatives sending a letter to SkinKandy on her behalf proposing an amicable ending to her employment relationship. On 1 August 2024, she was told SkinKandy were seeking her immediate resignation and were not interested in any amicable settlement as they had become aware Ms Werner had relocated to the Gold Coast and was seeking alternative employment. Ms Werner accepts she had inadvertently prepared a draft email to prospective employers but had no plans of moving interstate. She concluded SkinKandy just wanted her to resign.

[44] Feeling at her lowest mental, financial and physical point on 5 August 2024, Ms Werner sent an email to Ms Holland indicating that because of SkinKandy's failure to take her complaints of bullying and harassment seriously and provide her with any proper support, she was left with no choice but to resign with 4 weeks' notice.

[45] Ms Werner's email of 5 August 2024 did not receive a response. On 8 August 2024, she sent another email to Ms Holland seeking clarification if she was required to work her notice period and, if so, details of her return-to-work arrangements.

[46] Ms Holland responded, advising she was required to give 8 weeks' notice and advising Ms Werner that the company was open to not requiring her to return to work if she wished, forgoing payment for notice. Ms Holland sent a follow up email the next day asking Ms Werner to confirm if she was return to work on Tuesday, 13 August 2024 or if she wished to waive her notice and finish up immediately.

[47] Ms Werner felt she was again being bullied and pressured by Ms Holland. Before responding she wanted to get the advice of Ms Arnold and opened her work WhatsApp account to contact her. In doing so, she discovered that on 6 August 2024 she had already been deleted from all the company groups by Mr Papandriopoulos.

[48] This was before her letter of resignation had been accepted or even acknowledged by Ms Holland. For Ms Werner this discovery confirmed to her that SkinKandy were intent on seeing her gone and forcing her to resign. She concluded they were eager to take advantage of the vulnerable position she found herself in and had no intention of doing anything to attempt to address her workplace complaints. She had a severe panic attack as a result and just wanted her nightmare experience dealing with SkinKandy to stop.

[49] Distraught and without hope, she emailed Ms Holland back and indicated she accepted the offer to finish immediately and not be paid out her notice.

The Respondent's case

[50] SkinKandy's position is that Ms Werner resigned from her position and that she has not been unfairly dismissed.

[51] Supporting this position, they acknowledge issues with Ms Werner's failure to present for work on Saturday, noting she worked only 9 out of 18 expected Saturday shifts between December 2023 and April 2024. They accept when Ms Sullivan took over as Ms Werner's Area Manager in March 2024, she attempted to address this issue and directed Ms Werner to return to working regular Saturday shifts.

[52] These attempts were resisted by Ms Werner. SkinKandy maintains there was no agreement for Ms Werner to work Saturday's and that Ms Sullivan's attempts to direct her to do so were reasonable management action.

[53] SkinKandy's position is that they were fair and reasonable to Ms Werner. That includes providing her with extensive periods of paid and unpaid leave to provide her the time needed to meet the challenges she faced following the loss of loved ones.

[54] They submit, Ms Werner's rejected claim for workers compensation and complaints of bullying and harassment by Ms Sullivan were treated seriously and with the highest levels of professionalism. Ms Holland, who made submissions and gave evidence for SkinKandy as the Human Resources Manager handling Ms Werner's case, attempted to mediate Ms Werner's complaints against Ms Sullivan and Ms Werner's return to Saturday work. She commenced an investigation into Ms Werner's bullying complaint that had not been completed but was likely to conclude her complaints where unsubstantiated and that Ms Sullivan's actions managing Ms Werner were reasonable.

[55] Ms Holland's evidence is that she did not press Ms Werner on engaging with her investigation into her bullying complaints because she was on sick leave and unwell. That when she sought to discuss Ms Werner's return to work so the investigation could be progressed, Ms Werner made it clear to her that she would not be returning while Ms Sullivan was her manager. And that Ms Werner's breach of confidentially in the investigation process needed to be explained.

[56] Ms Holland accepts that inadvisedly she said to Ms Werner it was a Catch 22 – describing her situation where the investigation couldn't be progressed until she returned to work, while acknowledging she wouldn't return to work while Ms Sullivan was her manager.[7]

[57] SkinKandy maintains they became aware Ms Werner had relocated to the Gold Coast and was looking for work in Queensland. That she had no intention to return to work at SkinKandy and that in these circumstances they were happy to waive the requirement she work out her notice period, accepting her resignation with immediate effect on Friday, 9 August 2024.

Consideration

[58] Determining whether Ms Werner was dismissed turns on my consideration of the conduct of SkinKandy in the period preceding 9 August 2024. There is no contest Ms Werner put her resignation in writing. Her position is she was forced to do so because of the conduct of her employer.

[59] Previous decisions of the Commission have considered what is required for an employee to establish they have been forced to resign. In *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli (Bupa)*[8] a Full Bench of the Commission examined the relevant authorities at great length and summarised the definition of dismissed under s.386(1) as follows:

> "(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable period of time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.
>
> (2) 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 her is whether the employer engaged in conduct with the intention of bringing the employment to an end or whether termination of the employment was a probable result of the employer's conduct such that the employee had no effective choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element."

[60] This question was further considered by the Full Court of the *Industrial Court of Australia in Mohazab v Dick Smith Electronics Pty Ltd*[9] where it said:

> "a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship."
>
> ...
>
> In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly and important feature is the act of the employer results directly or consequently in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship."

[61] In *O'Meara v Stanley Works Pty Ltd,*[10] the Full Bench of the Australian Industrial Relations Commission expanded on *Mohazab,* and stated:

> "In our view the full statement of the reasons in Mohazab which we have set out together with the further explanation by Moore J in Rheinberger and the decisions of the 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 relationship 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**." (emphasis added)

[62] I have applied these principles in my reasoning below.

[63] In the present case, Ms Werner argues her employer has been intent on seeing her gone for some time. Mr Walters, Ms Miller and Mr Lucas provide consistent evidence that Ms Werner was seen by management as 'not a good fit' and 'S*he's a troublemaker and we need to get rid of her".*[11] I did not find Mr Walters' evidence of a 'hypothetical' scenario in which this was communicated to him convincing. However, I accept the evidence of Ms Miller and Mr Lucas that a prevailing view of members of the management team about Ms Werner was that SkinKandy would be better off without her and that this was communicated with other staff. When communicated to Ms Werner in the context of feeling bullied and harassed by Ms

Sullivan, I accept these sentiments led her towards the conclusion she was being forced to resign.

[64] Objectively assessed, I accept that from her perspective Ms Werner had legitimate concerns Ms Sullivan was bullying her into working regular Saturday shifts contrary to her religious beliefs or choosing to resign. The evidence Ms Werner presents that Ms Sullivan sought to make unilateral changes to her rosters is unchallenged. Ms Arnold, Mr Walters and Ms Miller all provided evidence to the Commission that in their experience Store Managers at SkinKandy had the discretion to determine their shift and rostering arrangements without seeking approval or the involvement of Regional Managers. I accept this evidence, and that on the evidence presented to me, Ms Werner had legitimate grounds to believe she was being bullied by Ms Sullivan.

[65] SkinKandy's evidence that Ms Werner did not have a prior commitment or understanding with her previous manager to start work early and work on alternate Saturdays is not compelling. In evidence, Ms Holland accepted an informal agreement had been in place at some time. Further, the Respondent's evidence that it was in place only for a short period while a 2IC was available, or for 6 weeks while Ms Werner moved house, is inconsistent.[12]

[66] SkinKandy chose not to present either Ms Sullivan or Mr Papandriopoulos to give evidence. In proceedings, I made it clear to Ms Holland in the absence of firsthand evidence from members of her management team, her inconsistent evidence of what was said to whom would be weighed against the Applicant's corroborated evidence.[13]

[67] The evidence presented by Ms Werner is that she had an understanding that because of the impact of events in the Middle East on her she had sought and reached an understanding that she could work alternate Saturday's so she could support her community and observe the Shabbat. The evidence presented overwhelmingly supports this version of events and I accept it.

[68] Ms Werner had previously been granted extended periods of compassionate leave arising from events in Israel. Her request for an extended period of leave on these grounds was unable to be accommodated.[14] Against this context, I find Ms Holland's evidence that as the National HR Manager she only became aware that Ms Werner's concerns working every Saturday was because of her religious beliefs after she had commenced her investigation implausible.

[69] Even if I were to accept these submissions, Ms Holland's evidence of how Ms Werner's complaint was considered and acted upon by SkinKandy leaves much to be desired.[15] Ms Werner's complaint letter dated and sent to Ms Holland on 18 April 2024 clearly articulated her understanding of the agreement she had to allow her to observe the Shabbat and that she was concerned she was going to be fired or forced to resign.[16] It was not until 3 May 2024 that Ms Holland spoke to Ms Werner and not until 15 May 2024 that she indicated she was commencing her investigation into Ms Werner's complaint.

[70] It was not contested that Ms Sullivan made it clear to Ms Werner she expected her to work every Saturday regardless of what Ms Werner said, and that Ms Werner recalled her saying words to the effect of:

> "…it is part of a manager's duties to work Tuesday to Saturday and all peak trading hours…this is in your contract and if you have a problem with that you can just step down from your role". [17]

[71] This evidence leads me to be satisfied Ms Werner had legitimate concerns she may have been bullied at work and was entitled to make a complaint about this. In making this complaint, she was entitled to have her concerns treated seriously and properly investigated.

[72] The evidence does not suggest that this was the case.

[73] In her evidence, Ms Holland accepts that SkinKandy's investigation into Ms Werner's complaints had still not been completed at the time of proceedings. The only plausible explanation presented for this is that the investigation was delayed and not finalised because Ms Werner was unwell. And that Ms Holland did not want to press her to participate in the investigation until she was well. Ms Holland provided no explanation why the investigation could not have been progressed and finalised without Ms Werner returning to work. She accepts her description to Ms Werner of the situation she was in as a "*Catch 22*" as a mistake.

[74] Ms Werner's submissions that Ms Holland was also out to "*get her*" and working to support Ms Sullivan and the management team to get rid of her are not supported by the evidence. I do not accept Ms Holland was acting other than genuinely with regards to Ms Werner.

[75] However, I do not accept that the probable result of the conduct, and course of conduct engaged in by Ms Holland and other members of SkinKandy management was not Ms Werner's resignation and conclusion she had no effective or real choice but to resign.

[76] I accept the evidence that Ms Werner had legitimate reason to perceive she has been subjected to bullying by Ms Sullivan. It follows from this that I accept Ms Werner had a right to make a bullying complaint to Ms Holland. Further, that she had a right to have her complaint seriously considered and properly investigated.

[77] There is little evidence to support a conclusion that on receipt of Ms Werner's complaint Ms Holland took it seriously and endeavoured to thoroughly investigate Ms Werner's complaints and seek to address her concerns. Not unreasonably, Ms Werner expected this to be the case.

[78] After the first meeting with Ms Holland, events compounded, and Ms Werner's overall health and financial capacity further deteriorated.

[79] Ms Werner was advised she would need to account for alleged breaches of confidentiality. Ms Werner's evidence is that she only contacted people after this confidential meeting because Ms Holland requested her to ask for their permission to be contacted for the purposes of her investigation. In evidence, Ms Holland accepted this to be the case.[18]

[80] Ms Holland genuinely expressed concern about Ms Werner's fitness for work. The separate workers compensation compliant was progressed, investigated and rejected. Ms

Werner's conditions and concerns escalated as she was told by co-workers that Ms Sullivan and other SkinKandy managers had it in for her and wanted her gone all along.

[81] Understandably, Ms Werner didn't feel comfortable returning to work and reporting to Ms Sullivan until she had a resolution to her complaint and concerns. She told Ms Holland this. Ms Holland's response was not to find a way to progress Ms Werner's investigation or assure her that she had been heard and her complaint was being treated seriously. Rather, she described Ms Werner's situation as a Catch 22.

[82] I am satisfied that, when objectively assessed, the evidence in this case supports a conclusion that it was the conduct, or course of conduct of the employer that presented Ms Werner with no effective or real choice but to resign. It was Ms Sullivan's actions directing Ms Werner to work Saturdays despite Ms Werner's understanding that initiated Ms Werner's perception of bullying. It was Ms Holland's failure to find a way to progress and conclude Ms Werner's bullying complaint that exacerbated Ms Werner's circumstances. Ms Holland's actions initiating a breach of confidentially complaint against Ms Werner not supported by an objective assessment of the evidence had the same impact. SkinKandy's managers had made it known to Ms Werner's colleagues that Ms Werner was a troublemaker and needed to be gone.

[83] Ms Werner's evidence is that the above was compounded when she discovered she did not have access to her email, credit card and saw her photo removed from the staff notice board. Ms Holland presented a plausible explanation for Ms Werner's credit card and email no longer being accessible. However, her evidence was unable to explain why Ms Werner's photo remained on the staff notice board and she continued to have email access while on leave for 6 weeks in October 2023.[19]

[84] Ms Werner's evidence, which I accept, is that these discoveries compounded her conclusion that her employer wanted her gone and they were not going to take her complaint seriously, if she had not been dismissed already.

[85] On 27 July 2024, she consented to her legal representatives setting out her concerns and offering an amicable ending of her employment by resignation in return for a financial settlement. Her proposal was rejected, purportedly because her employer maintained its position and had reason to believe she had relocated to Gold Coast and was looking for alternative work.

[86] In her response to Ms Werner rejecting her offer, Ms Holland made it clear SkinKandy sought "immediate clarification of Ms Werner's resignation from her position of Store Manager".[20]

[87] Ms Werner's evidence is this was the last straw. She submits she was exhausted, distraught and just wanted things to end. That she was not aware of any other options available to her. She had previously reached out to the CEO of the Respondent and did not think she could do so again. She had reached out to HR, been let down and placed under investigation.

[88] When I asked Ms Werner why she did not make a s.739 application to the Commission, a General Protections application or a bullying complaint, her response was she was not aware of these options being available. Further, that she thought she had done everything she could

and just wanted her nightmare with SkinKandy to end. This evidence is inconsistent with the letter sent by Ms Werner's legal representatives on her behalf which clearly identifies the above options being available to her.

[89] In the circumstances of this case, I have accepted that it was the conduct and actions initiated by her employer that brought Ms Werner to this point. Further, I accept the uncontested evidence Ms Werner has presented of the stress, depression and anxiety she was suffering at the time and the impact this had on her mental health and capacity to identify and act on all options that may have been available to her. This evidence is supported by sworn evidence of Dr Marinesco and Mr Szer, which was not contested.

[90] On this basis, I accept that when Ms Holland rejected her proposal and unequivocally sought her immediate resignation, Ms Werner was left with no choice but to resign, consistent with the provisions of s.386(1)(b) and the authorities identified above. On 5 August 2024, Ms Werner emailed her forced resignation letter. She received no response.

[91] Ms Holland, who received Ms Werner's email and was responsible for managing Ms Werner's case, did not acknowledge or respond to the resignation letter. Her evidence is that despite the concerns it expressed she did not think it was necessary to contact Ms Werner. She did not think it necessary to assure her that her concerns were being treated seriously, ask her to confirm she had moved interstate or to reconsider her decision. Not even until she had a chance to consider the outcomes of SkinKandy's investigation into her complaints.

[92] Ms Werner had to email Ms Holland again on 8 August 2024 seeking a response to her resignation letter and enquire if she was required to work out her notice period. Only at this time is Ms Werner's resignation accepted, and she is advised she will be required to work out her notice period of 8 weeks unless she wanted to finish up earlier without being paid. A notice period inconsistent with the terms of Ms Werner's signed employment contract effective from 15 May 2023, which provides a 6 week notice requirement for managers of between 1-2 years.[21]

[93] Subsequently, Ms Werner discovers the day after she emailed Ms Hollard her resignation that Mr Papandriopoulos removed her access from the company WhatsApp. Ms Werner's perception of this discovery was that it confirmed SkinKandy had already resolved she was no longer going to be an employee.

[94] SkinKandy did not present any plausible explanation for Mr Papandriopoulos' actions. Ms Werner's submissions are that on discovering her removal she was again forced to confirm her resignation.

[95] Ms Werner emailed Ms Holland on 9 August 2024 confirming her resignation without payment for notice.

[96] I am satisfied that Ms Werner made this decision because of the conduct of Mr Papandriopoulos, which was undisputed. I am further satisfied that Ms Holland's delay in replying in any way to Ms Werner's forced resignation letter made it clear to her she was no longer wanted by SkinKandy as an employee and confirmed her decision to resign. These two actions add to my findings above that Ms Werner was forced to resign because of the conduct, or course of conduct by her employer.

[97] Had I not reached this conclusion, on the evidence before me, I would have also found that in the circumstances of this case the probable result of Ms Holland's reply to Ms Werner on 31 July 2024 seeking her "*immediate resignation*" was in fact what occurred. This also constitutes a dismissal within the meaning of s.386(1)(b).

Was the dismissal harsh, unjust or unreasonable?

[98] While I have found Ms Werner's employment ended because of the conduct, or course of conduct of her employer, it does not automatically follow that her termination was unfair. In making this determination, I must consider all the circumstances of the case along with the relevant authorities.[22] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[23]

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[99] Section 387 of the Act provides for the criteria for consideration whether a dismissal was harsh, unjust or unreasonable as follows:

> "**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."

[100] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.[24]

[101] I have set out my consideration of each below.

s.387(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)

[102] In order to be a valid reason, the reason for the dismissal should be "sound, defensible, or well founded"[25] and should not be "capricious, fanciful, spiteful or prejudiced."[26] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[27]

[103] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[28] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.[29]

[104] Deputy President Asbury (as she was then) summarised the relevant principles in relation to an employer's onus of establishing that there was a valid reason for a dismissal on the balance of probabilities as follows in *Mellios v Qantas Airways Limited,* which was confirmed on appeal by the Full Bench:[30]

"[17] In considering whether there is a valid reason for the Applicant's dismissal, I am required to be satisfied on the balance of probabilities that he engaged in the alleged misconduct or in misconduct to which dismissal was a valid, sound and defensible response. I must be conscious of the gravity of the allegations and the ramifications for the Applicant if they are made out. However, the standard of proof does not change and the issues in dispute must be determined on the balance of probabilities. Put another way, if must be more probable than not that the Applicant engaged in the relevant misconduct."

[105] I have applied these principles to the matter before me.

[106] I have set out Ms Werner's submissions and evidence in support of her contention that she was forced to resign above. Similarly, the Respondent's position and evidence that Ms Werner resigned from her employment is also set out above.

Findings

[107] I have been satisfied that Ms Werner was forced to resign from her employment because of the conduct, or course of conduct of her employer as set out above. The only identifiable reason SkinKandy has provided to explain the way it handled Ms Werner's bullying complaint is that because Ms Werner was not fit for work, it didn't want to proceed with its investigation because this may have made Ms Werner's situation worse. I do not accept this presents a valid reason.

[108] Ms Werner made it clear to Ms Holland she wanted to press on with the investigation and was happy to participate while not a work. I see no reason why this should not have been the case.

[109] Furthermore, SkinKandy has decided to not to make Mr Papandriopoulos available to give evidence. They have provided no explanation why Ms Werner was removed from the WhatsApp group on 6 August 2024 before her resignation was even acknowledged, let alone accepted.

[110] On this basis, I am not satisfied that SkinKandy has articulated any misconduct on the part of Ms Werner that would amount to a valid reason to bring her employment to an end. It follows that I do not accept a valid reason has been provided.

[111] As I have not found a valid reason for Ms Werner's termination, this finding weighs against the Respondent.

s.387(b) Whether the person was notified of that reason

[112] Proper consideration of s.387(b) requires a finding to be made as to whether the Applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[31]

[113] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[32] in explicit,[33] plain and clear terms.[34]

[114] As identified by the Full Bench in *Crozier v Palazzo Corporation Pty Ltd*:

> "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before a decision taken to terminate their employment in order to provided them an opportunity to respond to the reason identified."

[115] As I am not satisfied that there is a valid reason for dismissal, this factor is not strictly relevant in this case.[35] If I had found there was a valid reason for dismissal, I would have found that Ms Werner was not notified of the reason for her dismissal prior to a final decision being communicated to her. The evidence before me supports a conclusion that Mr Papandriopoulos removed Ms Werner from the company WhatsApp group without any reason, explanation or response to Ms Werner's forced resignation letter.

[116] Given these circumstances, I consider this to be a neutral factor.

s.387(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[117] There is no evidence Ms Werner was provided with an opportunity to respond to the any purported reasons for her dismissal. On the contrary, the evidence is that despite her requests for the investigation into her bullying complaint to be progressed, it is still to be finalised. In terms of Ms Werner's conduct, no evidence of any concerns with Ms Werner's performance or conduct has been presented but for the reference to a previous warning letter. Copies of the warning letter, however, have not been presented. Nor were they provided to Ms Werner, contrary to SkinKandy's usual practices and procedures.

[118] However, as the ending of Ms Werner's employment relationships is not related to her capacity or conduct, I consider this factor to be neutral.

s.387(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

[119] This factor is not relevant to the facts of this case as there was no request or opportunity for this to occur in the circumstances of this case.

s.387(e) If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal

[120] This factor is not relevant to the facts of this case as the ending of the employment relationship did not relate to unsatisfactory performance.

s.387(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 s.387(g) - Whether the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise impacted on the procedures followed

[121] The Respondent has not made any submissions on the size of its business or the absence of a dedicated human resource specialist. The Respondent is not a small business. It has dedicated human resources specialists, including in the form of Ms Holland. I consider this to be a neutral factor.

s.387(h) Any other matters that the FWC considers relevant

[122] The undisputed evidence in this case is that Ms Werner is a worker of Jewish faith struggling with and juggling the impact of the events in the middle east on her and her loved ones. This fact has had a negative impact on the mental health and capacity. She has sought support and understanding from her employer. To an extent, this was provided, up until Ms Werner made her complaint that she felt she was being bullied and harassed at work and an associated claim for injuries arising from this bullying. Thereafter, her employer has failed to adequately respond to her concerns or promptly act to investigate or address them. As a

consequence of this conduct and course of conduct, I have been satisfied Ms Werner was left with no choice but to resign and waive her period of notice. The combined impact of her absence from work as a result of her bullying complaint and subsequent resignation has had a significant impact on her financial and non-financial circumstances. So much so she has resorted to charity and community organisations for accommodation and other support. Ms Werner also submits, and it has not disputed, that she has not yet found comparable alternative employment despite attempts to do so.

[123] I regard these other factors weigh in favour of the Applicant.

Conclusion

[124] I have been satisfied Ms Werner has been dismissed within the meaning of s.386(1)(b).

[125] I have determined that there was not a valid reason for the dismissal.

[126] I have not been satisfied that Ms Werner was notified of the valid reason for her dismissal prior to this decision being made.

[127] I have not been satisfied that Ms Werner was given a proper opportunity to respond to any reason related to her capacity or conduct prior and consider this to be a neutral factor.

[128] There was no unreasonable refusal by the Respondent to allow Ms Werner a support person.

[129] I am not satisfied that there was relevant unsatisfactory work performance prior to the dismissal that was a contributing factor.

[130] I do not consider that the size of the Respondent's business and the absence of employed dedicated human resource management was a relevant factor.

[131] I have also had regard to the other matters I consider are appropriate to take into consideration.

[132] I have determined that Ms Werner's case was a case of forced resignation resulting in constructive dismissal and that dismissal was harsh, unjust and unreasonable.

Remedy

[133] Having been satisfied that the Applicant:

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

> I may, subject to the Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[134] Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

> (a) the FWC is satisfied that reinstatement of the Applicant is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all of the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[135] Ms Werner is not seeking to be reinstated to her job, but compensated for being unfairly dismissed. SkinKandy opposes reinstatement and compensation.

[136] Considering all the circumstances in this case and the submissions of the parties, including that Ms Werner has been absent from the workplace since April 2024, I am satisfied that reinstatement is not an appropriate remedy due to the breakdown of the employment relationship between the parties, which are beyond repair.

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

[137] Having determined that reinstatement is not appropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench:

> "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[36]

[138] Where an Applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[37]

[139] Here, Ms Werner submits that had it not been for the actions of her employer she would have returned to work when able and continued in her employment relationship as long as possible. It is also not disputed that Ms Werner has not been able to secure comparable alternative employment since her termination, despite attempts. On this basis, I am satisfied that the Applicant has incurred financial loss in the period since her termination and that some compensation is appropriate.

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

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

> (a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

[141] After the conclusion of the hearing, I invited both parties to address these criteria and sought additional submissions. Considering all the circumstances of this case, the evidence before me and the additional submissions, I am satisfied I can form a view as to compensation and consider each of these criteria below.

(a) the effect of the order on the viability of the employer's enterprise

[142] I do not have any evidence before me that would indicate that an order for compensation would have an effect on the viability of the employer's enterprise. I have, therefore, regarded this as a neutral factor in the calculation of compensation.

(b) the length of the person's service with the employer

[143] The Applicant commenced employment with the Respondent as a causal on 4 January 2022. She commenced full time on 7 March 2023, and ended her employment on 9 August 2024. She was not paid any notice on termination.

[144] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed

[145] As stated by a majority of the Full Court of the Federal Court:

> "…in determining the renumeration that the Applicant would have received, or would have been likely to receive…. the Commission must address itself to the Question whether, if the actual termination has not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as the likelihood of a further

> termination in order to be able to assess the amount of renumeration the employee would have received, or would have been likely to receive, if there had not been the actual termination".[38]

[146] In the present circumstances, the Applicant's evidence is that she would have continued in her employment as long as possible. The evidence before me is that by towards the end of July 2024 she had made the decision she did not want to return to the workplace if she had to report to Ms Sullivan. It is also that case that Ms Werner remained unwell and unable to return to work until 30 September 2024.

[147] The Respondent argues that Ms Werner resigned on 9 August 2024, that she waived her entitlement to work out her notice period and was paid all her outstanding entitlements at this time. Whether Ms Werner may have been required to return to work reporting to Ms Sullivan is not able to be determined as the employer's only conclusion to its investigation into Ms Werner's bullying complaint was that it was "likely to lead to a finding her claims were unsubstantiated".

[148] However, I accept there is a high likelihood that had Ms Werner not been forced to resign and had SkinKandy completed, finalised and communicated the outcomes of its investigation into her complaint to Ms Werner she would have been faced with the prospect of reporting to Ms Sullivan. This being the case, based on my findings above, I accept that it is more likely than not, Ms Werner would have then decided to end her employment with notice.

[149] In the circumstances of this case, I anticipate that the time it would have taken for SkinKandy to complete and finalise is investigation into Ms Werner's case would have taken a further 3 weeks. I find further that SkinKandy would have waited until Ms Werner was able to return to work from 30 September 2024 to communicate the outcomes of this investigation to her.

[150] On receipt of the investigation report that I am satisfied would have recommended Ms Werner continue to report to Ms Sullivan, I consider Ms Werner would have taken a further 3 weeks to respond to this report and confirm the ending of her employment with the Respondent on 20 September 2024, with notice. Considering a 6 week notice period as required by her contract, I am satisfied the effective end date of her employment would have been 1 November 2024.

[151] I consider the 12-week period between 9 August 2024 and 1 November 2024, the 'anticipated period of employment'.[39] Of this period, I note Ms Werner was not well enough to work until 30 September 2024 and that she would not have received any remuneration for the period from 9 August 2024 to 30 September 2024 as her paid leave entitlements had been exhausted. Therefore, I determine that Ms Werner would have received renumeration for the 5 weeks from 30 September 2024 to 1 November 2024.

[152] Ms Werner was paid an annual salary of $65,000, or a gross payment of $2,500 per fortnight, plus superannuation. This evidence is supported by her payslips provided. On this basis, I estimate her total gross earnings for the period 9 August 2024 to 1 November 2024 would have likely equated to $6,250 gross, plus superannuation contributions of $718.75.

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal

[153] In the circumstances of this case, it is not contested, and I am satisfied that the Applicant took reasonable steps to mitigate her loss and has sought to find alternative suitable employment since termination.

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[154] In the period since her termination, Ms Werner's evidence is she has earnt $7,366.77 gross. Of these total earnings, an amount of $1,267.00 was earnt during the 'anticipated employment period' from 9 August 2024 to 1 November 2024. The Respondent's evidence is that Ms Werner has also entered into an agreement in relation to her claim for workers compensation in which she will be paid 21 weeks' wages from 17 April 2024 and receive up to 10 psychological support sessions.

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation

[155] I have found the anticipated period of employment would have ended on 1 November 2024. There is no evidence presented of the Applicant's earnings between the time of making the order and the actual compensation, therefore, I consider this a neutral factor.

Compensation – how is the amount calculated?

[156] As noted by the Full Bench:

> "[t]he well established approach to the assessment of compensation under s.392 of the FW Act … is to apply the 'Sprigg formula' derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licenced Festival Supermarket (Sprigg).* This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages"*.[40]

[157] The approach in Sprigg is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an Applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[158] I have estimated that Ms Werner would have remained employed by SkinKandy until 1 November 2024.

[159] The remuneration Ms Werner would have received, or have been likely to have received, from her dismissal on 9 August 2024 to 1 November 2024 to be $6,250.00 gross, plus superannuation.

Step 2

[160] Only monies earned since termination for the anticipated period of employment are to be deducted.[41] Ms Werner earnt a total gross amount of $1,267.00 since termination, during the anticipated employment period from 9 August 2024 to 1 November 2024. This calculation of $6,250.00 less $1,267.00 leaves an amount of $4,983.00.

Step 3

[161] I now need to consider the impact of contingencies on the amounts likely to be earned by Ms Werner for the remainder of the anticipated period of employment.[42]

[162] I have already determined Ms Werner's earnings during the anticipated employment period. Therefore, I do not need to make a deduction for contingencies.

Step 4

[163] I have considered the impact of taxation but have elected to settle a gross amount of $4,983.00, plus superannuation.

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

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

[165] As I have not made any findings of misconduct this is not a relevant factor.

Compensation – how does the compensation cap apply?

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

(a) the amount worked out under s.392(6); and

(b) half the amount of the high income threshold immediately before the dismissal.

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

The amount is the total of the following amounts:

(a) The total remuneration:

i. Received by the person; or

ii. To which the person was entitled;

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

[168] Given I have estimated Ms Werner's weekly earnings to be $1,250, a compensation cap of $32,500.00 applies in accordance with s.392(6) of the Act.

Is the level of compensation appropriate?

[169] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate have regard to all the circumstances of the case".[43]

[170] The application of the Sprigg formula has resulted in an outcome where Ms Werner would be awarded a gross compensation amount of $4,983.00, plus superannuation. In the circumstances of this case, it is not contested that Ms Werner has suffered loss as a consequence of her employment coming to an end and not yet returning to comparable alternative employment. She has been out of comparable full-time work since April 2024. Most of this time she has been without an income as her entitlements to paid leave had been exhausted and she was not fit to return to work until 30 September 2024. This includes a 7-week period within the 'anticipated employment period'.

[171] Consequently, the compensation payable to Ms Werner has been reduced to considering she would have been on unpaid leave for this period if her employment had continued. Ms Werner's submissions are that she was only unable to work because how she was treated by her employer. Whilst I have found the probable result of SkinKandy's conduct was Ms Werner's employment coming to an end, I have not found SkinKandy to be wholly responsible for the circumstances Mr Werner found herself in. The evidence, including the impact of what was occurring in the Middle East, does not support this conclusion.

[172] The evidence does support a conclusion that the conduct of SkinKandy contributed to Ms Werner's circumstances and on this basis, I consider it appropriate they accept some responsibility for the exhausting of her paid leave entitlements. In reaching this conclusion, I have had regard to the undisputed evidence that Ms Werner and the Respondent have entered into a voluntary agreement to settle her claims for a workplace injury. Taking this into account, I considered it appropriate to increase the compensation payable to Ms Werner by a further $3,750, plus superannuation, being a 3-week proportion of the anticipated employment period she was unfit for work and would not have received an income. Taking all the circumstances of the matter before me into account, I am satisfied this is appropriate. The total amount of

compensation I have determined payable to Ms Werner is therefore $8,733.00, plus superannuation.

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

Compensation Order

[174] Given my findings above, an order [PR784218] will be issued requiring the Respondent to pay the Applicant in this matter the amount of $8,733.00, less taxation as required by law, plus superannuation of $1,004.26, to be paid into the Applicant's nominated fund, with both payments to be made within 14 days of the date of this decision.

COMMISSIONER

Appearances:

Ms A. Werner as the Applicant
Ms S. Holland on behalf of the Respondent

Hearing details:

2024.
Melbourne.
20 and 21 November.

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[1] See *Sathananthan v BT Financial Group Pty Ltd* [2019] FWC 5583.

[2] Transcript of Proceedings on 21 November 2024 at [PN1083].

[3] Court Book page 93.

[4] Applicant's Statement, Court Book page 20 at [80].

[5] Ibid at [82].

[6] Transcript of Proceedings on 20 November 2024 at [PN511] and Transcript of Proceedings on 21 November 2024 at [PN1263].

[7] Transcript of Proceedings on 21 November 2024 at [PN1150].

[8] [2017] FWCFB 3941.

[9] (1995) 62 IR 200.

[10] PR973462.

[11] Transcript of Proceedings on 21 November 2024 at [PN1263].

[12] Transcript of Proceedings on 20 November 2024 at [PN732].

[13] Transcript of Proceedings on 21 November 2024 at [PN954].

[14] Ibid at [PN1083] – [PN1084].

[15] Ibid at [PN1310].

[16] Email titled 'Attn: Sally Holland. Formal Complaint', Court Book page 47.

[17] Applicant's Statement at [27], Court Book page 11.

[18] Transcript of Proceedings on 20 November 2024 at [PN210]-[PN214].

[19] Ibid at [PN411]-[PN413].

[20] Court Book page 93.

[21] Employment Agreement (Salary) Store Manager – Full Time, Court Book page 233

[22] See *Australian Hearing v Peary* [2009] AIRCFB at [39]

[23] (1995) 131 ALR 422 at [128].

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

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

[26] Ibid.

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

[28] *Edwards v Justice Giudice* [1999] FCA 1836 at [7].

[29] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].

[30] [2020] FWC 2989.

[31] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533 at [55].

[32] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [151].

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

[34] Ibid.

[35] *Read v Gordon Square Child Care Centre* [2013] FWCFB 762 [46]-[49]; also *Rizvi v Salini* [2023] FWC 3112 at [48]-[50], [56]-[57].

[36] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [9].

[37] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550 at [20]; *Jeffery v IBM Australia Ltd* [2015] FWCFB 4171 at [5]-[7].

[38] *He v Lewin* [2004] FCAFC 161 at [58].

[39] Ellawala v Australian Postal Corporation Print S5109 (AIRCFB Ross VP, Williams SDP, Gay C, 17 April 2000) at [34].

[40] [2013] FWCFB 431.

[41] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFC 7206 at [19].

[42] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Action SDP, Gay C, 31 October 2001) at [39].

[43] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFC 7206 at [17]-[19].