DECISION

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

Mr Sirajul Bashir
v
Alex Perry Pty Ltd t/a Alex Perry
(U2018/9985)

DEPUTY PRESIDENT SAMS SYDNEY, 28 MARCH 2019

Termination of employment – application for an unfair dismissal remedy – aggressive and abusive conduct – gross profanities – disrespect for authority – health and safety of employees – overwhelming corroborative evidence – applicant's denials unbelievable and implausible – serious misconduct proven – valid reason for dismissal – procedural fairness afforded to applicant – any minor misstep in process does not outweigh seriousness of conduct – application dismissed.

BACKGROUND

[1] Mr Sirajul Bashir was employed as a Custom Made Pattern Maker/Sample Machinist by Alex Perry Pty Ltd at its Darlinghurst premises in Sydney. Mr Bashir commenced employment in November 2013 and was employed under the *Textile, Clothing, Footwear and Associated Industries Award 2010* [MA000017] on a nett salary of $948 per week. He was dismissed for serious misconduct on 10 September 2018. The letter terminating Mr Bashir's employment advised he would be paid five weeks' pay in lieu of notice, but did not expressly state that he was dismissed for serious misconduct. Although the letter did not set out the grounds for dismissal, it is apparent it was as a consequence of earlier warnings about Mr Bashir's allegedly threatening and aggressive behaviour towards other staff. I shall return to the details shortly.

[2] On 27 September 2018, Mr Bashir (herein after referred to as the 'applicant'), through his Union, the Construction, Forestry, Maritime, Mining and Energy Union (the 'Union'),

filed an application, pursuant to s 394 of the *Fair Work Act 2009* (the 'Act') seeking reinstatement and compensation for his alleged unfair dismissal. In its F3 – Employer Response, Alex Perry Pty Ltd (herein after the 'respondent') raised a jurisdictional issue in respect of the application in that the respondent was a small business covered by the Small Business Fair Dismissal Code (the 'Code') and that the Code had been complied with in this case. This objection was later withdrawn by the respondent and ultimately not pressed.

[3] In accordance with my usual practice, when the matter was remitted to me, I issued directions, fixed a hearing date and convened a further face-to-face conciliation in an endeavour to settle the applicant's claim. The conciliation was unsuccessful and the matter proceeded to hearing on 12 February 2019. At that time, the applicant was represented by Mr D *Malbasa*, National Legal Officer of the Union and Ms J *Steele*, of Counsel appeared with Ms A *Davidson*, Solicitor, Davidson Legal Consulting for the respondent, who were granted permission to represent the respondent, pursuant to s 596 of the Act.

THE EVIDENCE

[4] The following persons provided statements and/or oral evidence in the proceeding:

- Mr Alexander Pertsinidis (Mr Alex Perry), Owner and Director;
- Mr Trevor Stones, Creative Director;
- Ms Emily Bibby, Global Sales and Human Resources Manager;
- Ms Sally Anne Lemon, Production Manager (not required for cross examination);
- Mr Peter Kim, Financial Controller (not required for cross examination); and
- the applicant.

[5] It is useful at this this point, to set out the allegations against the applicant:

a) On Friday, 27 May 2016, an argument occurred between the applicant and a co-worker, Ms Carmela Pintamalli which was a violent, aggressive and antagonistic verbal altercation in front of the entire Alex Perry workroom (First Incident).

b) On the morning of 4 September 2018, the applicant asked the Production Manager, Ms Lemon, '*who is complaining?*' and said '*I will fucking slap her*' pointing in the direction of a female colleague, Yan Weng (Ms Weng) (Second Incident).
c) On 7 September 2018, the applicant had raised his voice and used aggressive and derogatory language to a fellow staff member and Manager (Third Incident).

[6] The applicant was also issued a warning letter dated 7 December 2018, described as a 'second warning', which referred to the applicant's failure to maintain a high level of quality workmanship. Although this warning was not the reason for the applicant's dismissal, it does relevantly form part of the factual matrix of the case.

Background to the business and workplace policies

[7] Mr Perry is an internationally renowned Australian fashion creator, designer and producer, primarily in the very high quality, high-end women's luxury fashion market. He has been in the business for 30 years. Mr Perry employs a number of persons who all work (including Mr Perry), in a relatively small, open plan workroom, measuring approximately 20 by 8 metres. This allows for regular contact and interaction between all staff. When not interstate or overseas, Mr Perry meets daily with Mr Stones, Ms Bibby and Ms Lemon to discuss work plans, schedules and any matters or issues requiring his attention.

[8] The applicant signed his most recent contract of employment (headed 'Employment Agreement') on 29 June 2016. His duties were set out as including:

- custom pattern construction;
- grading;
- sample machine sewing;
- hand sewing;
- fabric rouching and draping;
- fabric fusing;
- fabric cutting; and
- workroom cleanliness.

[9] In Clause 1.2 of the Contract, the applicant's duties and responsibilities are set out as follows:

> You will undertake the duties as set out in the Schedule to this agreement.
>
> From time to time, there may be a need to amend Your duties to reflect changing work roles and Our business needs and You agree that reasonable amendments may be made by Us to Your duties, tasks and responsibilities and Our reporting structures. You must also:
> (a) perform Your role in a professional manner;
> (b) serve Us faithfully and diligently to the best of Your ability;
> (c) not engage in anything that may create a conflict of interest with Your obligations to Us (eg. working for or providing information Our competitors);
> (d) comply with any operational and performance measures We issue from time to time; and
> (e) be punctual in attending at work and performing Your duties.

[10] Under the heading, 1.7 Work Health and Safety, the Contract provides:

> You must while at work:
>
> (a) take reasonable care for the health and safety of people who are at the place of work and who may be affected by Your acts or omissions;
> (b) co-operate with Us to enable compliance with all relevant work health and safety legislation;
> (c) not be in breach of any policies We have relating to bullying/harassment or drugs and alcohol;
> (d) use all equipment safely; and
> (e) comply with any work health and safety procedures We specify.
>
> Your work health and safety obligations are a fundamental requirement of Your position.

[11] A separate document titled 'Workroom Office Procedures Guidelines', was signed and acknowledged by the applicant on 8 June 2018. It contains the following relevant provisions:

> (a) Respect is to be shown to all staff members
> (b) yelling, swearing, arguing or violence will NOT be tolerated.
>
> 7. (a) Performance & quality will be heavily monitored – Alex Perry will not accept poor quality work.
> (b) If high performance is not executed warnings will be given.
> (c) Quality will be inspected by Kerryn, Alex, Trevor or Van.

(d) If you are unsure of the make, cutting or construction of your given work please ask Kerryn, Van or Trevor before anything is executed.

First incident

[12] It was Mr **Stones'** evidence that on the afternoon of 27 May 2016, he was witness to a verbal argument between the applicant and another employee, 65-year-old, Carmella Pintamalli (since retired). He was standing close to the applicant and several other employees were also close by, including Ms Lemon. Mr Stones had understood the argument began when Ms Pintamalli made a comment about the applicant's workmanship. The argument became heated and turned into a shouting match in which the applicant yelled '*I'll fuck you up the arse*'. Ms Pintamalli responded '*No you won't. I'm not your wife*'. Mr Stones said the applicant's behaviour was threatening and aggressive, particularly given Ms Pintamalli's small stature and age. The applicant had stood up from his machine and moved around in an agitated manner. At one point, Ms Pintamalli said '*Hit me, hit me, do it, I'll fucking sue you*'. Mr Stones and the then Brand Manager, Ms K Roco intervened and stopped the argument. Mr Stones said he was concerned that the work area contains large scissors and that given its intensity and the threat made by the applicant, the altercation could have turned physical.

[13] Shortly after, Mr Stones phoned Mr Perry to advise him of the incident. Mr Stones also recalled an earlier incident between the applicant and another female employee when the applicant had told Mr Stones '*sometimes women just need a slap*.' Mr Stones understood both the applicant and Ms Pintamalli were issued formal warnings for their conduct. Mr Stones was not cross examined about this incident. In a reply statement, Mr Stones acknowledged that he and Mr Perry swear from time to time with each other. However, he does not swear at any other person and had never heard Mr Perry, or anyone else swear in the office. He rejected the applicant's claim that '*swearing and banter was commonplace*' in the office.

[14] Ms **Lemon** confirmed that she was present during the 27 May 2016 altercation and had looked up when she heard heated raised voices. She clearly remembered the threat made by the applicant, because it was not the sort of language you would expect to hear in the workroom. After this incident, she had felt uncomfortable and unsafe around the applicant. Ms Lemon was not called to be cross examined about this incident.

[15] Ms **Bibby** was also present during the altercation and confirmed the applicant's threat, remembering the words because they were said loudly and aggressively and she was shocked. She was also concerned that an assault might have occurred, given the multiple pairs of scissors used in the workroom. Ms Bibby and Ms Lemon agreed that Mr Perry does swear occasionally, but it is never directed to, or about anyone. Ms Bibby was also not cross examined about this incident.

[16] Mr Perry was not present during this incident and recounted his conversation later that day with Mr Stones. He had no reason to doubt Mr Stones' report of the offensive and aggressive language used by the applicant. In fact, he had heard the applicant swearing before, using expressions such as '*it's fucking shit*'. Mr Perry did not discuss the matter with the applicant as he trusted Mr Stones and Ms Raco to deal with it. Individual or joint counselling was offered to both of them and they both refused. He recalled that both of the persons involved received a warning.

[17] Mr Perry said he was concerned that this incident was not the first time the applicant had behaved aggressively and had threatened female coworkers previously. Mr Perry recalled an earlier incident when he observed and heard the applicant threatening another female employee. He took the applicant aside and the following conversation ensued:

> Mr Bashir: 'Sometimes women just need a slap.'
> Mr Perry: 'You cannot say that, you just can't say that in here, you cannot threaten somebody.'
> Mr Bashir: 'She was doing it on purpose.'
> Mr Perry: 'She wasn't doing it on purpose. You can't do that. You've got to be able to work together.'

[18] Mr Perry said he was concerned for the wellbeing and safety of all his employees and agreed the applicant should be given a warning for his conduct on 27 May 2016.

[19] In a reply statement, Mr Perry denied the applicant's claim of a conversation between them about Ms Pintamalli. It never took place. Ms Pintamalli worked for the Company for 8 years and he had not wanted her to retire. He would never have said she was a '*bitch*', or that

he wanted to get rid of her. He added that attempts had been made to contact Ms Pintamalli, but were unsuccessful and it was believed she was overseas. Mr Perry acknowledged he does swear, but swearing is not commonplace. He had never directed swearing at anyone in the workplace.

[20] In cross examination, Mr Perry agreed he did not seek the applicant's response and that he did not personally investigate this incident. He trusted Mr Stones' and the other employees' first hand witnessing of the language used. It is not something they would manufacture.

Applicant's evidence

[21] The applicant was born in Burma and is 48 years old, married with two young children. English is his second language, although he is proficient in English. He holds a Certificate IV in Fashion Design. The applicant claimed that in a contract he was given on 6 January 2015, it contained a season clothing allowance, which he had never received. He claimed he was never given a copy of the Award or the Fair Work Information Statement. In cross examination, the applicant said that the contract of employment he signed on 29 June 2016 was '*definitely not my contract*'. The page with his signature was '*something else*'.

[22] The applicant agreed the workroom was small and it was easy to hear someone yelling in the office and people could see each other. He agreed that taking reasonable care for the health and safety of people, includes not threatening other employees with physical violence or verbally abusing them. The applicant agreed he was the only male Machinist in the workroom; and he claimed he is a very good one. However, not everyone appreciated him.

[23] During the applicant's cross examination, Ms *Steele* advised that the first employment letter of offer in 2015, had been updated, as had all the employees' contracts, and this was the one the applicant had signed in 2016. The applicant agreed he had read and signed to acknowledge the Workroom and Office Procedures, which included the matters set out in [11] above.

[24] The applicant recalled the argument he had with Ms Pintamalli in May 2016. It was heated, but he never swore at her, as swearing is not in his nature. He claimed that he did not see the warning letter dated 2 June 2016, until his dismissal two years later. He had never signed the letter and does not accept its content.

[25] In cross examination, the applicant could not remember what the argument with Ms Pintamalli was about. He first said it was not heated; but when he was referred to his statement, he agreed it was. He now remembered Ms Pintamalli had said to him '*I don't like Muslim men*' and Mr Perry called him aside and said '*this woman (Ms Pintamalli) is a fucking bitch. I will get rid of this woman. Be patient*.' When asked why this was the first time he had mentioned this detail, he claimed he had only just remembered it when asked the question.

[26] The applicant was shown the office floorplan as it was on 23 May 2016. He agreed the positioning showed Ms Lemon and Mr Stones about two metres from him and Ms Bibby about 10 metres away. He agreed the heated argument occurred in front of the whole workplace team. He did not know if they heard the argument or not. While the applicant denied the language alleged, if it had been said, he acknowledged it would be inappropriate, would make the person feel uncomfortable and frightened and would constitute an assault. However, he denied he assaulted Ms Pintamalli. Somewhat boldly, the applicant denied he had ever sworn, in any circumstances. He claimed that Mr Stones, Ms Lemon and Ms Bibby's evidence was false, they were lying and had made up what they claim they heard. He said Mr Perry was also lying.

[27] The applicant claimed he had never seen the warning letter and could not explain why it was in his employment file. This was another fabrication. The applicant insisted he was the one telling the truth. He then said Mr Perry and Ms Raco had said something to him about the argument, but had never given him a warning letter. He denied he used violent or aggressive language. The applicant said he would sign a 'proper' letter.

[28] The applicant denied an earlier incident in which Mr Perry claimed that he had threatened to hit Ms Van and raised his arm. He could not recall if Mr Perry had spoken to him about this, but could recall that there had been some sort of argument with Ms Van. He

denied telling Mr Perry that '*sometimes women just need a slap*.' He claimed Mr Perry was lying. As a Muslim man, he said '*I never lie*'. He agreed that if it happened, it would be completely unacceptable and would make the person feel unsafe.

Second Incident

[29] On 4 September 2018 at around 9am, Mr **Stones**, witnessed Ms Lemon and the applicant in an exchange about work that day in which words to the following effect were said:

> Ms Lemon: 'Could I get you to start working on this leather dress. Here is one you've done before. It looks great. Can you please go slow with this new one. I need it to be really perfect.'
>
> Mr Bashir: 'Why do you say that, is someone saying something? Who is saying something?'
>
> Mr Bashir pointed to the desk that Yan Weng, a pattern maker, works. Yan was not at her desk at the time as she had not yet started working for the day.
>
> Mr Bashir then said: '**I will fucking slap her**'.
>
> Ms Lemon: No one is saying anything.'

[30] Mr Stones said that he was approximately four metres away and he could easily hear the conversation. He observed the applicant's demeanour was aggressive, loud and angry. There could be no doubt he was referring to Ms Weng. Mr Stones approached Ms Lemon and said:

> 'What was all that about? He's not going to slap anyone. Where's Emily? We need to get Emily.'

[31] Mr Stones, Ms Lemon and Ms Bibby then discussed the matter and Mr Stones said:

> 'Emily, you need to go talk to Bashir straight away and give him a warning as soon as Alex gets in. I will tell Alex what's happened as soon as he gets into the office. He cannot, he will not threaten other people in the office.'

[32] Mr Perry was informed about the incident shortly after. Mr Stones was genuinely concerned the applicant might 'slap' Ms Weng. He had generally observed the applicant's interactions with women in the office, as aggressive, loud and dismissive (he would not refer to women by their names and simply referred to Ms Weng as 'her' or 'she').

[33] After Ms Bibby's meeting with the applicant at which he received a warning, Mr Stones had a conversation with her to the following effect:

> Ms Bibby: 'I spoke to Bashir and he would not accept the warning and he denied everything. He didn't accept that he said what you witnessed. I raised it with him a number of times and he denied it. I also tried to give him the letter and wouldn't accept it.'
>
> Mr Stones: 'That's ridiculous I heard it, and so did Sally.'
>
> Ms Bibby: 'He has asked that if there is any concern about the quality of anything he makes it needs to be discussed with him immediately. And I agreed that if there are any quality issues in the future, I am to raise them directly with him. So, going forward, if any of you have issues with his quality, you need to tell me quickly so that I can speak with him correctly and straight away. Please don't discuss it amongst yourselves or tell Sally. You need to tell me.'
>
> Mr Stones: 'Ok.'

[34] In cross examination, Mr Stones said it was unnecessary for him to meet the applicant to get his version of the incident, as he had watched it happen. In any event, it was not his role to meet him; it was Ms Bibby's responsibility.

[35] As Production Manager, Ms **Lemon** is responsible for the production process and supervising and allocating work to the seven workroom staff. Leading up to 4 September 2018, Ms Lemon had been concerned with the applicant's recent sewing of a zipper on a leather skirt, which made the dress unwearable. She allocated a garment to him and said:

> 'Can you please start on this one? Please take your time on it and make sure it's perfect.'

[36] The applicant and Ms Lemon then had the following conversation:

> Mr Bashir: 'Who is complaining, I want to know.'
>
> Ms Lemon: 'No one is complaining.'
>
> Mr Bashir said (while pointing of the direction of the pattern maker, Ms Weng, who was not at her desk at the time): '**I'll fucking slap her**.'

[37] It was Ms Lemon's evidence that she was offended by this conversation. It made her feel uneasy and uncomfortable. Given she had experienced the 2016 incident, she was nervous and concerned for her own, and other employees' safety in the work room. Ms Lemon was not required for cross examination as to this conversation (or at all).

[38] While Ms **Bibby** heard the conversation between Ms Lemon and the applicant, she could not hear the exact words used. After discussing the matter with Mr Stones and Ms Lemon, Ms Bibby met the applicant privately in the front room. When she raised the words he used towards Ms Van, he sneered at her, leant back, folded his arms and said:

> 'I don't swear. Who told you I said that. I'll talk to them'.

[39] After Ms Bibby said that as this was not the first time the applicant had sworn and used aggressive and derogatory language, she gave him a second warning. He sneered again and denied swearing. Ms Bibby knew his denial was untrue. After again denying he had sworn, but accepted he was angry, the applicant said:

> 'If there are any issues with the quality of my work, you need to come straight to me as soon as it happens. Then we won't have any problems.'

[40] Ms Bibby agreed, but the issue was his angry and aggressive language and that he knew he was not telling the truth and not taking his unacceptable conduct seriously. Ms Bibby then handed him the warning letter. As he refused to read or sign it, she ended the meeting.

[41] In her reply to the applicant's evidence, Ms Bibby noted that the applicant referred in his statement, to Ms Lemon or 'Sally'. However, she had never heard him refer to her, or any other woman by their name; it is always by a pronoun such as 'her' or 'she'. Ms Lemon

rejected the applicant's claim that she had not told him of the warning and that he did not receive the warning. She had the warning letter with her and he refused to take it.

[42] In cross examination, Ms Bibby acknowledged she has no HR qualifications. She was asked about the prepared warning letter she gave to the applicant. She said it was prepared as a guideline for their discussion. She said that although she did not identify the first instance of aggressive conduct, she believed he was fully aware that it related to Ms Pintamalli in May 2016. She denied the applicant's claim that she had not mentioned Ms Lemon or that he had not received the warning letter.

[43] Mr **Perry** was interstate on 4 September 2018, when Mr Stones rang to inform him of the Second Incident. Mr Perry directed the applicant be given another warning, as he was concerned that a pattern of unacceptable behaviour was happening and that his threats against Ms Pintamalli and Ms Weng may not be 'empty threats'. He had a duty to protect all employees and provide a safe workplace for them. He stressed that while quality of work was of the highest priority, this was not the issue.

[44] In cross examination, Mr Perry acknowledged he had not personally investigated this incident. It was unnecessary to tell the applicant who was complaining about him, as his pointing to Ms Weng's desk, indicated he believed he knew. The issue was not the complaint about the quality of his work, but the applicant's behaviour. While Mr Perry is the ultimate decision maker, he relied on his valued senior staff to provide him advice on any incidents in the office.

[45] The **applicant** claimed that on 4 September 2018, Ms Lemon met with him to discuss work issues. As he had heard rumours about his performance, he asked her if anyone was complaining about his work. Ms Lemon said '*No. No one is complaining*' and the discussion ended. The applicant said that later that day Ms Bibby summoned him to a meeting to ask about the conversation with Ms Lemon. He said nothing had happened, although he had asked whether anyone was complaining about him. When Ms Bibby asked whether he swore at anyone, he denied it and she told him to go. He claimed to have never received the second warning letter until after his dismissal.

[46] In cross examination, the applicant denied threatening to hit Ms Weng. He was shown the floor plan at that time and agreed Mr Stones' desk was ordinarily about four metres from him. However, he was not sure if Mr Stones was there at the time. He claimed Mr Stones was lying when he said he heard him say '*I'll fucking slap you*' and that he was pointing at Ms Weng's desk at the time. Ms Bibby was also not telling the truth about her version of events. If it had happened, he acknowledged that it was a threat of violence, which was completely unacceptable. He denied Ms Bibby had asked him to explain his threat to Ms Weng. He agreed Ms Bibby mentioned Ms Lemon being a reliable source and that she had said '*we cannot have swearing and threats of violence in our office*'. The applicant claimed he was never given, and had not seen any warning letter and he had not said '*I'm not signing that*'. He claimed Ms Bibby made all this up.

Third Incident

[47] In the first week of September 2018, being the finalisation of the new Spring/Summer collection for showing overseas, the Management Team (Mr Perry, Ms Lemon, Mr Stones and Ms Bibby) were concerned the samples were 'not up to scratch'. Consistent with her undertaking to the applicant to address any quality issues directly with him, Ms Bibby sought a meeting with him on 7 September 2018, to discuss a number of his recent samples which were of poor quality.

[48] At the meeting and after pointing out the unacceptable samples (uneven stitching, bunched up fabric etc.), Ms Bibby said the applicant became progressively more heated and aggressive, hitting the samples rack and jabbing his finger at her. He shouted four times '*these are perfect!*' within 30cm of her. He became extremely heated and was waving his arms almost touching her. While she tried to remain calm, she felt extremely uncomfortable and afraid. She tried to explain the faults, but he kept shouting '*these are perfect!*', '*I am the best machinist here. Who are you?*' Ms Bibby said she tried to get the applicant to calm down and suggested he sit and have a reasonable conversation. He remained standing when Ms Bibby tried to hand him a warning letter, he refused to take it. Eventually, he picked it up, read it for some time, and threw it at her while uttering the words:

'*I'm not signing this. Who are you? You are nothing*.'

[49] He then yelled '*I want to speak to Alex. He thinks I am amazing*.' Ms Bibby explained that as Mr Perry was not present, she had his authority to raise these matters, but he was welcome to talk to him. The applicant again replied '*You are nothing*.'

[50] Ms Bibby thought it best to end the meeting as she felt very uncomfortable. She was visibly shaking and close to tears and went outside with Mr Stones to tell him what had happened. He told her not to have any further contact with the applicant and he would let Mr Perry (who was in Melbourne) know. Mr Perry called Ms Bibby that evening and they had the following conversation:

> Mr Perry: 'Hi Em Trevor's just told me what's happened. Are you alright? Tell me what happened.'
>
> Ms Bibby: 'Oh Alex it was pretty awful, I tried to bring up quality with Bashir and it completely went in a whole different direction. He was extremely aggressive and dismissive and he was right in my face and yelled at me the whole time. He thinks what he did was perfect. He didn't want to talk to me, he only wanted to talk to you. He said I was nothing and he threw the letter at me.'
>
> Mr Perry: 'I am so sorry that you are in this situation, I am really sorry that you had to deal with this. I'm flying back tonight. Don't worry, we'll sort this out on Monday.'

[51] In a reply statement, Ms Bibby denied that when the applicant had asked to speak to the decision-maker Mr Perry, she had refused.

[52] In cross examination, Ms Bibby agreed she had prepared a warning letter for the meeting, but there was nothing for the applicant to explain, as she had all the poor quality samples with her. It was Mr Perry's express instructions that she issue him a warning letter. The issue became about his behaviour during the meeting. As he was unwilling to accept his poor workmanship, there was nothing to discuss about improving his performance, because he was yelling all the time. Ms Bibby accepted she had not told him he could have a support person.

[53] Mr **Perry's** evidence was that on inspection of the applicant's work, some of the dresses were sewn very badly and had to be recut. He asked Ms Bibby to have a word to the applicant and give him a warning. Mr Perry confirmed the substance of what he had been told by Mr Stones and Ms Bibby about the meeting. When he had spoken to Ms Bibby that evening, her voice was shaky and he could tell she was distressed. He believed what Ms Bibby had told him and formed the view the applicant should be dismissed, subject to anything he might say in his defence. The meeting was arranged for the following Monday for that purpose. Mr Perry drew a distinction between issues about quality workmanship and behaviour. It was a completely different matter to cause such distress to other individuals in his office, particularly as he had spent '*my entire career on making women feel good about themselves*.'

[54] In cross examination, Mr Perry said he did not have a meeting with the applicant about his poor workmanship, because he had seen it for himself. In any event, the issue was not the applicant's performance, but his unacceptable behaviour. The applicant had an opportunity on the Monday (10 September 2018) to say whatever he wanted to say. By this time, Mr Perry said he had '*Had it. His past behaviour, I had literally reached my limit*.' Mr Perry said that as he had spoken to Mr Stones, Ms Bibby and Ms Lemon, this was all the investigation he needed. He added:

> 'It was not a matter of giving Mr Bashir an opportunity to improve his performance. It was Mr Bashir's aggressive and unacceptable behaviour towards my employees that resulted in his dismissal.'

[55] Mr **Stones** was consulted about the warning letter the applicant was to receive on 7 September 2018. He was aware of the meeting between the applicant and Ms Bibby and observed them both entering the front room and close the door. Mr Stones said he could not see anything or hear the exact conversation, save for the applicant's loud voice. He never heard Ms Bibby. Although he had another appointment, Mr Stones was so concerned about her, he decided to wait until the meeting ended. After a long pause with no voices being heard, Mr Stones told Ms Lemon '*I'm going in there*', as he was extremely concerned.

[56] As he was about to do so, they both emerged. Ms Bibby looked distraught, shaken, visibly upset and red in the face. He took her outside to find out what had happened. They had the following conversation:

> Mr Stones: 'Are you ok what was going on in there?'
>
> Ms Bibby: 'He wouldn't accept the warning letter, he said I was nothing, that Alex will get rid of me.'

[57] Mr Stones confirmed he then spoke to Mr Perry and they agreed such behaviour was '*not on*', and had to be addressed.

[58] Ms **Lemon** was also in the vicinity during this meeting. She could hear a raised voice, but not precisely what was being said. At one point, Mr Stones said to her '*there is screaming going on in the room – do we need to go in there and see if Emily is okay?*'. Mr Stones went to the front room and a short while later Ms Bibby and the applicant came out.

[59] In cross examination, Mr Stones acknowledged he did not meet the applicant about this warning. He said that this was Ms Bibby's job. Mr Stones said he did not tell Ms Bibby to ignore the applicant after the meeting, but rather to avoid contact, so as not to risk further confrontation.

[60] The **applicant** said he was summoned to this meeting with Ms Bibby in which she raised concerns with the quality of his samples. She told him he needed to improve his performance and asked him to sign a warning letter. After reading the letter he claimed he said to Ms Bibby '*I would like to speak with Alex Perry about these concerns before I sign it*'. Ms Bibby told him Mr Perry was not available. He told her he would not sign it and she said '*okay you can go*'. He did not sign the letter as he did not agree with it, noting it related only to performance and not conduct.

[61] In cross examination, the applicant said the meeting with Ms Bibby went for 10 minutes (whereas she had said 20 to 25 minutes). He denied saying the sample is perfect. He said '*I will try my best*.' He agreed the meeting started quietly and professionally. He denied he was heated and aggressive. He never shouted or pointed his finger at Ms Bibby or went

close to her. He did not hit the sample rack. He claimed Ms Lemon and Ms Stones, who had heard the shouting, were lying. He denied standing up and said he and Ms Bibby were sitting all the time. He acknowledged he was given a warning letter and she asked if he understood it. He denied telling her she was '*nothing*'. All he had said was '*Alex thinks I'm amazing*.' He rejected the evidence that Ms Bibby was observed 'visibly shaken' after the meeting. He had no idea what happened after the meeting.

[62] Had the incident occurred as Ms Bibby described, the applicant acknowledged it would be threatening and completely unacceptable and would have made her feel unsafe. He agreed it would be difficult for him to work with her if it happened – but it did not.

The Dismissal Meeting – 10 September 2018

[63] Mr **Perry** had a prepared script of what he intended to say at the dismissal meeting with the applicant. Ms Bibby and Mr Stones were also present. After briefly outlining the three incidents involving Ms Pintamalli, Ms Weng and Ms Bibby, he asked the applicant for a response. He replied '*No I didn't.*' Mr Perry did not accept his denial and lack of respect for the staff. He gave him the termination letter and told him to leave right away. It was Mr Perry's view that the applicant's aggressive conduct could become more serious and jeopardise the safety of his staff, particularly the women. It would be impossible to reinstate him in such circumstances. He was also concerned women staff would leave, if he returned. Mr Perry rejected the applicant's claims that:

- he was summoned to the meeting;
- he was not told of the reasons for his dismissal;
- he was told he would be given four weeks' notice. He received five weeks' pay;
- he was 'physically forced' to leave. In fact, he took about an hour and a half to do so; and
- Mr Kim '*forcefully escorted*' the applicant out. Mr Kim actually offered to drive him to the station and he accepted.

[64] Mr Perry said that the applicant continues to misunderstand the reasons for his dismissal. It was not a matter of giving him time to improve his performance. He was dismissed for his aggressive and unacceptable behaviour. He was given an opportunity to explain himself, but he simply denied the incidents had occurred.

[65] In cross examination, Mr Perry agreed that the termination of employment letter had been prepared before the meeting and that it did not mention dismissal for serious misconduct. However, had the applicant said something in the meeting, it would have been taken into account, but '*nothing was forthcoming*'.

[66] Ms **Lemon** had no involvement in the dismissal meeting, but observed the applicant eat an apple shortly after the meeting and he took about an hour before he left. He had a lot of belongings and Mr Kim drove him to the train station. Ms Lemon would be very concerned if the applicant was reinstated. She would feel very uncomfortable, extremely stressed and unsafe. She feared his retaliation, because of her evidence in these proceedings.

[67] As to the Financial Controller, Mr **Kim** paid the applicant five weeks' pay in lieu of notice. He denied '*forcefully escorting*' him out of the workplace; rather, he had a conversation with him immediately after the meeting to offer his help and some comfort. He never told him to '*hurry up, get out, Alex is angry*.' In fact, he offered to drive him to the station and he accepted. When he dropped him off, they hugged. The applicant had left some items behind and they exchanged the following text messages:

> Hi Peter it's Sirajul I am outside office waiting for something I forgot please call me on [number] thanks
>
> actually my lunch box in the fridge and my jacket in the rake next to Van that all
>
> > I will keep them!!! Thanks for letting me know Sirajul, whatever you need, let me know and look forward to hear good news But take a rest with family first Ok!!!
>
> I am hare [sic] now out side your office in my red car
>
> > oh xx okok will come down
>
> thanks

[68] Mr Kim said it was incorrect that the applicant '*ran into him*' when he was collecting his possessions. They had arranged to meet. Mr Kim delivered his possessions, as he had requested. Mr Kim denied saying anything about Mr Perry being in '*a bad temper*' and he '*should leave*'. He had not observed Mr Perry upset and he did not say those words.

[69] Both Mr Stones and Ms Bibby confirmed Mr Perry's version of the meeting, particularly that the applicant was told of the reasons for his dismissal. He was invited to, but provided no response, except a simple denial. He was not '*suddenly physically forced out of the premises without a chance to address any concern*'. The applicant returned to his desk, ate an apple and took a long time to collect his belongings.

[70] The **applicant** claimed Mr Perry summoned him to a meeting with Ms Bibby and Mr Stones. Mr Perry told him at the outset he was to be dismissed and gave him no reasons. The only words he quoted were from Mr Perry '*We are dismissing you and here are your four weeks' notice in lieu of service*.' Mr Perry directed him to leave the building. The applicant said he was shocked. He was then '*suddenly physically forced out of the premises without a chance to address any concern Mr Perry might have about his performance*.'

[71] The applicant claimed Mr Kim forcefully escorted him out, told him to hurry and because he was abruptly and forcefully removed, he forgot some possessions. He returned to collect his possessions and 'ran into' Mr Kim who told him Mr Perry was in a bad temper and he should leave now quietly.

[72] The applicant claimed he felt utterly humiliated and offended after five years of service without any issues or concerns with his performance. He was denied any opportunity to discuss his performance and given two days (a weekend when he did not work) to improve.

[73] In cross examination, the applicant maintained that the meeting on 10 September 2018 lasted five minutes (despite the three other participants saying is lasted 20-25 minutes). The applicant denied Mr Perry read from a sheet of paper and he was told of the incidents of his threatening and intimidating behaviour. Mr Perry did mention his alleged disrespect

towards Ms Bibby, but he denied it. He claimed Mr Perry did not ask him for an explanation or to apologise. He told him he respected everyone. He claimed Mr Perry rudely told him to '*get out from here*.'

[74] The applicant then said he told Mr Perry '*two, three times*' that Ms Bibby was lying. He pleaded with Mr Perry not to dismiss him as he had two children and a mortgage. (In answer to questions from me as to why none of this was in his statement, he said it was because he had thought about it later on).

[75] The applicant now agreed he went back to his desk and ate an apple, but he had to eat it quickly because he was hungry and being forced out. He claimed he remained for half an hour. He now accepted Mr Kim came to him and they had a discussion in which Mr Kim said he wanted to help him. However, Mr Perry came down and said '*why are you sitting here? Get out.*' This was not in his statement or been mentioned at any time before. He denied '*just making it up*'. He agreed Mr Kim offered him a lift to the train station and he had agreed and said '*that would be good*'. He still maintained he was forced out. He claimed Mr Kim was lying when he denied saying to him to hurry up, because Mr Perry was very angry. He could not explain the text messages; see: [67], which did not show him 'running into him'; rather they had arrangements for him to have Mr Kim bring down some of his possessions. He claimed Mr Kim was a good guy, but he was directed by Mr Perry to get him out. He said Mr Kim hugging him was him just forcefully escorting him from the premises.

[76] The applicant commenced new employment in early November 2018 on a similar rate of pay. However, his new employer does not have the same prestigious reputation as the respondent. As a well known member of the Burmese Rohingya community, he is experiencing a loss of reputation which makes him feel hurt, humiliated, offended and depressed. He seeks reinstatement.

[77] In cross examination, the applicant again denied he had done anything wrong. He could not explain why Ms Lemon and Ms Bibby felt uncomfortable and unsafe, if he was to return and to work close by them in a small space. He said it was up to the boss to investigate this, and sort it out. They were lying anyway. The applicant was asked about his new

employment which he secured in early November 2018. He now earns $980 nett for a 38 hour week, compared to $948 nett for a 40 hour week which he received when he worked for the respondent.

SUBMISSIONS

For the respondent

[78] It was submitted that this case essentially turns on witness credit; that is, whether the Commission accepts the applicant's steadfast denials of having done nothing wrong or the evidence of Mr Perry, Ms Bibby, Ms Lemon, Mr Stones and Mr Kim. The written submissions set out the evidence of the respondent which disclosed corroborative testimony that the applicant had:

(a) threatened and used profanities against a 65 year old female machinist;
(b) threatened to hit another female employee, Van;
(c) threatened that he would '*fucking slap*' Ms Weng; and
(d) became angry and aggressive with Ms Bibby on 7 September 2018, and told her she '*was nothing*'.

[79] This last outburst was the 'final straw' for Mr Perry. The applicant had engaged in serious misconduct which had created a serious and imminent risk to the health and safety of the other employees and for which dismissal was not only for valid reason reasons, but these reasons were sound, defensible and well founded; see: *Selvachandran v Peterson Plastics* (1995) 62 IR 371. Mr Perry had relied on the eyewitness accounts of Ms Bibby, Mr Stones, Ms Lemon and from his own experience, and found that the applicant's unacceptable conduct had occurred.

[80] Addressing each of the other criteria in s 387 of the Act, the respondent submitted that:

(a) the applicant was well aware of the reasons for his dismissal;
(b) the applicant was given an opportunity to respond to the allegations, but simply denied the behaviour;
(c) the applicant did not ask for a support person;

(d) the applicant's dismissal did not relate to unsatisfactory performance; and

(e) the small workplace meant Mr Perry's investigation was relatively straightforward. He only needed to speak to the witnesses of the applicant's behaviour and had his own experience to rely on.

[81] Other matters to be taken into account were the two formal warnings given to the applicant. If there were any procedural flaws, they were not of such significance as to outweigh the seriousness of the applicant's misconduct.

[82] The respondent put that should the applicant's dismissal found to be unfair, it would be entirely inappropriate to reinstate him. In addition, given the five weeks' notice he had been paid and that he secured alternative higher paid employment in early November 2018, any compensation would be nil, also having regard for his misconduct.

[83] In oral submissions, Counsel emphasised the contrary evidence of the applicant to that of the respondent's witnesses and the fact that most of the respondent's witness statements were not challenged, including Ms Lemon and Mr Kim, who were not cross examined at all. The Commission would reject the evidence of the applicant where it conflicts with the evidence of Mr Perry, Ms Bibby, Mr Stones, Ms Lemon and Mr Kim and the business records, particularly in respect to his denials of:

- ever swearing;
- using offensive or threatening language;
- not receiving any warnings; and
- being 'forcefully' removed from the workplace.

[84] Ms *Steele* put that the applicant's evidence was not credible. He was evasive and had sudden recollections in the witness box, for the first time, about relevant events. Ms *Steele* observed that it would appear Mr *Malbasa*'s questioning went essentially to issues of procedural fairness. However, the applicant was afforded procedural fairness. Mr Perry did not need to investigate the matter in the strict sense, as all he had was the applicant's steadfast denials, against the opposing corroborative evidence of three witnesses, who he had utmost confidence in. The matter was not complicated. Even if there were procedural flaws they were

not outweighed by the seriousness of the applicant's conduct, which was not just one off swearing, but of his consistent threats against female employees which constituted a risk to their health and safety; see: *Albert v Alice Springs Town Council* [2017] FWC 73. Further, any flaws would not have altered the outcome.

[85] In any event, as to the warnings, Ms *Steele* said it would have been unnecessary to warn him about his unacceptable behaviour, which was clearly contrary to any reasonable community standards. Ms *Steele* relied on two authorities in this regard; *Salloum v Jayco Unit Trust t/a Jayco Caravan Manufacturing* [2016] FWC 3746 and *Aiono-Yandall v Linfox Australia Pty Ltd t/a Linfox Australia* [2014] FWC 1649. These cases drew a clear distinction with common workplace swearing to abusive, threatening and offensive swearing, designed to intimidate the person to whom it is directed. As to the loss of trust and confidence relied on through the respondent's evidence, Ms *Steele* referred to *Tenterfield Care Centre Limited v Wait* [2018] FWCFB 3844.

For the applicant

[86] Mr *Malbasa* submitted that the evidence of the first incident in May 2016 was based on hearsay. The applicant strongly denied the comment he was said to have made two years earlier. He had never received or signed a warning letter at the time.

[87] Mr *Malbasa* said that on 4 September 2018, the applicant claimed the meeting with Ms Bibby was cordial. He denied Ms Bibby's version of events and denied receiving a second warning. In any event, the letter of warning focused entirely on his alleged poor performance (which he denied) and made no mention of his conduct. Further, the letter of termination made no reference to any conduct issue. He had no opportunity to respond to any of the allegations going to either performance or conduct and the decision to dismiss him was taken before he had any opportunity to defend himself; see: *Crozier v Pallazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 and *Wadey v YMCA Canberra* [1996] IRCA 568. Mr *Malbasa* also put that the applicant was not offered to have a support person in any of the meetings leading to, or at the meeting in which he was dismissed.

[88] Mr *Malbasa* submitted that the applicant had five years of high quality performance and diligence, without any warnings. He only found out about the first warning letter after he was dismissed. Mr *Malbasa* invited the Commission to take no account of the so-called warnings and, in any event, he was given no opportunity to improve his performance or conduct. The respondent's failures in procedure were exacerbated by it having a dedicated HR function and external legal advice.

[89] Finally, Mr *Malbasa* submitted that the applicant should be reinstated, without loss of continuity and the payment of lost back pay or, in the alternative the maximum compensation of 26 weeks' pay.

[90] In further reply submissions, Mr *Malbasa* put that:

- Ms Pintamalli made numerous racist comments towards the applicant about her dislike for Muslims;
- Mr Perry had told him that Ms Pintamalli was a '*bitch*' and he wanted to get rid of her;
- Mr Perry frequently swears in the workplace;
- it was 'extraordinary' that the applicant knew nothing about any warning letter until after he was dismissed;
- the applicant was refused an opportunity to speak to Mr Perry about his alleged poor workmanship;
- the termination meeting lasted five minutes;
- the applicant's English is poor, and he was given no opportunity to have a support person to help him;
- Mr Perry was not present at the incident on 27 May 2016, or the meetings on 4 and 7 September 2018. He was the decision-maker, but did not investigate any of the allegations against the applicant and failed to seek his version of events;
- the applicant's conduct did not fall within the definition of misconduct in Regulation 1.07 of the *Fair Work Regulations 2009*;
- swearing at work did not constitute serious misconduct, justifying summary dismissal; and
- there should be no deduction made from any compensation order because the applicant had mitigated his losses by obtaining a higher paid alternative position.

[91] In oral submissions, Mr *Malbasa* focused on the fact that the applicant was not given an opportunity to meet the decision-maker, Mr Perry. There was also confusion as to who had the authority to issue warning letters. Further, the applicant was never given any statements from those who were alleged to have been the persons he had directed his unacceptable language towards. Mr *Malbasa* relied on my decision in *Rojas v Beacon Products Pty Ltd* [2018] FWC 4317 in this respect.

CONSIDERATION

Statutory provisions and authorities

[92] There are no jurisdictional objections to this unfair dismissal application being determined by the Commission. Specifically, I am satisfied that:

(a) the applicant was dismissed at the initiative of the employer on 10 September 2018 (ss 385(a) 386(1)(a) of the Act);

(b) his unfair dismissal application was lodged within the 21 day statutory time limitation set out at s 394(2)(a) of the Act;

(c) he is a person protected from unfair dismissal in that:

   i. he had completed the minimum employment period set out in ss 382 and 383 of the Act, being a period of five years;

   ii. his remuneration was below the high income threshold (s 382(b)(iii)); and

   iii. he was employed according to the terms and conditions of a Modern Award (s 382(b)(i)).

(d) his dismissal was not a case of genuine redundancy (s 385(d)); and

(e) his dismissal was not a case involving the Small Business Fair Dismissal Code, as the respondent employs over 15 employees (s 385(c)).

[93] Section 385 of the Act defines an unfair dismissal based on four criteria there set out, each of which must be satisfied if the person, seeking a remedy from unfair dismissal, is to succeed. The section reads:

> **385 What is an unfair dismissal**

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.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.

[94] As I have just concluded that three of the above criteria have been satisfied ((a), (c) and (d)), this only leaves the question of whether the applicant's dismissal was '*harsh, unjust or unreasonable*' and therefore an unfair dismissal. To this end, one must direct attention to s 387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. These matters are:

(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.

[95] It is trite to observe that each of these matters must be considered and a finding made on each of them, including whether they are relevant or not; for example, whether a person was refused an opportunity to have a support person present (ss(d)) may be irrelevant, if the request was not made, or the employee declined to take up the offer.

[96] The meaning of the expression '*harsh, unjust or unreasonable*,' in the context of a dismissal, was explained in the oft-quoted extract from *Byrne & Frew v Australian Airlines* (1995) 185 CLR 410 (*Byrne*) by *McHugh* and *Gummow* JJ, as follows:

> '128. … 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.'

[97] Pertinent to this case, is the following extract from *BHP Coal Pty Ltd v Schmidt* (2016) 257 IR 11 ('*BHP Coal v Schmidt*'), where the Full Bench of the Commission said at [9]:

> 'It is also well established that an assessment of whether a dismissal is harsh, unjust or unreasonable does not involve the Commission member putting themselves in the shoes of the employer and determining what he or she would have done in the circumstances. Findings of fact need to be made in relation to the specified criteria and other relevant factors. An overall assessment then needs to be made in relation to the statutory test of whether the dismissal is harsh, unjust or unreasonable. The task is not to review specific elements of the employment history to determine whether a discrete element may be unfair or unjustified.'

Allegation of serious misconduct

[98] The applicant was summarily dismissed for serious misconduct, although he received five weeks' pay in lieu of notice. Such payment does not mean the reason for dismissal, or its immediate effect, are called into question. 'Serious misconduct' is defined in the Act's Regulations. Regulation 1.07 sets out a non-exhaustive definition as follows:

1.07 Meaning of serious misconduct

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

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

(a) wilful or deliberate behaviour by an employee 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.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault;

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment. [*my emphasis*]

[99] It may be safely assumed that the respondent relies on sr (2) and possibly sr (3)(a)(iii) of the Regulation. However, reliance on the Regulation is not necessarily determinative. Mr *Malbasa* stressed that the applicant had not engaged in any of the examples of serious misconduct defined in subregulation (3) the Regulation. Putting aside that I do not agree, the Regulation and the non-exhaustive examples of serious misconduct, do no more than provide a guide. Consistency with one, or more of the examples in the Regulation, does not displace the statutory instruction that a valid reason (such as a finding of serious misconduct), is but one of the relevant matters the Commission is required to take into account, under s 387 as to whether a dismissal is '*harsh, unjust or unreasonable*'. To demonstrate this proposition I refer

to what the Full Bench said in *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [33]-[34]:

> **'[33]** The relevance of the definition of "*serious misconduct*" in reg.1.07 to the matter is also, with respect, obscure. Section 12 of the Act contains a definition of "serious misconduct" for the purposes of the Act which simply cross-refers to reg.1.07. Apart from s.12 itself, the expression "serious misconduct" is used in only three places in the Act. In s.123(1)(b), a dismissal for serious misconduct is a circumstance in which the notice and redundancy entitlement provisions of Pt 2-2 Div 11 are not applicable; in s.534(1)(b) a dismissal for serious misconduct is one to which the requirements for notification and consultation in Pt 3-6 Div 2 do not apply; and in s.789(1)(b) a dismissal for serious misconduct is one in relation to which the requirements established by Pt 6-4 Div 3 for notification and consultation do not apply. The expression "*serious misconduct*" is not used anywhere in Pt 3-2, Unfair Dismissal, of the Act. Section 392(3) requires the Commission, in relation to the award of compensation for an unfair dismissal, to reduce the amount that it would otherwise order by an appropriate amount where it is "*satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person*". However, it is clear that conduct may constitute "*misconduct*" for the purpose of s.392(3) without necessarily being "*serious misconduct*". The expression is used in the Small Business Fair Dismissal Code, but that had no application in this case (and it is at least highly doubtful in any event whether the reg.1.07 definition applies to the Small Business Fair Dismissal Code). Reg.1.07 therefore had no work to do in the application of the provisions of Pt 3-2 to the circumstances of this case.
>
> **[34]** It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee's conduct met a postulated standard of "serious misconduct". In *Rankin v Marine Power International Pty Ltd* Gillard J stated that "There is no rule of law that defines the degree of misconduct which would justify dismissal without notice" and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship. "Serious misconduct" is sometimes used as a rubric for conduct of this nature, but to adopt it as a fixed standard for the consideration of misconduct for the purpose of s.387(h) may be confusing or misleading because the expression, and other expressions of a similar nature, have been considered and applied in a variety of contexts in ways which are influenced by those contexts. In *McDonald v Parnell Laboratories (Aust) Pty Ltd, Buchanan* J said:
>
> > "[48] The terms 'misconduct', 'serious misconduct' and 'serious and wilful misconduct' are often the subject of judicial and administrative attention as applied to the facts of particular cases but there is relatively little judicial discussion about their content and meaning. Naturally enough, when the term 'serious misconduct' is under consideration an evaluation of what conduct

> represents 'serious' misconduct is influenced by the (usually statutory) setting in which the phrase must be given meaning and applied. Frequently, for example, the question at issue is whether an employee is disentitled by reason of his or her conduct to a statutory entitlement (eg. in New South Wales, where Ms McDonald was employed, see *Long Service Leave Act 1955* (NSW) s 4(2)(a)(iii); *Workers Compensation Act 1987* (NSW) s 14(2).'" (*footnotes omitted*)

[100] The notion of wilful or deliberate behaviour which strikes at the heart of the employment relationship, has been considered in a number of well known authorities. In *North v Television Corporation Ltd* (1976) 11 ALR 599, *Franki* J said at p 616:

> 'It is clear that a single act of disobedience may be sufficient to justify dismissal on the ground of misconduct but it was held in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, that to justify summary dismissal a single act must be such as to show that the employee was repudiating the contract of service or one of its essential conditions.'

[101] *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 (referred to in the citation above) makes it plain that an act of disobedience or misconduct (justifying dismissal) requires also that the disobedience must be 'wilful':

> '... I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions (P288).'

[102] In *Concut Pty Ltd v Worrell* (2000) 103 IR 160, His Honour, *Kirby* J, dealt with the ordinary relationship of the employer and employee at common law and said at [51]:

> 'The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law:
>
> > "conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. ...[T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his

> relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."

In the present case, the findings at trial went beyond mere uneasiness as to the future. They necessitated, or at least warranted, a conclusion that the "confidence" essential to the relationship of employer and employee had been destroyed. Instead of pursuing the interests of the company and its shareholders, the employee had pursued his own private interests. Not only was the employee in breach of his duty of fidelity and trust owed to the employer, he had remained in breach of that duty to the date of the trial. Until that time he had not accounted for the benefits wrongly appropriated by him. Indeed, he had denied any wrongful appropriation. The issue so tendered at the trial was determined against the employee. He was then subject to the employer's counter-claim for an order to make a refund. Such order was duly made at trial. It was not contested on appeal. Given his senior status in the company's service and the nature and extent of the misconduct disclosed in the evidence and accepted by the primary judge, it was open to him to find that the employee had undermined the confidence essential to the ongoing relationship of employment. Prima facie, this had afforded a legal justification for the employee's summary dismissal.

It is, however, only the exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to 'isolated' acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee like Mr Wells, will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal.'

[103] In cases of summary dismissal, the onus rests on the employer to prove, to the Commission's satisfaction, that the misconduct, had in fact, occurred. While this evidentiary onus must be discharged on the civil onus of proof (on the balance of probabilities); see: *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*'), the more serious the allegation, the higher the burden on the employer to prove the allegation. In *Briginshaw*, at page 362, *Dixon* J said:

> 'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding

> are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.'

[104] Further, in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449*,* the High Court said:

> 'The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.' (*footnotes omitted*)

[105] That the Commission, for itself, must be satisfied that the misconduct occurred, is well established by the authorities of this Commission and its predecessors. In *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1019, a Full Bench of the Australian Industrial Relations Commission ('AIRC', as the Commission was then styled) said at [24], [26], [28] and [29]:

> '**[24]** 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 in the proceedings 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.
>
> ...
>
> **[26]** As we have noted above, s.170CG(3)(a) obliges the Commission to make a finding as to whether there was a valid reason for the termination of employment. In circumstances where a reason for termination is based on the conduct of the employee the Commission must also determine whether the alleged conduct took place and what it involved.
> ...
>
> **[28]** It is apparent from the above extract that his Honour answered the question of whether the alleged misconduct took place on the basis of whether it was reasonably

> open to the employer to conclude that the employee was guilty of the misconduct which resulted in termination. This is not the correct approach. **The Commission's obligation is to determine, for itself and on the basis of the evidence in the proceedings before it, whether the alleged misconduct took place and what it involved.**
>
> **[29]** In our view the Senior Deputy President failed to determine for himself whether Mr King was guilty of misconduct in the way alleged by Freshmore and he should have done so as part of determining whether the termination had been harsh, unjust or unreasonable. **When the reason for a termination is based on the misconduct of the employee the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred.** The absence of such a finding leads us to conclude that the member below failed to properly determine whether there was a valid reason for the termination of Mr King's employment.' (*my emphasis*)

[106] Even accepting that a finding of serious misconduct was open to the respondent, such a finding must not be confused with the statutory language. The statute still requires the Commission to find that there was a valid reason for dismissal (s 387(a)). In *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200, a Full Bench of Fair Work Australia (FWA, as the Commission then was) held at [16]:

> '**[16]** In the circumstances of this matter the University purported to terminate Dr Asher's employment for serious misconduct within the meaning of that term in the University's enterprise agreement. If it successfully established that Dr Asher had engaged in serious misconduct it would necessarily follow that there was a valid reason for the dismissal. However, the converse is not true. As established by *Annetta*, the question that needed to be considered was whether there was a "valid reason" in the *Selvachandran* sense – whether the reason was sound, defensible or well founded. Whether it also amounted to serious misconduct may well be a factor relating to the overall characterisation of the termination but it was not an essential requirement in the determination of whether a valid reason exists.'

THE EVIDENCE

Swearing in the workplace

[107] It is difficult to understand why the applicant relied on a claim that swearing (and banter) was common in the workplace, if his primary position was he had never sworn at any time, as it was not in his nature. I ask, what difference would it make if swearing was, or was not common in the workplace, if he never swore at any time (which for reasons I later set out,

I do not accept). This defence is usually advanced when an employee admits to swearing, but claims it is a normal and commonplace occurrence for employees to swear at work. This is not the applicant's position at all. He maintains he did not swear during the incidents in which he was heard doing so, and in fact he never swears, despite the evidence of others that he does so regularly.

[108] In any event, it hardly needs to be said that swearing in ordinary conversation might be tolerated in some workplaces (very unlikely in schools, childcare facilities or convents), it is an entirely different proposition where swearing, and grossly offensive language is directed at a particular person or group of persons in an aggressive, threatening or intimidatory fashion. If the evidence of the respondent is accepted, there can be no doubt that the language used in the manner it was used, falls squarely in this latter category. Such conduct will invariably be grounds for summary dismissal, as it will likely result in a risk to the health and safety of the person to whom the language is directed. As such, the employer has a duty to protect the health and safety of its employees. A number of decisions have highlighted the distinction I refer to above. In *Salloum v Jayco Unit Trust* [2016] FWC 3746, *Harper-Greenwell* C said at [63]-[64]:

> **[63]** The language used by Mr Salloum may be language that is commonly used in many workplaces. However, attention must be given to the distinction between the general use of the language as opposed to using it in an abusive manner directed towards another employee. I have no doubt that directing such language in an abusive manner towards other employees would amount to gross insubordination and warrant dismissal.
>
> **[64]** The evidence establishes that Mr Salloum continued to behave in an aggressive and abusive manner in the workplace despite being counselled and receiving previous warnings for his behaviour. The first and final warnings state the consequence of a further breach would result in termination of employment. I consider the conduct in question amounts to a valid reason for termination of Mr Salloum's employment, in that it was a sound, defensible and well-founded reason.

[109] *Richards* SDP in *Aiono-Yandall v Linfox* [2014] FWC 1649 said at [81]-[83]:

> **[81]** I also do not accept that the workforce commonly communicated in the tone and manner in which the Applicant interacted with his supervisors at the meeting in the boardroom. This was never made out. The facts as I have found them to be are that the

> Applicant's conduct was his personal responsibility and did not arise from or reflect any collective standards.
>
> **[82]** In all, the Applicant's conduct was of a serious kind. It was conduct about which he had been warned some nine months earlier. In November 2012 the Applicant had been informed in very clear terms that the employer would not tolerate abusive language or threatening conduct. That warning was not so long in the Applicant's past for it to have lost its currency or for the Applicant to have to have forgotten its potency as a warning. When he was given the prior warning, the Applicant had been given an unambiguous communication by his employer that certain conduct if again manifested may result in the termination of his employment. He did not heed that warning or restrain his impulses as reasonably required.
>
> **[83]** The Applicant's conduct was such that it warranted his dismissal. It was insubordinate, disrespectful and threatening. It also posed a potential safety risk to him and others in the environment in which the Applicant worked.

[110] It behoves an employer to take whatever steps are necessary to ensure the health and safety of its employees. This must include the kind of threats alleged against the applicant. Sometimes, this will mean the dismissal of an employee who makes such threats. I am satisfied that this was the situation facing Mr Perry. He responded appropriately and within the bounds of affording the applicant procedural fairness and natural justice. To do otherwise was not only contrary to law, but is inimical to a harmonious, respectful and productive workplace. Given the overwhelming weight of corroborative evidence of the respondent's witnesses, whose cross examination barely mentioned the incidents they had directly witnessed, and the applicant's fanciful and untruthful denials of any wrongdoing, Mr *Malbasa* was left to valiantly build a case akin to creating '*a silk purse out of a sow's ear*'. It is little wonder that the applicant's case focused almost entirely on a few insignificant procedural points and a poor work performance warning, which was completely unrelated and irrelevant to the reasons for the applicant's dismissal, being his aggressive, threatening and intimidatory behaviour towards fellow women co-workers. In short, Mr *Malbasa* struggled to defend the indefensible.

[111] In my view, the applicant was a witness of little credit. I believe he was deliberately untruthful in his responses to Ms Bibby and Mr Stones and in his statement and oral evidence in these proceedings. Specifically, I do not accept his evidence that:

(a) he did not receive a warning from Ms Bibby for his aggressive and threatening behaviour on 4 August 2018. It is very convenient for an employee to later deny receiving a warning, or claiming it has no effect, merely because it was not signed at the time;

(b) he does not swear and did not swear in the workplace. The 'red herring' excuse that swearing and banter in the workplace was commonplace, does not sit well with his claim that he was an innocent bystander, who had never sworn. Mr Perry, Ms Lemon, Mr Stones and Ms Bibby all gave evidence that they had heard the applicant swear on other occasions. I accept their evidence. In any event, even if this was a workplace where swearing was commonplace, that entirely misses the point. It hardly needs to be said that mild swearing not directed to anyone and in general conversation, is a world away from obscene swearing towards another employee in an aggressive and threatening manner;

(c) he did not use the threatening and offensive language towards Ms Pintamalli and Ms Weng. His absolute denials are utterly implausible when the following matters are taken into account:

  (i) his own evidence was that he was angry when someone appeared to have complained about his workmanship;

  (ii) the small workroom where 7 to 10 people worked in close proximity to each other and where loud and angry language is easily heard;

  (iii) at least three persons who gave evidence and others who did not, heard or would have likely heard, the threatening and offensive language used by the applicant;

  (iv) the threat towards Ms Pintamalli was so grossly offensive one would be unlikely to forget it, particularly when directed to a 60 year old woman;

  (v) the meeting with the applicant on 10 September 2018 lasted 20 to 25 minutes and not five minutes as he claimed. In my view, the applicant had to maintain the five-minute line, because to do otherwise, would not fit his other narrative that he was not told of the reasons for his dismissal and not invited to respond;

  (vi) he had never signed, and was unaware of his Contract of Employment, dated 29 June 2016. In explaining his signature on page 8 and countersigned by Mr

Kim, the applicant claimed he had signed something else, not this document. This is errant nonsense;

(vii) he was 'forcefully' removed from the premises. Given that Mr Kim gave a detailed account of his assistance to the applicant that day and the applicant spent about one and a half hours in the office (including eating an apple) – this claim is demonstrably false. As Mr Kim was not called to be cross examined, his evidence was admitted, without objection. Accordingly, his evidence to the extent it conflicts with the applicant is to be preferred; and

(viii) Mr Perry had said to him on an unspecified date and in unexplained circumstances, '*that some women need a slapping from time to time.*' This was obviously designed to deflect or minimise his own threat of slapping Ms Weng. Unsurprisingly, Mr Perry made the following rhetorical observation: is it really believable that a person who has built his career and reputation on the international high-end women's fashion industry, would ever make such a derogatory and offensive comment. Mr Perry's denial of any such conversation is accepted.

[112] The applicant's lack of credibility is patently obvious when one considers the corollary of his denial that he had not signed his Contract of Employment and had not received the warning letters. It would mean that these documents were falsely created by management in order to buttress its arguments in this case. Accepting his abject denials of not using the threatening and offensive language towards Ms Pintamalli and Ms Weng, would mean that Mr Stones, Ms Lemon and Ms Bibby had all conspired to fabricate evidence and gave false testimony to the Commission. This is so bizarre that its mere recital is enough to demonstrate its absurdity.

[113] The applicant's credibility was further impugned when, in oral evidence, he said for the first time, that Mr Perry had told him Ms Pintamalli was a '*fucking bitch who he would get rid of*'. When asked why he had only raised this that day, he claimed he '*had suddenly remembered*'. Unsurprisingly, Mr Perry strenuously denied he had said anything of the kind. Rather, Ms Pintamalli had been employed for five years and he regretted she had decided to retire. I accept Mr Perry's evidence and reject the applicant's evidence as untruthful.

Was the applicant's dismissal 'harsh, unjust or unreasonable'?

[114] As earlier mentioned, s 387 of the Act sets out each of the matters the Commission is required to take into account when determining this question. All of the criteria must be taken into account when the Commission considers whether a particular dismissal is unfair. Nevertheless, it must be steadily borne in mind that all of these matters must be considered in totality. This is obvious from the Explanatory Memorandum to the *Fair Work Bill 2008* at para 1541:

> '1541. FWA must consider all of the above factors in totality. It is intended that FWA will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative.'

[115] I turn to each of these matters, seriatim.

Section 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

[116] The meaning of 'valid reason' in s 387(a) is drawn from the judgment of *North* J in *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 ('*Selvachandran*'). This meaning has been applied by members of the Commission and its predecessor entities for many years:

> 'In its context in s 170DE(1), the adjective ''valid'' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must ''be applied in a practical, common sense way to ensure that'' the employer and employee are each treated fairly, see what was said by Wilcox CJ in *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, when considering the construction and application of s 170DC.'

[117] It will be evident from my discourse above, that I am satisfied that the serious misconduct alleged against the applicant has been proven, on the balance of probabilities. Specifically, I am satisfied that the applicant, on at least three occasions, used offensive, aggressive, threatening and intimidating language towards female staff and in addition was rude, offensive and dismissive of his Manager, Ms Bibby. This constituted a valid reason for dismissal.

Whether the applicant was notified of the reason for dismissal (387(b))

[118] I am satisfied that the applicant was well aware of the serious allegations against him at the time of the dismissal meeting on 10 September 2018. On earlier occasions, he was counselled, warned and told that if the behaviour continued his future employment was in jeopardy. Although the dismissal letter did not expressly set out the reasons for dismissal, it did not need to, given he was made very aware of the reasons when they were put to him by Mr Perry. This is neither a negative or a positive factor in this case.

Whether the applicant was given an opportunity to respond (s 387(c))

[119] As I earlier found, I reject the applicant's evidence that he was not given an opportunity to respond to the misconduct allegations against him. Attempts to 'muddy the waters' by claiming that he was not asked to respond to the poor performance allegation takes the applicant's case nowhere. He was not dismissed for poor performance. At its highest, his non-response was an example of his failure to engage and cooperate with the disciplinary process. He had a duty to do so. In any event, the applicant did respond to the allegations in exactly the same manner as he did in these proceedings; by simply denying any wrongdoing and claiming the misconduct allegations were fabricated by liars. Nothing could be further from the truth. He was not telling the truth as to all of the relevant circumstances surrounding the incidents. This factor tells against a finding of unfairness.

Whether there was any unreasonable refusal to allow the applicant to have a support person present to assist in any discussions relating to dismissal (s 387(d))

[120] While the applicant was not offered a support person in the warning meetings or the dismissal meeting, this is not the test. He did not ask for one. I have no reason to believe that had he done so, the respondent would have refused. On one view, particularly in respect to the meeting with Ms Bibby on 7 September 2018, it was Ms Bibby who should have had a support person, or witness, in the face of the arrogant and aggressive behaviour of the applicant. Nevertheless, this is a neutral factor in this case.

Whether the applicant had been warned about unsatisfactory performance before the dismissal (s 387(e))

[121] The applicant was dismissed for serious misconduct, not unsatisfactory performance. This criterion is not relevant to this matter.

The degree to which the size of the employer's enterprise, and the absence of a dedicated Human Resources specialists would have impacted on the procedures followed leading up to the dismissal (ss 387(f)-(g)).

[122] The Company is a relatively small employer with no dedicated human resources specialists, save for Ms Bibby, who has no Human Resource or Industrial Relations qualifications. She has some knowledge of the Act. It is apparent Mr Perry has a good knowledge, from practical experience, of his obligations in respect to ensuring a safe and healthy workplace for his employees. Mr Perry was correct in preparing for the dismissal meeting with the applicant by ensuring he covered all the principles of procedural fairness. He was open and candid when he said he had decided to dismiss the applicant before the meeting, but with the caveat, that he might have changed his view, if the applicant had a reasonable and satisfactory explanation for his conduct. I accept Mr Perry's evidence in this respect. Mr Perry did not even have an acknowledgement from the applicant of having done anything wrong.

[123] I apprehend the applicant's case sought to rely on procedural unfairness issues; firstly, that Mr Perry, as the decision-maker, did not personally investigate the allegations or ask the applicant for his version of events, and secondly, he had predetermined the outcome of the dismissal meeting.

[124] Criticism of Mr Perry, as the decision maker, for not meeting the applicant is not accepted. It is not in every case that the decision-maker is obliged to meet personally beforehand with the employee who is to be dismissed. In some instances, the evidence will be so overwhelming and the consistent denial of any wrongdoing, will be grounds for concluding that a meeting with the employee is unnecessary, likely to be unhelpful or of little utility. Such was the case here. In other circumstances, the final decision maker will be satisfied that he/she can rely on senior management to have conducted an investigation, including meeting with the employee, and making recommendations for the decision-maker to consider. In any event, the applicant did meet with the decision-maker on 10 September 2018 and Mr Perry invited him to explain his behaviour. It could hardly be said that Mr Perry was not involved in the disciplinary process.

[125] In my view, there was nothing for Mr Perry to investigate. He had a set of facts corroborated by three and four witnesses, who he had the utmost confidence and trust in. In the face of the applicant's absolute denial of any wrongdoing, demonstrably contrasted with the eyewitnesses and Mr Perry's own personal knowledge of the applicant's derisory view of women, his judgement was the correct one. In these proceedings, the applicant brought no witnesses to corroborate his version of events, or even to put a less harsh spin on them. One must ask the rhetorical question – what more was there to investigate? On one view, Mr Perry might have had cause for concern with the applicant's comments early in his employment, that '*women sometimes need a slap*' and that after the incident in May 2016 Mr Perry could well have had good cause to terminate the applicant's employment at that time. In my view, Mr Perry's willingness to give the applicant a second chance was 'rewarded' with the applicant's ongoing appalling behaviour. The applicant should consider himself lucky he kept his job for longer than might otherwise have been the case and found a new job after dismissal. Moreover, there is a real possibility the applicant had engaged in criminal behaviour.

[126] As to the claim of a predetermined outcome, I apprehend that relates to the scripts both Mr Perry and Ms Bibby used when they met with the applicant. While it is obvious the script for the 10 September 2018 meeting refers to the outcome of dismissal, it also has spaces for explanations or answers from the employee. As I have said, this demonstrates the script was little more than a prompt to the matters which needed to be covered to ensure the applicant

was provided with an opportunity to respond. He was provided this opportunity and his only response was a complete denial of the allegations. There is no substance to any submission of a denial of procedural fairness. To the extent the process might be criticised for not strictly following the norm in serious misconduct cases, there is nothing to suggest that any procedural infelicities would outweigh the seriousness of the applicant's conduct. In my view, there were no substantive issues of procedural unfairness in this case.

Any other matters the Commission considers relevant (s 387(h))

[127] The applicant has a reasonable, but not lengthy period of service with the respondent. He has two dependent children and a mortgage. I accept he regards the prestige of working for the respondent as significant and he seeks reinstatement. I am bound to say that even if any 'harshness' factors tipped the balance in the applicant's favour, I could not be satisfied, given his untruthfulness, his failure to acknowledge a skerrick of responsibility for his appalling conduct and his total disregard for Company policy and procedures, that he should be reinstated. Such an outcome, in my view, would be inimical to, and be a threat to the maintenance of:

(a) ensuring the trust and confidence of the employer in the employment relationship;
(b) ensuring the health and safety of other employees, particularly women; and
(c) Mr Perry's ongoing business viability.

[128] It must also be observed that the applicant secured alternative employment within two months of his dismissal, for which he receives higher pay for fewer hours of work. In the circumstances, and even if compensation was considered appropriate (which it most certainly is not), it is difficult to see how the applicant has suffered any significant economic loss. I accept the calculations of Ms *Steele* that in the best case scenario, the applicant has, and will suffer no loss. This includes a five-week notice in lieu payment, which in the circumstances, he was not entitled to.

[129] Although not evident here, had the applicant's case attracted a finding of some measure of 'harshness', it seems to me that one of the further matters to be taken into account, would include any acknowledgement by the applicant of misconduct, a genuine apology, real

contrition, or realistic assurances the conduct would not be repeated. None of these elements or anything resembling them, were evidenced in this case. This weighs against a finding of unfairness. In the face of such overwhelming cogent and corroborative evidence, it is somewhat surprising to me that the Union, which Mr *Malbasa* expressly told me comprises 98% women members, working in poor sweatshop conditions, would have represented a person who has, at best, little respect for women.

[130] Finally, s 381(2) of the Act is a significant and overarching object of Part 3-2. It is expressed in these terms:

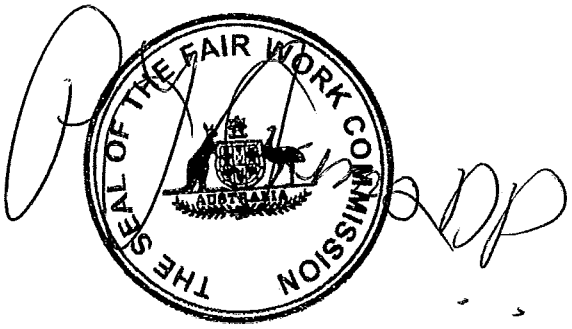
> '**381 Object of this Part**
>
> (1) The object of this Part is:
>
> (a) to establish a framework for dealing with unfair dismissal that balances:
>
> (i) the needs of business (including small business); and
>
> (ii) the needs of employees; and
>
> (b) to establish procedures for dealing with unfair dismissal that:
>
> (i) are quick, flexible and informal; and
>
> (ii) address the needs of employers and employees; and
>
> (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
>
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.
>
> Note: The expression "fair go all round" was used by *Sheldon* J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.'

[131] In *BHP Coal v Schmidt*, a Full Bench of the Commission said at [8]:

> 'The criteria for assessing fairness, although not exhaustive, are clearly intended by the legislature to guide the decision as to the overall finding of fairness of the dismissal and are essential to the notion of ensuring that there is "a fair go all round". This is particularly important in relation to safety issues because the employer has obligations to ensure the safety of its employees, and commitment and adherence to

> safety standards is an essential obligation of employees – especially in inherently dangerous workplaces. The notion of a fair go all round in relation to breaches of safety procedures needs to consider the employer's obligations and the need to enforce safety standards to ensure safe work practices are applied generally at the workplace.'

[132] For the above reasons, I find that the applicant's dismissal on 10 September 2018, was not '*harsh, unjust or unreasonable*', within the meaning of s 387 of the Act. His dismissal was not unfair. Accordingly, his application for an unfair dismissal remedy is dismissed. I so order. I am satisfied that the outcome I have determined ensures a 'fair go all round' is accorded to both the applicant and the respondent.



DEPUTY PRESIDENT

<PR706291>

Appearances:
Mr D *Malbasa* of the Construction, Forestry, Maritime, Mining and Energy Union for the applicant.
Ms J *Steele* of Counsel with Ms A *Davidson*, Solicitor, Davidson Legal Consulting for the respondent.

Hearing details:
2019.
Sydney:
12 February.