DECISION

Fair Work Act 2009
s 394—Unfair dismissal

Emma Horan
v
Tren Trading Pty Ltd t/a Dubbo Early Learning Centre
(U2018/5554)

DEPUTY PRESIDENT SAMS SYDNEY, 27 MAY 2019

Application for an unfair dismissal remedy – termination of employment for alleged serious misconduct – Early Childhood Teacher – anonymous complaint – allegation of yelling and forcibly isolating a child – compliance with regulatory requirements – investigation and statements from witnesses – refusal to attend meeting without support person or details of the allegations – applicant's request not unreasonable – conflicting evidence – investigation could not sustain decision of dismissal – denial of procedural fairness – allegations not proven – findings of substantive and procedural unfairness – reinstatement inappropriate – compensation ordered.

INTRODUCTION

[1] Ms Emma Horan was employed as an Early Childhood Teacher at the Dubbo Early Learning Centre (the 'Centre' or 'respondent') in central New South Wales. The Centre employs around 26 employees and is jointly owned by Mr Mathew Stapleton and Mr Tom Hill. Ms Horan commenced employment at the Centre on 16 May 2016 on a part-time basis and was earning $29.65 per hour. Her employment terms and conditions were governed by the *Children's Services Award 2010* (the 'Award').

[2] The circumstances surrounding the termination of Ms Horan's employment are somewhat unusual, and may be shortly stated. On 3 May 2018, Ms Horan accepted an offer of employment at Redgum Childcare, another child care facility in Dubbo. Around 3pm that day, she delivered her resignation letter to the Centre. She claimed that shortly thereafter, the two owners of the Centre called to ask her to reconsider her resignation decision. She declined to do so. However, at around 4.30pm, she received another call from the owners informing her that she was to be stood down due to an incident said to have occurred the day before, and

anonymously reported. The incident was alleged to have constituted serious and gross misconduct.

[3] Ms Horan was subsequently dismissed on 7 May 2018. The letter terminating her employment was emailed to her and reads:

> 'Dear Emma,
>
> On 3 May 2018 at around 4pm, you were stood down pending the investigation of a very serious accusation made against you, anonymously by a member of the Dubbo Early Learning staff.
>
> Since that time, both Melissa Cox and I have requested that you attend the Centre for an interview to provide your version of events to inform our investigation of the matter. We have made this request no less than three time (sic).
>
> We have found that you forcibly removed a child who was engaging in rough play to an exclusion spot. When the child started to cry that you yelled at the child to stop and threatened to remove him to the next door room if he did not. When he did not stop, you physically removed him through the partition wall and pulled him through the door to release his grasp which was preventing you from taking him through.
>
> I need to ensure that we meet the requirements of the Education and Care Services National Law Act 2010 and Education and Care Services National Regulations to ensure the safety, health and wellbeing of children. Your actions have put our service approval at risk, consequently, you have been summarily terminated due to gross misconduct effective immediately.
>
> I have reported this incident to the regulatory authority as per the requirements of the regulation.'

I shall return to the detail of the relevant facts and circumstances between 2 May and 7 May 2018.

[4] On 28 May 2018, Ms Horan (hereafter referred to as the 'applicant') filed an application, pursuant to s 394 of the *Fair Work Act 2009* (the 'Act'), seeking a remedy for her alleged unfair dismissal by Mr Stapleton on 7 May 2018. The applicant nominated United Voice (the 'Union') as her representative in the matter. In accordance with my usual practice, I convened a pre-hearing telephone conference on 3 August 2018, in order to explore settlement of the applicant's claim. The matter was unable to be resolved. Accordingly, I issued directions for a hearing in Dubbo on 3 October 2018, subsequently relisted to 4 and 5 December 2018, due to the unavailability of Mr Stapleton, the respondent's key witness and decision maker. At the hearing, Mr J *Davis*, Industrial Officer, appeared for the applicant, and

Mr M *Morphett*, Agent, appeared for the Centre, with permission granted for him to do so, pursuant to s 596 of the Act.

THE EVIDENCE

[5] The following persons provided statement and oral evidence in the proceeding:

- Ms Melissa Cox - Nominated Supervisor
- Ms Mathew Stapleton - Owner of the Centre
- Ms Charlee Curtis - Trainee Educator
- Ms Emma Stephens - Certificate III Educator
- Mr Tom Hill - Co owner of the Centre
- Mr Cade Foster - Cook at the Centre
- Ms Emma Horan - the applicant
- Ms Rachele Currey - Certificate III Educator
- Ms Rhiannon Leach - Certificate III Educator

Respondent's statement evidence

Ms Melissa Cox

[6] Ms Cox has been employed as the Nominated Supervisor at the Centre since September 2016. From 26 April to 3 May 2018, the applicant was temporarily appointed as the 'responsible person' while she was on leave. Ms Cox said that on 3 May 2018, Mr Stapleton called to advise her of a serious allegation against the applicant and that the applicant had been stood down. He asked her to make inquiries of staff the next day as to whether they had observed anything unusual or concerning around lunchtime the day before. She began interviewing staff the next day.

[7] Ms Cox said that as Mr Stapleton had informed her he would be coming to the Centre at 5pm on Friday 4 May 2018 to meet with the applicant, she sought to confirm that the applicant was okay to attend the meeting. The applicant told her she would not be attending the meeting at such short notice. At 2.13pm, the applicant emailed Ms Cox seeking a copy of the allegations against her. About an hour later, she emailed again, advising that her Union had told her that she would require 24 hours' notice of any meeting, and the details of the allegations, in writing, in order for her to respond.

[8] Ms Cox said that on Monday 7 May 2018, after collating evidence of the incident on 4 May 2018, she and Mr Stapleton agreed that the applicant's behaviour was unacceptable. The applicant was dismissed by email at 6.08pm that day, and the letter terminating her employment is set out at [3] above.

Mr Mathew Stapleton

[9] Mr Stapleton said that in the afternoon of 2 May 2018, he received the following anonymous grievance form:

> '*Grievance (please give as much detail as possible)*
>
> I witnessed Emma Horan remove a child, who had been rough housing, to an exclusion spot. When the child started to cry Emma yelled at the child to stop or she would put him next door (the toddlers room). When the child did not stop she physically removed him through the partition wall and reefed on the child when they grabbed the wall to stop her from taking him through.
>
> *Action you would like to see taken:*
>
> Formal warning and re training on conflict de-escalation.'

[10] At the time of the complaint, the applicant was the 'Responsible Person' required under the licensing regulations, in the absence of Ms Cox, the Nominated Supervisor. Mr Stapleton set out the relevant section (s 166) of the *Education and Care Services National Law Act 2010* which provides for significant penalties for an approved child care provider which does not ensure that a child in its care is not subject to:

(a) any form of corporal punishment; or

(b) any discipline that is unreasonable in the circumstances.

[11] Mr Stapleton said that he was also mindful of Regulation 155 of the *Early Childhood Education National Regulations*. These Regulations require a provider to take all reasonable steps to maintain the dignity and rights of a child, and that any complaint that might breach the law, must notify the Department of Education and Early Childhood Development (the 'Department') within 24 hours. Accordingly, he advised the Department of the complaint and the actions he had taken being:

1. immediately stepping the educator down and removing her from the work place; and

2. conducting a staff meeting to ensure all staff understand what is not appropriate when interacting with children. Praise (sic) staff to report inappropriate interactions with children.

[12] It was Mr Stapleton's evidence that at around 12.30pm on 3 May 2018, the applicant advised the Centre of her resignation in the following terms:

'Mel, Matt and Tom,

Please accept this letter as formal notification of my resignation from Dubbo early learning centre. My last day at the centre will be Thursday the 31st of May 2018.

Before I leave I will ensure that all of my work is completed and up to date and I am happy to assist in anyway (sic) to ensure a smooth handover to my replacement.

I would like to thank you for the opportunity to work at DELC for the past 2 years. During this time I have thoroughly enjoyed working with the staff at the centre and I will miss working with them and the children.

I will always remember my time at DELC and thank you so much for the opportunities I have been given.'

[13] Mr Stapleton said he phoned the applicant from his car around 2.45pm and asked why she had resigned. She had replied with words to the effect:

'*Mel (Cox) is a useless director and we sit in the room leader meetings and nothing happens'*.

She told him she had accepted a position at Redgum Childcare.

[14] Mr Stapleton said that around 4pm he and Mr Hill contacted the applicant again and discussed the allegations that the applicant had forcibly removed a child from the preschool room and dragged him into the Toddler Room. He advised the applicant that she was to be stood down while an investigation was carried out. He sought a meeting with the applicant at 5pm the next day and told her she could have a support person present. Mr Stapleton claimed she just replied 'OK', had no questions and hung up. He then phoned Ms Cox and asked her to interview staff and to have the information available for him by 5pm the next day.

[15] After being advised that the applicant would not be attending the meeting, and after unsuccessful attempts to contact her he sent her the following text message:

> 'Hi Emma, you need to come and see me. I'll be at the centre at 5pm I need to hear your version of events with what happened because I need to make a decision and it would be on (sic) your best interest if you told me your version of what happened. You can bring anyone you want with you. I'm coming to Dubbo and flying out tomorrow at 4:30pm'.

[16] Mr Stapleton claimed that he did not understand the applicant's concerns as she had 24 hours' notice, and she was aware of the allegations (from his phone call the day before). He could not understand why the applicant could not organise a support person.

[17] Mr Stapleton said that on Monday 7 May 2018, he formed the view that the staff recollections of the incident in their statements obtained by Ms Cox, were true. Despite not having any response from the applicant, he decided to dismiss her with immediate effect.

Ms Charlee Curtis

[18] Ms Curtis claimed she had observed the applicant open the partition between Toddler Room 2 and the Junior Preschool Room, and pull a child (hereafter referred to as 'G') into the room by the arm. At the same time, she had said '*stop acting like a baby*'. 'G' was crying and replied '*I don't want to go to the Toddler Room*'. When 'G' got into the room, she let him go, shut the door and walked back into the Preschool Room. 'G' continued to cry out to her and remained in the room for about five minutes. Ms Curtis claimed she was shocked (by what she had observed) and did not know what to do.

Ms Emma Stephens

[19] Ms Stephens claimed she had also observed that 'G' had been crying, and that the applicant pushed him through the door and said '*I need 5 minutes*'. When 'G' tried to open the door, she opened it and said '*you can't come back until you stopped (sic) crying*'. She shut the door again. Ms Stephens believed 'G' remained in the room for about five minutes. When he tried to open it again, the applicant had said '*you can come back now*'.

Mr Cade Foster

[20] It was Mr Foster's evidence that when he was delivering lunch to the Preschool Room, he had observed the applicant pick up 'G' and move him next to her. When 'G' sat down, he began to cry. Then, in a raised voice, the applicant said '*calm down or I will take you next door*'. The applicant then took 'G' by the arm and pulled him towards the Toddler Room. 'G'

was sobbing and said '*I don't want to go to the other room*'. Mr Foster said that as the applicant pulled 'G' into the room, 'G' grabbed at the door. The applicant then grabbed 'G' under the armpits to pull him away. 'G' was crying loudly, and appeared very upset.

Applicant's statement evidence

[21] The applicant said that in April 2018, she had applied for a position at Redgum Childcare. On 2 May 2018, there was an incident involving 'G', which required her to separate two children, who were fighting. She took one of them ('G') into another room to 'cool off'. On 3 May 2018, she received an offer of a positon at Redgum Childcare and at around 3pm, she advised the Centre of her resignation. When Mr Stapleton and Mr Hill called her shortly after, she told them she was unhappy working at the Centre. When Mr Hill said '*if we make some changes will you stay?*', she said she would not reconsider her decision to resign.

[22] It was the applicant's evidence that Mr Stapleton called her at around 4.30pm to direct her to leave the Centre, as she was suspended due to a serious allegation. Mr Stapleton provided no details of the allegations. On the advice of the Union, and to avoid being 'ambushed', she declined to attend the 5pm meeting on Friday 5 May 2018, as the Centre had refused to provide her with details of the allegation. She later found out about the details of the allegations from co-workers after she was dismissed.

[23] The applicant gave her version of the incident involving 'G'. I set this out in full below:

> 'The 3 May incident was as follows: ['G'] was sitting on another child's head and I helped him move off ['G'] by guiding him by holding his hand. As I moved away ['G'] then did a playful laugh as he usually does and ran at me, hitting me with his head first and then hitting me with his arm as he usually does when he is over excited. To stop him from hitting me I picked him up and moved to the toddler room. I did not even speak to ['G'], let alone raise my voice at him. As I was going through the Toddler Room doors he grabbed onto the door and as I was holding him with one arm I removed his hands from the doors. Again, this was not done in an aggressive or forceful manner. I then stood ['G'] in the toddler room, turned around to another educator, Tamara Whiteley, smiled as I was walking out of the room. ['G'] followed me and when I got to the door to close it ['G'] was behind me which meant I couldn't close the doors. I got down to his level and asked him "Are you ready to stop being silly and come back into our room?" He said: "Yes, I'm sorry." I hugged ['G'], he followed me back to the table and began cuddling me. We then ate our lunch and continued with our day.'

[24] The applicant said she was not aggressive, did not raise her voice at any time and regarded the incident as a fairly standard experience for an Early Childhood Educator.

[25] In reply to Mr Stapleton's statement, the applicant denied saying in the phone call on 3 May 2018 '*Mel is a* useless *director…*' Rather, she was critical of the workload at the Centre. The applicant believed it was Mr Hill who told her of her suspension on 3 May 2018, following a serious allegation made against her. He did not detail the allegations at all. She was unsure if Mr Stapleton was also present. When told to leave the Centre, Mr Hill had said '*you'll find out more tomorrow.*' As she wanted to be respectful, this was why she did not ask any questions or protest her innocence. The applicant said she did not attend the meeting at 5pm the next day because she had not been given 24 hours' notice of the details of the allegations.

[26] In response to Mr Foster's statement, the applicant denied yelling at 'G'. She never moved him by the arm – rather, she carried him. The applicant said that when she had recently been Second in Charge, she had cause to speak to Mr Foster twice, for leaving work early and for receiving personal packages at the Centre, contrary to current practice.

[27] In respect to Ms Curtis' and Ms Stephens' statements, the applicant denied telling 'G' to '*stop acting like a baby.*' 'G' had not said he did not want to go to the Toddler Room. He was not left in the room for five minutes and the door was not shut. She did not push 'G'. The applicant said that some months earlier at a staff meeting (3 October 2017), Ms Cox had instructed staff to remove an aggressive child to another room. This is what she did on 2 May 2018. The applicant attached a statement dated 2 May 2018 from Ms Rhiannon Leach, another Educator who witnessed the incident. Ms Leach described the incident as follows:

> 'On Wednesday during rest time Emma was talking to a child as he was being disruptive to the children who were sleeping. As (Emma) was helping the child move away from the others the child ran at her and started hitting her playfully as he normally does. To stop him from doing this Emma then picked the child up and walked with him to open the doors to the next room, the child then became upset. As Emma put the child in the other room she turned around to shut the doors and the child ran at the door, Emma caught her own leg in the door as she went to shut the door and moved the child's hand so his hand didn't get caught. Emma left the doors closed for a second and then opened the doors, as she opened the doors she got down to the child's level and said, "have you stopped being silly now, are you ready to come back into our room?" the child replied, "yes, I'm sorry," then Emma gave the child a hug, which he

returned. During this incident Emma never acted in a way to cause abuse to the child, no threats were made to the child and she never once raised her voice at the child.'

[28] In Ms Cox's Investigation Report, she had stated that Ms Leach did not witness the incident, because she was at lunch at the time. However, the applicant said this was untrue, as Ms Leach went to lunch at 10.30am that day due to understaffing. She was definitely present at the time.

Ms Rachelle Currey

[29] Ms Currey was a witness to the incident. She believed it had arisen as a result of rough play in which one child was sitting on the head of another child and not allowing the child to get up. Ms Currey described what happened next:

'Ms Horan helped the child sitting to hop up by holding his hand, the child then ran towards her after she let go of his hand and hit her with his head and then started hitting her playfully. To stop him, Ms Horan picked him up and moved him into the toddler room to calm down before he got ready for lunch. The child was crying and continuing to hit her. The child grabbed onto the separating doors as she was taking him through to the toddler room. She removed his hands from the door and then put him into the toddler room.

As she was walking out, the child followed her. She got down to talk to him and asked if he "was ready to come back" into our room and "stop being silly", or words to this effect.

The child said yes and that he was sorry and get her some cuddles then he continued with the routine of washing hands ready for lunch.

None of Ms Horan's actions were done in an aggressive, forceful or nasty manner nor did she threaten or yell at the child. She handled the situation with care and just like the child is familiar with.'

[30] Ms Currey considered that the allegations against the applicant were false. She believed the applicant was a fantastic and very well-liked educator, who would never put a child in harm's way.

Respondent's reply statements

[31] Ms **Cox** said that on 4 May 2018 around 10.30am, Ms Currey had come to see her. She was in a very emotional state and said she was '*too upset to be here*' and was going home. On 6 May 2018, Ms Currey provided a doctor's certificate absenting her from work

until 14 May 2018. However, on 10 May 2018, she resigned. Nevertheless, on 14 May 2018, she attended the Centre and answered the set questions put to all staff by Ms Cox about the incident on 2 May 2018.

[32] Ms Cox could not recall if the applicant had asked for notice of the meeting and details of the allegations when she rang her to confirm the 5pm meeting with Mr Stapleton on 4 May 2018.

[33] In response to the applicant's evidence about the Room Leader's meeting on 3 October 2017, Ms Cox said the staff had collectively discussed strategies to deal with children exhibiting challenging behaviours. The direction was to distract the child by asking them to help in another room or assist in a particular task. Isolating a child was never be used to punish or belittle the child. Staff were reminded of the Centre's policies in this regard.

[34] Mr **Stapleton** responded to the applicant's evidence as follows. He could not recall if, on 3 May 2018, it was he, or Mr Hill, who had asked the applicant if they could change anything, would she reconsider her resignation. He claimed he later gave her a description of the complaint. She did not respond, or indicate she would not attend the meeting at 5pm the next day. Mr Stapleton said he was not aware of any refusal to provide the applicant information (about the allegations).

[35] Mr Stapleton said he would never allow a process where challenging behaviour resulted in a child being removed from their friends. The Regulations require a 'circle of security' in which children are provided with support, and not through intimidation or exclusion.

[36] Mr **Hill** was in the car with Mr Stapleton when they called the applicant about her resignation on 3 May 2018. He could not recall whether they asked her to stay. However, she was critical of Ms Cox. In the later phone call, Mr Hill said that Mr Stapleton did most of the talking, including giving her an explanation of the allegations.

[37] Mr **Foster** said that to the best of his recollection, Ms Leach was not in the Junior Preschool Room at the time of the incident on 2 May 2018.

Viva Voce **evidence**

[38] In Ms Cox's cross examination, she said that although the applicant had requested the details of the allegations and 24 hours' notice of any meeting, she had referred these matters to Mr Stapleton, because she was unsure of her responsibilities.

[39] Ms Cox agreed that Mr Stapleton's decision to dismiss the applicant was taken without speaking to her and before speaking to Ms Currey on 14 May 2018. She conceded that the consistency of the other staff statements might have changed, if Ms Currey and the applicant had given their version of events. Ms Cox did not accept that there was no reason to interview Ms Currey when the decision to dismiss was made a week prior. She said she did so for future reference.

[40] Ms Cox was taken to this interview and Ms Currey's responses below:

> '1. *Did you see any child placed in an exclusion spot?*
>
> No, I don't recall any child being excluded
>
> 2. *Did you witness any child being yelled at or spoken to in an overly loud manner in the Junior Preschool room?*
>
> No. No one yelled at any child
>
> 3. *Are you aware of any child being moved from the Junior Preschool room to the Toddler room? If so, did you witness the manner in which this occurred?*
>
> Yes, a child was taken from Jnr Preschool to the Toddler 2 room. He was crying, but no one was yelling at him. He didn't really say that he didn't want to go, but he did hold onto the wall. When he was taken into the Toddler 2 room, I didn't see Emma shut the door behind him, and he followed her back into the room.
>
> 4. *Do you have any information related to this alleged incident that you would like to provide?*
>
> Not really. I don't think anything too rough happened, and there was no yelling.'

Ms Cox claimed that she was unsure if Ms Currey was being truthful, or if her recollection was clouded by her emotional state at the time. Ms Cox's concern was not referenced anywhere else in the respondent's materials.

[41] It was Ms Cox's evidence that there was a vast difference between the staff's discussion in October 2017 about processes to deal with challenging children and what the applicant had done in physically taking a child into a room under protest. Mr *Davis* took Ms

Cox to the answers given by the three witnesses in their interviews and the number of inconsistencies in their recollections and with the letter of termination. The dismissal letter said she '*forcibly removed a child*', whereas Mr Foster agreed with the applicant that she had picked up the child. Ms Cox was taken to other inconsistencies; for example, Ms Whitely said she did not hear yelling; the applicant appeared to carry the child, she did not notice where his arms were and the applicant knelt down to speak to the child. She and another witness had said the child was in the room for no more than 30 seconds, not 5 minutes.

[42] Ms Cox explained that the time frame was not important; it was the manner in which 'G' was forcibly taken to another room, if he was arguing and upset. Ms Cox conceded that children crying at the Centre was a daily occurrence and it does not, in and of itself, disclose anything else. Ms Cox believed the 30-second estimate may have been because Ms Whitely was not fully focussed on the incident. Ms Cox agreed that if the child had been picked up after engaging in rough play, this would be appropriate. However, this was not the issue – he was dragged into a room, where he did not want to go. Ms Cox accepted that the applicant's hands would have been occupied, if she was carrying the child. Ms Cox conceded that the statements conflicted 'to a degree'. She accepted her report did not identify any weighing up of these differences (in recollections).

[43] Ms Cox said that the witnesses described an incident which did occur and which was assessed as inappropriate. She stressed that three witnesses saw the applicant forcing the child through the door. This behaviour was unacceptable, and put a child at risk. Ms Cox agreed that none of the witnesses described 'G' as being in an 'exclusion' area, despite having all been trained on the issue. The only person who claimed there was yelling was Mr Foster. This was accepted and referenced in the termination letter. Ms Cox conceded that the evidence as to yelling was inconsistent, albeit adding that '*there was enough consistency*'. Ms Cox finally assumed that the nature of the incident must have involved yelling. She believed that the other five witnesses may not have heard yelling, because Ms Curtis and Ms Stephens were not in the same room.

[44] In re-examination, Ms Cox said that the applicant would have been well aware of the Centre's policies and procedures. Ms Cox also understood Ms Currey was a close personal friend of the applicant.

[45] In cross examination, Mr **Stapleton** said when he first read the anonymous complaint, he went to the child care law and Regulations and determined that forcing a distressed child into another room and yelling at him, was unreasonable discipline and as such, must be reported to the Department within 24 hours. Mr Stapleton insisted he had told the applicant in the phone call of 3 May 2018 of the details of the allegations. He conceded that her request for the allegations in writing was **not** unreasonable. However, as she was still an employee at the time, she was invited to a meeting to put her position, but had refused. Mr Stapleton agreed the allegations could have been emailed to her. He accepted that an 'accusation' is the same as an allegation. However, Mr Stapleton believed her request for 24 hours' notice of a meeting was not a reasonable request.

[46] Mr Stapleton said he did not need Ms Currey's statement (provided 11 days later) to make his decision, because there was enough evidence ('*in my eyes*'). Mr Stapleton claimed the applicant refused to attend a meeting and refused to take phone calls from him and Ms Cox. He claimed he had legal advice (Mr *Morphett*) that 24 hours' notice for a meeting was not required for a disciplinary meeting.

[47] Mr Stapleton attempted to explain that he had two responsibilities; firstly, to notify of the serious allegations and secondly, to decide whether the applicant should be dismissed. The long delay to the 14 May 2018 (when Ms Currey's statement was made), had made a difference, because a full Investigation Report was required for the Regulator.

[48] Mr Stapleton believed that his decision to dismiss the applicant was not about taking a balanced view, but making a judgement about probable cause and satisfying the Department that he, as the approved provider, was taking all reasonable care to protect children. He said there was nowhere in the Regulations which required 24 hours' notice of a disciplinary meeting.

[49] Mr Stapleton said that although he had booked flights out of Dubbo on Saturday 5 May 2018, he would have cancelled his flight, if the applicant had agreed to a meeting on Monday 7 May 2018. He agreed there was nothing stopping him making arrangements to meet the applicant over the weekend (5 and 6 May 2018).

[50] Mr Stapleton accepted that in the staff interviews, it was only Mr Foster who had said the applicant was yelling. When others (Mr Stapleton and Mr Whitely) said they heard no

yelling, this was probably right, because they were in the next room, with the door closed. Further, Mr Stapleton agreed no witnesses had said the applicant placed the child in an 'exclusion spot'. However, this was understood to be the other room. Mr Stapleton agreed that the employees had been trained as to what was meant by an 'exclusion spot'. He denied this finding, as recorded in the termination letter, was unsound.

[51] Mr Stapleton agreed that he had spoken to at least one parent after the applicant's dismissal, but could not recall if he spoke to the three parents identified by Mr *Davis*. He denied speaking to four parents. The only one he spoke to was one parent who had been concerned about staff turnover, arising from Ms Currey's resignation and the applicant's dismissal and was considering removing her child from the Centre. He explained to the parent that a serious allegation had been made, it had been investigated and the applicant had been dismissed.

[52] Mr **Hill** reaffirmed that in the phone call on 2 May 2018, he could not recall if anything had been said to the applicant about withdrawing her resignation, if changes were to be made at the Centre. As to the later conversation, he recalled Mr Stapleton saying there were serious allegations against the applicant.

[53] In cross examination, Ms **Curtis** insisted that she heard the applicant say to 'G', '*stop acting like a baby*' and that he was left in the room for five minutes. Ms Curtis agreed Ms Cox helped her prepare her statement.

[54] Ms **Stephens** reaffirmed that she heard the applicant say to 'G' '*you can't come back until you stop crying.*' She claimed that 'G' was left in the room for what seemed like 'roughly' five minutes, but that she did not look at a clock.

[55] In Mr **Foster**'s cross-examination, he claimed he heard the applicant using a 'raised voice' when she twice said to G '*calm down or I will take you next door*'. He equated a 'raised voice' to 'yelling'.

[56] Mr Foster acknowledged that the applicant did speak to him about receiving packages personally addressed to the workplace. She had also raised some behavioural issues with Mr Foster's son, who was also a student at the Centre. They had discussed his son getting more and more disruptive and having difficulty concentrating. It was suggested he be seen by a paediatrician and tested for ADHD. He did this, as well as taking him to see a speech

pathologist. It was suggested they might look for a smaller service, where he could be calmer in himself, as he was having difficulty with the number of children at the Centre. Subsequently, Mr Foster removed his son from the Centre. Mr Foster also agreed that Ms Cox had spoken to him early in the year about leaving work early. **Mr Foster conceded he had filed the anonymous complaint.** However, he rejected the suggestion he wanted to get back at the applicant for what had happened with his son. He claimed he had no issues with the applicant.

[57] In examination in chief, the **applicant** described the incident with 'G', which I set out below:

> 'So ['G'] was sitting on another child's head at the time, when I helped ['G'] off him by holding his hand and moving him off. As I moved away to go back to start lunch ['G'] ran at me, hitting me with his arms and his head, as he just usually does when he gets in those moods, and to stop him from hitting me I picked him up and was taking him next door to the toddler 2 room. When I was on my way through he did grab onto the petition doors and I did move his hands from the doors. When we got in there I put ['G'] onto the floor. He was still standing. As I walked back through the petition doors ['G'] followed me. I got down to his level and asked him to calm down. I asked him if he was ready to come back into the room and he said yes. He hugged me and said sorry, and he followed me back through to the room.

[58] The applicant agreed 'G' was upset. However, this is an everyday, usual occurrence for childcare workers. She denied yelling or raising her voice at 'G'.

[59] The applicant believed that Mr Foster '*wasn't impressed with me*', as a result of her speaking to him about personal packages sent to the Centre, and because she had spoken to him about his son's behaviour at the Centre. She believed Mr Foster's son might be on the 'autism spectrum' and suggested he be assessed. Mr Foster was not very happy about this. She was able to make this observation because Mr Foster's son has been in her room for six months. Shortly after Mr Foster withdrew his son from the Centre. There were also issues with Mr Foster concerning food preparation, his time management and leaving early. She understood Ms Cox may have raised these concerns with him.

[60] In cross examination, the applicant said that in the second phone call with Mr Stapleton and Mr Hill on 3 May 2018, she had been told there was a serious allegation. She was stood down and told to hand in her keys and would be told more the next day. She said the conversation was with Mr Hill, not Mr Stapleton. She was not told any details of the

allegations. The next day, she learnt from co-workers that the allegation was that she had moved a child to another room. The applicant said she did not want to attend a disciplinary meeting to be 'ambushed'. All she was told from her co-workers was that a child had been removed from a room.

[61] The applicant claimed that children were frequently removed to other rooms (sometimes twice a week), particularly when a child is behaving aggressively towards the educator. This is so because the educator cannot leave the room, with the other children unattended. The applicant agreed that 'G' grabbed onto the door and it probably indicated he did not want to be there. However, the procedure is to pick up the child and move them to another room to calm down. The doors were not shut, because he followed her back.

[62] In answer to questions from me, the applicant said she had not started at the new job at Redgum Childcare, because they had found out about the incident and 'held off', until it had been resolved. Nevertheless, she had commenced employment at a different job on 10 September 2018. She had no income for eight weeks until this time.

[63] Ms **Leach** gave evidence under an Order Requiring a Person to Attend the Fair Work Commission (Form F51). Ms Leach said that on 2 May 2018, she came back from lunch, just at the end of the incident involving the applicant and 'G'. She said that when Ms Cox interviewed her, she had not been aware of any wrongdoing. However, when they discussed it, she '*started to remember what happened.*' She said there was no yelling. Ms Leach said the date on her email to the applicant (2 May 2018) she sent a week later, was the date of the incident. She had sent her email at 5.15pm on 9 May 2018.

[64] In cross examination, Ms Leach said that all she saw was the applicant shut the doors and then open them and bring 'G' back to the room. Mr Foster was not present at this time. Earlier, through the window, she had observed 'G' hitting the applicant. The applicant had picked him up. Ms Leach did not see him being physically put into the next room.

[65] In Ms **Currey**'s oral evidence, she reaffirmed what she observed in the incident and said that what the applicant did was the process usually followed, as had been directed by management. Ms Currey said that although the child did not want to go to the other room, the applicant only placed him inside the door. 'G' then followed her back, so he was not left

there. Ms Currey added that the child had been difficult before, but was '*getting a bit rough lately.*' As to her belief the allegations against the applicant were false, Ms Currey said:

> 'I believe that's false because she wasn't aggressive, she wasn't being forceful, she didn't hurt the child. The child was hurting her. Like, she wasn't doing anything that was out of conduct, or anything that our director hadn't told us to do, like removing children from rooms.'

SUBMISSIONS

For the Centre

[66] Mr *Morphett* agreed that the only matters relevant to this case was whether the applicant's dismissal was '*harsh, unjust or unreasonable*', and while not conceding it was, if the Commission found otherwise, what was the appropriate remedy?

[67] As to valid reason, Mr *Morphett* put that the respondent diligently undertook an investigation of Mr Foster's anonymous complaint of the incident on 2 May 2018, and had concluded that the witness statements of six staff were consistent. He put that any inconsistencies in their statements were related to where they were positioned in respect to the incident, and what they could have seen or heard at the time. Despite the applicant being invited to be interviewed and meet with Mr Stapleton, she refused to do so. Mr Stapleton had concluded that '*the applicant removed a child from his usual area of care to another area as a disciplinary action due to his behaviour*'. As a result, Mr Stapleton had an obligation as the licensed provider to report the incident to the Regulator and investigate whether the incident occurred, and if so, what measures would be taken to ensure such an incident did not occur again. This was the primary purpose of Ms Cox's Investigation and Report.

[68] Mr *Morphett* set out Mr Stapleton's obligations under the *Education and Care Services National Law* (the 'Law') and the *Education and Care Services National Regulations* (the 'Regulations') and the consequences of him not complying with the Law and the Regulations. Mr *Morphett* claimed that the Regulator's (or Department's) only focus is to be notified within 24 hours of the incident and if it occurred, what steps the provider took to ensure the incident is not repeated. This information was provided to the Regulator.

[69] Mr *Morphett* submitted that while the allegations were found to be proven, on the balance of probabilities, even on the applicant's own version of events (the child grabbed the

door and his hand had to be forcibly removed to proceed to the next room) was sufficient to demonstrate a non-consenting child had been moved, as an act of discipline, rather than a procedure adopted to distract a misbehaving child.

[70] Mr *Morphett* claimed it defied reason why the applicant would not ask about the allegation, even though she knew it apparently involved moving a child to another room. Further, it was troubling why she wanted the allegation in writing so as not '*to be ambushed*' (although he did not elaborate).

[71] Mr *Morphett* submitted that the applicant's behaviour constituted serious misconduct, as it was deliberate behaviour that caused '*a serious and imminent risk to the reputation, viability* or *profitability of the employer's business*.' Further, the applicant had refused to carry out a lawful and reasonable instruction to assist the employer in addressing issues of concern regarding the incident.

[72] Mr *Morphett* submitted that the applicant's refusal three times to attend a meeting was a decision she made at her own peril. Given the gravity of the allegations, it was not unreasonable for Mr Stapleton to insist she meet him. Further, the applicant had an opportunity to respond at any time on 4 May 2018. She had produced no evidence as to why she could not do so. This was a refusal of a lawful direction. Mr *Morphett* said the applicant was never denied any opportunity to bring a support person to a meeting.

[73] Mr *Morphett* claimed the employer was familiar with its responsibilities and was able to '*administer and discipline staff*' effectively and in accordance with the Act. Lack of HR support had a negligible effect.

[74] In addressing s 392 matters, Mr *Morphett* said that depending on the amount of compensation the Commission may order, the respondent may seek leave to demonstrate it should be paid in instalments. The applicant had short service (23 months) and given her resignation was to be effective on 31 May 2018, and she had been on paid suspension until 7 May 2018, the period of any likely future employment was only 18 working days. According to the *Sprigg* formula, calculating that period at $29.65 per hour at 37 hours for 18 days equals $4002.75. There should be a contingency deduction of 25% ($1,000.69) and deductions for the tax free threshold and an entitlement to the Medicare levy rebate ($739.03), leaving a balance of $2,263.03.

[75] Mr *Morphett* added that efforts by the applicant to mitigate loss were a neutral factor. All other considerations under s 392 of the Act were either neutral or irrelevant.

For the applicant

[76] By reference to the applicant's termination letter, Mr *Davis* submitted that the specific allegation cannot be supported by the facts, as witnesses disagree on key aspects of the incident on 2 May 2018; namely:

(a) all witnesses agree the applicant picked up the child, which is consistent with the Centre's policy in these circumstances;

(b) none of the witnesses said the child was taken to an 'exclusion spot';

(c) the witnesses disagree as to how long the child was left in the adjoining room. The estimates ranged from a second, to 30 seconds to 5 minutes. No one checked the clock;

(d) only one witness claimed the applicant yelled at the child and even he (Mr Foster) said a raised voice equated to yelling;

(e) Ms Cox agreed a crying child is a frequent occurrence in a child care centre;

(f) only Mr Foster used emotive language to describe the applicant grabbing the child or 'reefing the child' (in his anonymous complaint). His evidence should be viewed with scepticism, given he was the complainant and had a reason to be unhappy with the applicant; and

(g) none of the other witnesses said the applicant used force to remove the child.

[77] Mr *Davis* submitted that the Commission would conclude that there was no yelling, no exclusion and no threats. The applicant's approach to a misbehaving child was unremarkable in a child care environment. Accordingly, there could be no '*sound, defensible or well-founded*' reason to dismiss the applicant. There was no valid reason to do so.

[78] Mr *Davis* traced the events immediately after the applicant was stood down. Despite the applicant seeking written details of the allegations and 24 hours' notice of a meeting, this was refused and she was summarily dismissed by email on 7 May 2018. Mr *Davis* noted that Ms Cox's investigation even continued beyond that point. The investigation was shambolic, incomplete and biased.

[79] The views of Ms Currey and the applicant were not taken into account and this was a denial of procedural fairness. Moreover, the applicant was given no reasonable opportunity to respond to the allegations, despite Mr Stapleton now agreeing it was reasonable she be provided the details of the allegations in writing.

[80] Mr *Davis* noted the applicant had no previous warnings. The size of the business and the procedures followed make clear the dismissal was no accident; rather, it was enacted by design. Mr *Davis* submitted the applicant's dismissal was already determined by Mr Stapleton, who took a personal stake in the situation. He ignored proper procedural steps, was angry and persisted in directing the applicant to attend a meeting he knew full well, she was not prepared for. His view was backed by Ms Cox's incomplete investigation and they both decided that the other witnesses' versions of events were consistent, when they clearly were not.

[81] As to remedy, Mr *Davis* noted that the applicant's original job offer was withdrawn, which left her eight weeks out of work until securing alternative employment at Stepping Stones. Accordingly, the applicant sought 8 weeks' pay, comprising of 37.5 hours at $25.65 an hour, totalling $8,895.00 and loss of accrued annual leave being a total of $9,636.25.

CONSIDERATION

Statutory provisions and relevant authorities

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

(a) Ms Horan was dismissed at the initiative of the employer on 7 May 2018 (ss 385(a) 386(1)(a));

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

(c) Ms Horan was a person protected from unfair dismissal in that:

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

  ii. a Modern Award applied to her employment; see: para [1] above (s 382(3)(b)(ii));

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

(e) her dismissal was not a case involving the Small Business Fair Dismissal Code, as the respondent employs more than 15 employees in a number of related entities (s 385(c)).

[83] Section 385 of the Act defines an unfair dismissal based on four criteria, 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.'

[84] 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 Ms Horan'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, which deals with the matters to be taken into account by the Commission in determining whether a dismissal was unfair. It is trite to observe that each of the matters must be considered, and a finding made on each of them, including whether they are relevant or not; ss (e) concerning warnings of unsatisfactory performance is usually not relevant in serious misconduct cases.

[85] The matters to be taken into account under s 387 of the Act 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.

[86] All of the criteria in s 387 of the Act must be taken into account when the Commission considers whether a particular dismissal is unfair. The notion of 'taking into account' a matter (such as those described in s 387 of the Act) connotes a genuine consideration of the relevant section and the apportionment of the appropriate weight of each criterion in the circumstances. In *Construction, Forestry, Mining and Energy Union v Hamberger and Another* (2011) 195 FCR 74, *Katzmann* J pointed out that '[t]o take a matter into account means to evaluate it and give it due weight' and that 'mere advertence will not be enough'. That said, it must also be steadily borne in mind that all of these matters must be considered in totality. That this is so is obvious from the Explanatory Memorandum to the *Fair Work Bill 2008* where at para 1541, it reads:

> '1541. FWA must consider all of the above factors in totality. It is intended that Fair Work Act 2009 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**.' (*my emphasis*)

Allegations of serious misconduct

[87] It is common ground that Ms Horan was summarily dismissed in an email from Mr Stapleton for alleged 'gross' misconduct on 7 May 2018. It may be accepted that 'serious' and 'gross' (misconduct) mean essentially the same thing; although on one view it might be said the word 'gross' is a higher level of seriousness than 'serious'. That said, '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*)

[88] It may be accepted that Mr Stapleton relied on subregulations (2)(a) and (b) of Regulation 1.07. Mr Stapleton put great emphasis on his reporting requirements under the *Early Childhood Education National Regulations*. However, reporting requirements under these Regulations are not findings of any breaches of the Regulations by the applicant. As far as I am aware, no action has been taken by any regulatory body against the applicant in respect to the incident. Accordingly, Mr Stapleton's complaint notification does not take the matter much further in the context of the *Fair Work Act*'s requirements. In addition, reliance on Regulation 1.07 is not determinative of whether an act of gross misconduct constitutes a

valid reason for dismissal. In *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033, the Full Bench of the Commission said at paras [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*)

[89] The notion of wilful or deliberate behaviour amounting to serious misconduct is conduct which strikes at the heart of the employment relationship. That notion has been considered in a number of well-known authorities (although characterised in slightly different terms). 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.'

[90] *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 (referred to in the quote 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.'

[91] 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 para [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 counterclaim 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.'

[92] In cases of summary dismissal, the onus rests on the employer to prove, to the Commission's satisfaction, that the misconduct, has in fact, occurred. This is why I have adopted the practice of requiring the employer to file and serve its evidence first when I issue directions in preparation for a serious misconduct unfair dismissal case (as I did in this case). While this evidentiary onus must be discharged on the civil onus of proof (on the balance of probabilities); *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 ('*Briginshaw*'), the more serious the allegation, the higher the burden on the employer to prove the allegation. 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*)

[93] That the Commission, for itself, must be satisfied that the misconduct occurred, is well established by the authorities of the Commission and its predecessors. In *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1019, a Full Bench of the AIRC said at paras [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*)

[94] Even accepting that a finding of serious misconduct was open to Mr Stapleton, it must not be confused with the statutory language and the relevant tests to be applied. The statute still requires the Commission to find that there was, or was not, 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 (as the Commission then was) held at para [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.'

***Education and Care Service National Law Act 2010*, No 69 of 2010 and Regulations**

[95] Given the emphasis, Mr Stapleton placed on his obligations under the *Education and Care Service Act* and its Regulations, I set out below their relevant provisions in the context of the applicant's conduct and dismissal. Section 8 defines the Regulatory authority as the Department of Education and Early Childhood Development. Section 166 makes it an offence for a staff member to use inappropriate discipline on a child. It reads:

> '**166 Offence to use inappropriate discipline**
>
> (1) The approved provider of an education and care service must ensure that no child being educated and cared for by the service is subjected to—
>
> (a) any form of corporal punishment; or
>
> (b) **any discipline that is unreasonable in the circumstances**. Penalty: $10 000, in the case of an individual. $50 000, in any other case.
>
> (2) A nominated supervisor of an education and care service must ensure that no child being educated and cared for by the service is subjected to—
>
> (a) any form of corporal punishment; or

(b) **any discipline that is unreasonable in the circumstances**. Penalty: $10 000.

(3) A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to—

(a) any form of corporal punishment; or

(b) **any discipline that is unreasonable in the circumstances.** Penalty: $10 000.

(4) A family day care educator must not subject any child being educated and cared for by the educator as part of a family day care service to—

(a) any form of corporal punishment; or

(b) **any discipline that is unreasonable in the circumstances**. Penalty: $10 000.' (*my emphasis*)

[96] Section 174 requires an approved provider at ss(2) to notify of any complaints alleging a serious incident. The full section reads:

'**174 Offence to fail to notify certain information to Regulatory Authority**

(1) An approved provider must notify the Regulatory Authority of the following information in relation to the approved provider or each approved education and care service operated by the approved provider—

(a) any change relevant to whether the approved provider is a fit and proper person to be involved in the provision of an education and care service;

(b) information in respect of any other prescribed matters. Penalty: $4000, in the case of an individual. $20 000, in any other case.

(2) An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider—

(a) any serious incident at the approved education and care service;

(b) any complaints alleging—

(i) that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service; or

(ii) that this Law has been contravened;

(c) information in respect of any other prescribed matters. Penalty: $4000, in the case of an individual. $20 000, in any other case.

(3) A notice under subsection (1) must be in writing and be provided within the relevant prescribed time to the Regulatory Authority that granted the provider approval.

(4) **A notice under subsection (2)** must be in writing and be provided within the **relevant prescribed time** to—

(a) the Regulatory Authority that granted the service approval for the education and care service to which the notice relates; and

(b) in the case of a family day care service, the Regulatory Authority in each participating jurisdiction in which the family day care service operates.'
(*my emphasis*)

[97] Section 182 makes provision for the Regulatory Authority to issue a prohibition notice to a person in the following circumstances:

'**182 Grounds for giving prohibition notice**

(1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an approved education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed—

(a) to remain on the education and care service premises; or

(b) to provide education and care to children.

(2) For the purposes of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following—

(a) an approved provider;

(b) a nominated supervisor;

(c) an educator;

(d) a family day care educator;

(e) an employee;

(f) a contractor;

(g) a volunteer;

(h) a person who was formerly a person referred to in paragraphs (a) to (g) in relation to the approved education and care service— or in any other capacity

(3) The Regulatory Authority may give a prohibition notice to a person to—

(a) prohibit the person from being nominated as a nominated supervisor if the Regulatory Authority considers the person is not a fit and proper person to be nominated as a nominated supervisor of a service; or

(b) impose one or more conditions on the nomination of the person as a nominated supervisor that the Regulatory Authority considers appropriate, if the Regulatory Authority considers the person is a fit and proper person to be nominated as a nominated supervisor of a service subject to those conditions.

[98] In the Act's Regulations there are certain requirements on the approved provider to notify of an incident at the Centre. Reg 86 requires 24 hours' notice to the parent of any child involved in an incident, injury, trauma or illness while the child is in the approved provider's care.

[99] Reg 87 requires the approved provider to keep a Register or record of any incident which must include:

'(a) details of **any incident in relation to a child** or injury received by a child or trauma to which a child has been subjected while being educated and cared for by the education and care service or the family day care educator, including—

(i) the name and age of the child; and

(ii) the circumstances leading to the **incident**, injury or trauma; and

(iii) the time and date the **incident occurred**, the injury was received or the child was subjected to the trauma;

(b) details of any illness which becomes apparent while the child is being educated and cared for by the education and care service or the family day care educator including—

(i) the name and age of the child; and

(ii) the relevant circumstances surrounding the child becoming ill and any apparent symptoms; and

(iii) the time and date of the apparent onset of the illness;

(c) details of the action taken by the education and care service or family day care educator in relation to any **incident**, injury, trauma or illness which a child has

suffered while being educated and cared for by the education and care service or family day care educator, including—

(i) any medication administered or first aid provided; and

(ii) any medical personnel contacted;

(d) details of any person who witnessed the **incident**, injury or trauma;

(e) the name of any person—

(i) whom the education and care service notified or attempted to notify, of any **incident**, injury, trauma or illness which a child has suffered while being educated and cared for by the education and care service or family day care educator; and

(ii) the time and date of the notifications or attempted notifications;

(f) the name and signature of the person making an entry in the record, and the time and date that the entry was made.' (*my emphasis*)

[100] Division 2 requires the approved provider to have in place policies and procedures in respect to a number of matters including:

'(b) **incident**, injury, trauma and illness procedures complying with regulation 85;

(c) dealing with infectious diseases, including procedures complying with regulation 88;

(d) dealing with medical conditions in children, including the matters set out in regulation 90;

(e) emergency and evacuation, including the matters set out in regulation 97;

(f) delivery of children to, and collection of children from, education and care service premises, including procedures complying with regulation 99;

(g) excursions, including procedures complying with regulations 100 to 102;

(h) **providing a child safe environment**;

(i) staffing, including—

(i) **a code of conduct for staff members**; and

(ii) **determining the responsible person present at the service**; and

(iii) the participation of volunteers and students on practicum placements;

(j) **interactions with children, including the matters set out in regulations 155 and 156**;

(k) enrolment and orientation;

(l) governance and management of the service, including confidentiality of records;

(m) the acceptance and refusal of authorisations;

(n) payment of fees and provision of a statement of fees charged by the education and care service;

(o) **dealing with complaints**.'

(*my emphasis*)

[101] Reg 175 requires prescribed information to be notified to the Regulatory Authority and subregulation 2 provides:

'(2) For the purposes of section 174(2)(c) of the Law, the following matters are prescribed—

(a) any change to the hours and days of operation of the education and care service;

(b) any incident that requires the approved provider to close, or reduce the number of children attending, the education and care service for a period;

Example.
A flood or a fire that requires an approved provider to close the education and care service premises (or part of those premises) while repairs are undertaken.

(c) **any circumstance arising at the service that poses a risk to the health, safety or wellbeing of a child or children attending the service**;

(ca) the attendance at the approved education and care service of any additional child or children being educated and cared for in an emergency in the circumstances set out in regulation 123(5), including—

(i) a description of the emergency; and

(ii) a statement by the approved provider that the approved provider had taken into account the safety, health and wellbeing of all the children attending the education and care service when deciding to provide education and care to the additional child or children.

> (d) any incident where the approved provider reasonably believes that physical abuse or sexual abuse of a child or children has occurred or is occurring while the child is or the children are being educated and cared for by the education and care service;
>
> (e) allegations that physical or sexual abuse of a child or children has occurred or is occurring while the child is or the children are being educated and cared for by the education and care service (other than an allegation that has been notified under section 174(2)(b) of the Law).' (*my emphasis*)

[102] Regulation 176 requires 24 hours' notice to the Regulatory Authority of any complaint or incident referred to in s 174(2)(b) of the Act.

Witness evidence

[103] In my opinion, there was no serious challenge to the applicant's version of events of 2 May 2018. Nor was Ms Currey's corroborative evidence undermined in cross examination. To the extent that I could be comfortably satisfied that Ms Cox's investigation justified a positive finding of misconduct, on the balance of probabilities, it fell well short of that mark. Putting aside the many inconsistencies in the supposed consistent statements of the witnesses (Ms Curtis, Mr Stephens and Mr Foster, in particular), to draw a conclusion of overall consistency, without taking into account any explanation from the applicant or Ms Currey, must result in a seriously flawed investigation, which manifested an injustice. The applicant's career in childcare might have been irreparably damaged, if not destroyed. I intend to correct such an injustice. Mr *Davis* provided a useful evidence matrix which plainly demonstrated the inconsistencies in the 'consistent' evidence. These included:

(a) Whether the child was picked up and carried, or forcibly pulled by the arm or pushed through the door.
(b) Whether the child was in the other room for about 5 minutes or 30 seconds and whether he followed the applicant back.
(c) Only one person said the applicant was yelling (Mr Foster).
(d) Significantly, despite all staff being trained as to not isolating a misbehaving child in an 'exclusion spot', and a specific question in their interviews, no witness described the applicant's placement of 'G' as being to an 'exclusion spot.'

[104] To my mind, Mr Foster's version of events was intended to cast the applicant in the worst possible light. Until Mr Foster's cross examination, it was not disclosed he was the anonymous complainant. On crucial issues, Mr Foster's evidence was inconsistent with

almost everyone else, or was embellished or exaggerated by the recent unpleasant incidents involving the applicant. It is not apparent whether Mr Stapleton or Ms Cox knew Mr Foster was the anonymous complainant, or were aware of a possible motive he had for lodging the anonymous complaint, including him withdrawing his son from the Centre. If they did, they most certainly did not take this into account. It is clear he did not disclose that he was the anonymous complainant to Ms Cox during her investigation.

[105] It seems to me that, at best, one must consider Mr Foster's highly negative statement from the standpoint that he had to ensure that his complaint stood up to scrutiny, otherwise he might be in trouble for making false allegations. At worst, it might be said he was motivated by *mala fide* intent, to overly dramatise a common workplace incident in a child care centre, in order to damage the applicant, the Centre or both. It is unnecessary for me to make direct findings in this respect, as I am satisfied his statement and oral evidence, where it conflicts with the applicant and Ms Currey, is not to be preferred. I make no adverse findings against Ms Curtis, Ms Stephens or Ms Leach, as I am satisfied that they were doing their best in a difficult and pressurised situation. Further comment as to Ms Cox's and Mr Stapleton's evidence, will be discussed shortly; suffice at this point, to say that I do not accept that Mr Stapleton or Mr Hill told the applicant the details of the allegations in the 4.30pm phone call on 3 May 2018. I accept the applicant's evidence in this respect.

[106] In my view, Mr Stapleton's confusing evidence as to why he did not take Ms Currey's statement into account, was really because he wanted to demonstrate to the Regulator that he had taken swift and decisive disciplinary action against the applicant, so as to not place his accredited provider licence in jeopardy. In doing so, he may have satisfied his own conscience and the Department's requirements, but he did not afford to the applicant her rights as prescribed by the *Fair Work Act*. There was no reason for a rush of judgement and a subsequent dismissal. Indeed on one view, the investigation was ongoing for at least another 9 days, until 14 May 2018, when Ms Currey was interviewed. If the investigation was as thorough and complete as Mr *Morphett* submitted, it was utterly irrelevant to interview Ms Currey, when her evidence would not have made a skerrick of difference (and did not anyway).

[107] On my reading of the Regulatory mandate, Mr Stapleton was only required to notify of the incident within 24 hours. He went further by advising of the applicant's suspension and of an investigation having been commenced. Far worse, he rushed to judgement, without

affording the applicant natural justice. There was no legal, ethical or logical reason to do so. He could have, for example, kept the applicant on suspension, accepted her reasonable request for 24 hours' notice of a directed meeting and provide her with the details of the complaint by email. These are the usual and orthodox steps taken in employment situations such as this. It is true, as Mr Stapleton put, that there is nothing in the Regulations requiring 24 hours' notice to be given to a person about whom a complaint has been made. However, Mr Stapleton confuses his separate obligations under s 387(c) of the Act, to afford the applicant a (reasonable) opportunity to respond to the allegations. The notice given was not reasonable, and even less so given that she was not provided with the actual details of the allegations in writing (or at all).

Meaning of harsh, unjust or unreasonable

[108] The meaning of valid reason in s 387(a) is drawn from the judgement of *North* J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 ('*Selvanchandran*'). This meaning has been considered and applied by members of the Commission and its predecessors for many years. For example, in *Rode v Burwood Mitsubishi* Print R4471, a Full Bench of the then-Australian Industrial Relations Commission ('ALRC') discussed the meaning of valid reason in the context of the relevant provisions of the *Workplace Relations Act 1996*, citing *Selvachandran*. The following is an extract from the Full Bench's decision at para [17]:

> '[17] In relation to the meaning of "valid reason" the following remarks of Northrop J in *Selvachandran v Peterson Plastics Pty Ltd* are relevant:
>
> > "Section 170DE(1) refers to a 'valid reason or valid reasons', but the Act does not give a meaning to those phrases or the adjective 'valid'. A reference to dictionaries shows that the word 'valid' has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is: '2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.' In the Macquarie Dictionary the relevant meaning is sound, just or wellfounded; a valid reason.'
> >
> > In its context in s 170DE(1), the adjective 'valid' should be given the meaning of sound, defensible or wellfounded. 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 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, commonsense 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, when considering the construction and application of a s170DC."
>
> [18] While *Selvachandran* was decided under the former statutory scheme the above observations remain relevant in the context of s.170CG(3)(a). A valid reason is one which is sound, defensible or well founded. A reason for termination which is capricious, fanciful, spiteful or prejudiced is not a valid reason for the purpose of s.170CG(3)(a).
>
> [19] We agree with the appellant's submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.'
>
> See also: *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370.

[109] Having regard for my credit findings above, it should come as no surprise that I am satisfied there was no valid reason for the applicant's dismissal. The decision was '*unsound, indefensible and ill founded*' and based entirely on a hopelessly flawed investigation. By reference to the letter of dismissal, I specifically find that the applicant:

(a) did not forcibly remove a child to an 'exclusion spot';

(b) did not yell at the child; and

(c) did not pull the child through the door.

[110] The applicant acted reasonably and appropriately in all the circumstances and in accordance with the Centre's policies and procedures. These conclusions strongly tell in favour of a finding of unfairness.

Further matters to be considered under s 387 of the Act

[111] Subsections (b)-(e) of s 387 are generally grouped under the rubric of 'procedural fairness' or 'natural justice' issues. To highlight the importance of procedural fairness issues, in unfair dismissal cases, I cite four authorities on the subject. In C*rozier v Palazzo Corporation Pty Limited t/as Noble Storage and Transport* (2000) 98 IR 137 ('*Crozier v Palazzo*'), a Full Bench of the AIRC said at para [73]:

> 'As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their

> employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment.'

[112] In *Wadey v YMCA Canberra* [1996] IRCA 568, *Moore* J made clear that an employer cannot merely pay 'lip service' to giving an employee an opportunity to respond to allegations concerning an employee's conduct. His Honour said:

> 'In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the employee must be made aware allegations concerning the employee's conduct so as to be able to respond to them. The second is that the employee must be given an opportunity to defend himself or herself. The second aspect, the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.'

[113] Nevertheless, procedural fairness steps should be applied in a commonsense and practical way. In *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 ('*Gibson*'), *Wilcox* CJ said at [7]:

> 'Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However, I also pointed out that the section does not require any particular formality. It is intended to be applied in a practical, commonsense way so as to ensure that the affected employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section.'

[114] It goes without saying that any issue (or issues) of procedural unfairness may not be of such significance as to outweigh the substantive reason (or reasons) for an employee's dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity as to outweigh any other considerations in respect to 'harshness', such as age, length of service, employment record, contrition or personal and family circumstances. In *Bostik Australia Pty Ltd v Gorgevski (No 1)* [1992] FCA 271; (1992) 36 FCR 20, the Federal Court of Australia Industrial Division said at [37]:

> 'Harsh, unjust and unreasonable

> 37. These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge's view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual is clearly relevant but of course not conclusive. **Other matters have to be considered such as the gravity of the employee's misconduct**.' (*my emphasis*)

[115] I make the following observations and findings. In my view, Ms Cox's investigation process was so flawed and hastily conducted and finalised, that I am left with little alternative but to find that the applicant was denied procedural fairness on a wide scale. For example:

(1) she was denied 24 hours' notice to arrange a support person to attend any meeting to discuss the matter;

(2) she was not provided with details of the anonymous complaint at the time, or any time subsequently; let alone provided with the details of the allegations, in writing;

(3) Ms Cox maintained her and Mr Stapleton's decision to dismiss was based solely on witness accounts which were said to be consistent. Putting aside my conclusion that the accounts were not consistent at all, it would have been reasonable to assume that both the applicant and Ms Currey might have provided accounts which would challenge the claim of consistency. This opportunity was denied to both of them;

(4) it was hasty, unrealistic and unreasonable to form a considered view as to the applicant's dismissal, one business day after the staff interviews, particularly as the applicant was not given a reasonable or fair opportunity to respond;

(5) why Ms Cox believed it was necessary to interview Ms Currey a week after the applicant's dismissal, is difficult to fathom. The fateful decision had already been made and there was no evidence from the respondent that had Ms Currey's version of events cast a different light, or at least demonstrated inconsistencies with the other staff interviews, that it would not have made a jot of difference;

(6) there was no reference until her oral evidence, that Ms Cox doubted Ms Currey's truthfulness or doubted her recollections due to her assumed emotional state at the time;

(7) Mr Stapleton's evidence was that the applicant refused to attend a meeting. This is incorrect and misleading. The applicant had requested 24 hours' notice and she

> was never given any such notice at any time, despite a period of 11 days before Ms Currey's interview. In any event, why would the applicant return phone calls when all the respondent had to do was give her 24 hours' notice by email while she was still employed. Overarching all of this was Mr Stapleton's concession, in oral evidence, that 24 hours' notice of the meeting, was a reasonable request.

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

[116] The applicant was notified of her dismissal in an email letter from Mr Stapleton sent to her around 6pm on 7 May 2018, see [3] above. Mr Stapleton's haste in dismissing her was crude, unseemly, unacceptable and exacerbated the unfairness of her dismissal. In my view, informing an employee of their dismissal by phone, text or email is an inappropriate means of conveying a decision which has such serious ramifications for an employee. I consider it would only be in rare circumstances that a decision to dismiss an employee should not be conveyed in person. For example, it may be necessary where the employer believes a dismissed employee might be a threat to the safety of his/her employees or because the employee expressly did not want a 'face to face' meeting to hear the outcome of any disciplinary process. I agree with Commissioner *Cambridge* when he said in *Knutson v Chesson Pty Ltd t/a Pay Per Click* [2018] FWC 2080 at [47]:

> '[47] The employer provided notification of dismissal by email communication sent at 8.53pm on 6 November 2017. Notification of dismissal should not be made by email communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face trot face. To do otherwise is unnecessarily callous. Even in circumstances where email or electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation.'

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

[117] As mentioned earlier the applicant was given no reasonable opportunity to respond to the allegations and never refused to do so. All she wanted was 24 hours' notice of the meeting and details of the allegations. The respondent's conduct was akin to having made the decision to dismiss the applicant without affording her any opportunity to defend herself. This factor strongly tells in favour of a finding of unfairness.

Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal (s 387(d))

[118] There was no meeting with the applicant, and her request for 24 hours' notice of a meeting was due in part because she needed to arrange Union representation or a support person. Given her workplace was in Dubbo, such notice was entirely reasonable. The respondent's failure to afford her this opportunity contributes to a finding of unfairness.

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

[119] As the applicant's dismissal was for misconduct, this criterion is not relevant for present purposes.

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 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 (ss 387(f) and (g))

[120] Mr Stapleton and Mr Hill's enterprise is not a small business, but it is not a large one in relative terms. The Centre is in a regional location of New South Wales. It was apparent to me that Mr Stapleton does not have a detailed understanding of his obligations under workplace law and relied in large part on Ms Cox, who also appeared to have a limited knowledge of what an objectively and legally sound investigation should look like. That said, Mr Stapleton claimed he had acted on legal advice at the time. If this was correct, he should insist on a refund of any fees paid for such advice to a lawyer or agent. It resulted in a hopelessly flawed investigation and numerous breaches of s 387 of the Act. This factor does not favour any weight to be given to the size of the enterprise or the availability of human resources and/or employment advice.

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

[121] The applicant was employed for two years. There was no evidence of any performance or conduct issues during that period. The fact she had acted up for Ms Cox as Nominated Supervisor would seem to demonstrate management's acceptance of her competence and abilities in a position of significant responsibility.

[122] The applicant suffered serious reputational damage by the false allegations made against her. This is exacerbated by the fact she lives and works in a regional location in central New South Wales. Despite this, the applicant has obtained alternative employment. She is to be commended for her initiative and success in this respect. Nevertheless, she is entitled to be vindicated by this decision. I have taken these matters into account.

[123] For all of the aforementioned reasons, I am satisfied that Ms Horan's dismissal on 7 May 2018 was '*harsh, unjust and unreasonable*' within the meaning of s 387 of the Act. Her dismissal was manifestly unfair, both as to substance and procedure.

Appropriate remedy

[124] The remedies for unfair dismissal are set out in s 390 of the Act as follows:

> '**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies.'

[125] Given that the applicant does not seek reinstatement and has secured alternative employment, I am satisfied that reinstatement is inappropriate. This leads to compensatory considerations.

[126] Section 392 of the Act sets out matters the Commission must have regard to when determining:

(a) whether compensation should be ordered;

(b) if so, what amount of compensation should be ordered;

(c) the effect of any order as to any findings of misconduct by the applicant;

(d) the upper limit of compensation; and

(e) specific matters not to be taken into account.

[127] Section 392 reads as follows:

'**392 Remedy—compensation**

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

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

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

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

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

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

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

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

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

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

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

[128] The methodology to be adopted by the Commission in calculating compensation having regard for each of the matters set out in s 392 of the Act (often referred to as the *Sprigg* formula), was considered by a Full Bench of the Commission in *Bowden v Ottrey Homes Cobram* and District *Retirement Villages Inc. t/a Ottrey Lodge* [2013] FWCFB 431 ('*Ottrey*'); see also: *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 and *Ellawala v Australian Postal Corporation* [1999] AIRC 1250. A Full Bench said in *Balaclava Pastoral Co Pty Ltd t/a Australian Hotel Cowra v Nurcombe* [2017] FWCFB 429 ('*Balaclava*') at [42]- [43]:

'[42] The correct approach to the assessment of compensation was summarised by the Full Bench in the recent decision in *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Alan Humphries* as follows (footnotes omitted):

> "[16] The well-established approach to the assessment of compensation under s.392 of the FW Act, taking into account the matters specified in s.392(2), is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul Licensed Festival Supermarket*. This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*. Under that approach, the first step to be taken in assessing compensation is to consider s.392(2)(c) - that is, to determine what the applicant would have received, or would have been likely to receive, if the person had not been dismissed. In *Bowden* this was described in the following way:
>
> > '[33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:
> >
> > > '... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.'
> >
> > [34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the '*anticipated period of employment*'...'
>
> [17] The identification of this starting point amount "necessarily involves assessments as to future events that will often be problematic" Once this first step has been undertaken, various adjustments are made in accordance with s.392 and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee's misconduct and the application of the cap of six months' pay. This approach is however subject to the overarching requirement to ensure that the level of compensation is in an amount that is considered appropriate having regard to all the circumstances of the case."

[43] We would add to this that in quantifying compensation, it is necessary to set out with some precision the way in which the various matters required to be taken into account under s.392(2) (and s.392(3) if relevant), and the steps in the Sprigg formula, have been assessed and quantified. That is to say, the way in which a final compensation amount has been arrived at should be readily apparent and explicable from the reasons of the decision-maker.'

[129] In a recent Full Bench decision, *Hanson Construction Materials Pty Ltd v Pericich* [2018] FWCFB 5960, it has been made clear that the *Sprigg* formula is not to be applied in a rigid manner. At [39] the Full Bench said:

> '[39] The strict application of the approach set out in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*), and endorsed in subsequent decisions, would yield an order that Mr Pericich be paid compensation of 1 weeks' pay. *Sprigg* is a useful servant, but is not to be applied in a rigid determinative manner. In deciding the amount of a compensation order the Act directs that the Commission 'must take into account all of the circumstances of the case' including the particular matters set out at s.392(2)(a) to (g).'

Viability effect

[130] The respondent provided no details as to its financial position. Given the order I propose to make I do not consider that the order will adversely impact on the respondent's enterprise and do not accept the order should be complied with by instalments.

Length of service

[131] The applicant's service was two years. This is neither a short nor a lengthy period of service.

Remuneration earnt to be taken into account

[132] The respondent relied on the applicant's resignation on 3 May 2018 as a basis for calculating how long she would have remained in employment, but for her dismissal. However, that ignores Mr *Davis*' submission that the offer of employment to work at Redgum Childcare did not proceed. While there is no direct evidence as to why the offer was withdrawn, Mr *Davis*' claim that Redgum Childcare had reservations after hearing about the allegations, has a 'ring of truth' about it, particularly given the regional area in which the applicant worked. She obtained alternative employment at Stepping Stones Childcare Centre on 2 July 2018. I find that the applicant would have remained in employment, but for her dismissal until 2 July 2019. The applicant seeks the 8 weeks she was unemployed at the hourly rate of $29.65 for 37.5 hours a week. This totals $8,895.00 plus $741.25 lost accrued annual leave for that period. Accordingly, an order is sought for $9,636.25.

[133] The applicant has mitigated her losses. I make no deductions for contingencies. I have also taken into account that the applicant received no notice of her dismissal or payment in lieu of notice. Notice payment would have been two weeks. Given I have found that there was no misconduct of the applicant, no deduction in compensation is made on that score (s 392(3)). The order I intend to make contains no component by way of compensation for shock, distress, humiliation or other analogous hurt (s 392(4)).

Compensation Assessment

[134] The compensation cap in relation to the applicant is the lesser of the amount equivalent to the remuneration earned by her in the 26 weeks immediately before her dismissal. As just mentioned, I have determined that the applicant would have remained in employment for a further period of 8 weeks, until obtaining employment at Stepping Stones Childcare Centre. I also consider that the amount of 2 weeks' pay in recognition of notice should be added to the order sought, being $9,636.25 + $2,223.75 = $11,860.00.

[135] This amount is obviously below the cap of compensation the applicant earnt in the 26 weeks prior to her dismissal. Accordingly, I propose to order an amount of compensation of $11,860.00.

CONCLUSION

[136] For the aforementioned reasons, I am satisfied the dismissal of the applicant by the respondent on 7 May 2018 was '*harsh, unjust and unreasonable',* within the meaning of the Act, for which compensation of $11,860.00 should be ordered. Finally, s 381(2) of the Act is a significant and overreaching 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

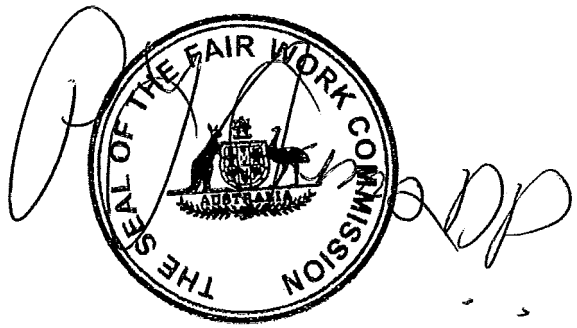
(ii) address the needs of employers and employees; and

(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.'

[137] I am satisfied that the remedy I have determined will ensure a '*fair go all round*' is accorded to both the applicant and the respondent. The amount ordered is subject to any deductions of appropriate taxation, according to law. The amount of compensation is to be paid to the applicant within 21 days of today. Orders giving effect to my conclusions will be published contemporaneously with this decision.



DEPUTY PRESIDENT

Appearances:

J *Davis* for the applicant
D *Morphett* for the respondent

Hearing details:

2018.

Dubbo:

4 December

Final written submissions:

Applicant, 13 January 2019

Respondent, 31 December 2018

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