DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Anthony Ashley-Cooper
v
Palm Beach Motor Yachts Co P/L T/A Palm Beach Motor Yachts
(U2019/7883)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 6 DECEMBER 2019

Application for relief from unfair dismissal –valid reason for dismissal – dismissal not harsh, unjust or unreasonable – application dismissed.

Introduction

[1] A dispute with a work colleague about a car battery was the catalyst for a series of events which quickly led to Mr Anthony Ashley-Cooper's summary dismissal from his employment with Palm Beach Motor Yacht Co Pty Ltd (***Palm Beach***) as a Metal Fabricator. Mr Ashley-Cooper contends that his dismissal was harsh, unjust and unreasonable. Palm Beach, which is in the business of constructing motor yachts, denies those allegations.

[2] I heard Mr Ashley-Cooper's unfair dismissal case against Palm Beach on 11, 12 and 13 November 2019. Mr Ashley-Cooper gave evidence in support of his case. He also adduced evidence from a former work colleague, Mr Sam Spence, Cabinet Maker of Palm Beach, who was ordered to attend the Fair Work Commission (***Commission***) to give evidence in the matter. Palm Beach adduced evidence from its following employees:

- Mr Ryan Graham, Production Manager;
- Mr Rhys Clark, Construction Manager;
- Ms Jade Onley, Finance Manager;
- Mr Robert Mawson, Storeman;
- Mr Andrew Pilon, Shipwright;
- Mr Jayden Moore, Metal Fabricator;
- Mr Kurt Adorna, Laminator;
- Mr Stephen Adorna, Cabinet Maker, and the father of Kurt Adorna; and

- Mr Anthony Daube, Marine Electrical Manager.

Initial matters to be considered

[3] Section 396 of the *Fair Work Act 2009* (Cth) (***Act***) sets out four matters which I am required to decide before I consider the merits of the Application.

[4] There is no dispute between the parties and I am satisfied on the evidence that:

(a) Mr Ashley-Cooper's application for unfair dismissal was made within the period required in s 394(2) of the Act;

(b) Mr Ashley-Cooper was a person protected from unfair dismissal;

(c) the Small Business Fair Dismissal Code did not apply to Mr Ashley-Cooper's dismissal; and

(d) Mr Ashley-Cooper's dismissal was not a genuine redundancy.

Was the dismissal harsh, unjust or unreasonable?

[5] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Ashley-Cooper's dismissal was harsh, unjust and/or unreasonable. I will address each of these matters in turn below. However, before doing so, I will address the principles of condonation and toleration and where they fit into the statutory scheme established by s 387 of the Act, because they are relevant to a number of the allegations against Mr Ashley-Cooper in this case.

Condonation and Toleration

[6] The concept of condonation embraces notions of waiver and election.[1] Deputy President Wells helpfully summarised the principles applicable to the concept of condonation in *Cannan & Fuller v Nyrstar Hobart Pty Ltd*[2] [references omitted]:

> "*Condonation*
>
> **[255]** The principle behind the Applicants' submission of condonation is that an employer, with full knowledge of an employee's misconduct and continues to employ him, cannot later rely on that misconduct to dismiss the individual. Thus, by knowing the behaviours of Mr Cannan and Mr Fuller and electing to continue the employment of them, Nyrstar 'condoned' their conduct and 'waived' the right to terminate their employment contracts.
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> **[256]** The practical manifestation of this principle in the employment context is that a wronged party has the right to elect, in the face of a breach of a condition of an

[1] *Phillips v Foxall* (1872) LR 7 QB 666 at 680

[2] [2014] FWC 5072

employment contract, either to continue the contract or terminate it for breach. In order for condonation to be present, an employee must provide that:

- the employer had full knowledge of the conduct;
- despite this, the employer retains the employee's services; and
- with this election, the employer has deliberately given up the right to dismiss the employee summarily."

[7] An appeal against Deputy President Wells' decision in *Cannan & Fuller v Nyrstar Hobart Pty Ltd* was dismissed by a Full Bench of the Commission.[3]

[8] At common law, even if conduct is condoned, it can later be taken into account to evaluate the significance of further misconduct. The principle was explained by Justice Sheppard in *John Lysaght (Australia) Ltd v Federated Iron Workers' Association; Re York*:[4]

> "It is no doubt possible for the company to waive particular acts of misconduct that would otherwise have justified dismissal without notice. These particular acts could not subsequently be used for this purpose once the decision was made not to rely on them. The act of misconduct however does not then disappear and become irrelevant when further misconduct occurs. It remains and makes up the continuing history and record of a man's service. That record may always be referred to for the purpose for which the company now points to it and the presence of incidents such as I have described will always be a relevant factor to be weighed in the balance by an employer when he comes to consider whether or not a further breach or other act of misconduct should not bring about a dismissal."

[9] The majority of the Full Bench of the Commission in *B, C and D v Australian Postal Corporation*[5] explained the relevance of condonation and toleration in the context of an unfair dismissal application in the following way:

> "[42] Broadly speaking, circumstances bearing upon whether a dismissal for misconduct is harsh, unjust or unreasonable fall into three broad categories:
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> (1) The acts or omissions that constitute the alleged misconduct on which the employer relied (together with the employee's disciplinary history and any warnings, if relied upon by the employer at the time of dismissal) but otherwise considered in isolation from the broader context in which those acts or omissions occurred.
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> (2) The broader context in the workplace in which those acts or omissions occurred. [This may include such matters as a **history of toleration or condonation of the misconduct by the employer** or inconsistent treatment of other employees guilty of the same misconduct.]

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[3] *Nyrstar Hobart Pty Ltd v Cannan & Fuller* [2015] FWCFB 888 at [52]-[55] in relation to the issue of condonation

[4] (1972) AILR 517; applied by Justice Ryan of the Supreme Court of Queensland in *McCasker v Darling Downs Co-operative Bacon Association Ltd* (1988) 25 IR 107 at 114

[5] [2013] FWCFB 619 at [42]-[43]

> (3) The personal or private circumstances of the employee that bear upon the substantive fairness of the dismissal. [This includes, matters such as length of service, the absence of any disciplinary history and the harshness of the consequences of dismissal for the employee and his or her dependents.]
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> [43] The determination of whether there was a valid reason proceeds by reference to the matters in category (1) and occurs before there is a consideration of what Northrop J described as "substantive fairness" from the perspective of the employee. Matters in categories (2) and (3) are then properly brought to account in the overall consideration of the whether the dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason"." [emphasis added]

[10] In *Toll Holdings Limited v Johnpulle*,[6] a Full Bench of the Commission considered the earlier Full Bench decisions in *Cannan & Fuller v Nyrstar Hobart Pty Ltd* and *B, C and D v Australian Postal Corporation* and made the following observations in relation to the relevance of condonation and toleration to the various s 387 considerations [references omitted]:

> "[15] It may be accepted that, under the general law, an employer is disentitled to summarily dismiss an employee for an earlier instance of misconduct on the part of that employee where the employer with full knowledge of the misconduct had decided to retain the employee in employment. It would be difficult to conclude for the purpose of s.387(a) of the FW Act that an employer who had condoned misconduct by an employee in this way and had thus lost the right of summary dismissal at law nonetheless had a valid reason for dismissing that employee. The Commissioner therefore did not err in declining to find that the instances of misconduct described in the second, third and fourth allegations against Mr Johnpulle constituted valid reasons for his dismissal. It may also be accepted that, for the purpose of s.387(h), the Commissioner was entitled to treat as relevant that Toll had previously elected not to dismiss Mr Johnpulle for his earlier instances of inappropriate behaviour towards Mr Karzi. However the fact that Mr Johnpulle had (as the Commissioner found) engaged in the earlier instances of inappropriate behaviour did not thereby become otherwise irrelevant in the consideration of whether his dismissal was harsh, unjust or unreasonable. The Commissioner's own findings supported the conclusion, stated in Toll's dismissal letter, that Mr Johnpulle had engaged in a "pattern of unacceptable behaviour" towards Mr Karzi and had persisted in that behaviour notwithstanding that he had been told by the Team Leader to cease such behaviour and he had agreed to do so. That was necessarily a highly material consideration which, while not necessarily being determinative, was adverse to the conclusion that the dismissal was harsh, unjust or unreasonable. It was also relevant to the issue of reinstatement, since it went to the degree of risk that Mr Johnpulle might repeat such behaviour in future if reinstated.
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> [16] The Commissioner did not have regard to the fact that Mr Johnpulle's misconduct was not isolated but was part of a "pattern of unacceptable behaviour". That was an error in the exercise of his discretion of the type described in *House v The King* as a failure to "take into account some material consideration"."

[6] [2016] FWCFB 108 at [15]-[16]

Valid reason (s 387(a))

General principals

[11] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.[7] In order to be "valid", the reason for the dismissal should be "sound, defensible and well founded"[8] and should not be "capricious, fanciful, spiteful or prejudiced."[9]

[12] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[10] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[11]

[13] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[12] It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[13]

[14] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.[14] In cases such as the present where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.[15]

[15] In *Patrick Stevedores Holdings Pty Ltd v CFMMEU,*[16] Justice Lee made the following useful observations about the *Briginshaw* standard and its impact on fact finding and the state of satisfaction required [references omitted]:

> "**Fact Finding and the State of Satisfaction Required**
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> 14. It is trite that both Patricks and Qube are required to prove their case on this liability hearing to the civil standard having regard to the degree of satisfaction required by s 140 of the EA. This section requires the court, in a civil proceeding, to find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. In deciding, in a civil case, whether it is satisfied that the case has been proved, the court is to take into account: (a) the nature of the cause of action or defence; (b) the nature of the

[7] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

[8] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

[9] Ibid

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

[11] Ibid

[12] *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24]

[13] Ibid

[14] Ibid

[15] *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J

[16] [2019] FCA 451

subject-matter of the proceeding; and (c) the gravity of the matters alleged. Although the standard of proof remains the balance of probabilities, the degree of satisfaction varies according to the seriousness of the allegations made and the gravity of the consequences (if the allegations are found to be correct): see EA s 140.

15. Importantly, the factual allegations made by both Patricks and Qube are not only foundations for the nature of the relief dealt with at this liability hearing (that is, declarations of contraventions of the FW Act), but are also the foundations for the deferred relief, that is, the imposition of pecuniary penalties.

16. It is well-established that s 140 reflects the common law as explained seminally by Dixon J in *Briginshaw v Briginshaw*. As the Full Court noted in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission*:

> The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.
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> Even though he spoke of the common law position, Dixon J's classic discussion in *Briginshaw*...at 361-363 of how the civil standard of proof operates appositely expresses the considerations which s 140(2) of the [EA] now requires a court to take into account. Dixon J emphasised that when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. He pointed out that a mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify the finding of a fact. But he recognised that (*Briginshaw* 60 CLR at 361-262):
>
> > 'No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the

> question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences...
>
> Dixon J also pointed out that the standard of persuasion, whether one is applying the relevant standard of proof on the balance of probabilities or beyond reasonable doubt, is always whether the affirmative of the allegation has been made out to the reasonable satisfaction of the tribunal. He said that the nature of the issue necessarily affected the process by which reasonable satisfaction was attained. And, so, he concluded that in a civil proceeding, when a question arose whether a crime had been committed, the standard of persuasion was the same as upon other civil issues. But he added, weight must be given to the presumption of innocence and exactness of proof must be expected (*Briginshaw* 60 CLR at 362-363).
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> 17. It is also clear that so-called "*Briginshaw* principles" apply to civil penalty proceedings (which is a particular example of the application of s 140(1) of the EA)…"

[16] It follows that for Palm Beach to succeed in relation to its allegations of misconduct against Mr Ashley-Cooper I am required to reach a state of satisfaction or an actual persuasion that Palm Beach has proved its allegations of misconduct, while taking into account the seriousness of the allegations and the gravity of the consequences that could follow if the allegations were to be accepted.[17]

Alleged valid reasons

[17] Palm Beach relies on the following seven reasons, individually and collectively, in support of its contention that it had a valid reason for the termination of Mr Ashley-Cooper's employment:

(a) first, Mr Ashley-Cooper unreasonably resisted returning a car battery to Mr Kurt Adorna;

(b) secondly, Mr Ashley-Cooper deflated a tyre on Mr Kurt Adorna's car by removing the valve from the tyre;

(c) thirdly, Mr Ashley-Cooper made a threat (concerning Mr Kurt Adorna) to Mr Stephen Adorna;

(d) fourthly, Mr Ashley-Cooper took an unauthorised absence from work on 1 July 2019;

(e) fifthly, Mr Ashley-Cooper engaged in aggressive behaviour in the workplace over a period of time;

[17] Ibid at [18]

(f) sixthly, Mr Ashley-Cooper took wood and a sheet of melamine (a building material used in kitchen cabinetry and other internal areas) without permission from Palm Beach's workplace on 22 June 2019 and used them for his own purposes; and

(g) seventhly, Mr Ashley-Cooper secretly recorded the meeting in which he was informed that his employment was terminated.

First alleged valid reason – return of car battery

[18] Mr Ashley-Cooper contends that he was given the car battery by Mr Kurt Adorna, who thought it was beyond repair, and Mr Kurt Adorna asked for the battery back after Mr Ashley-Cooper managed to get it working again. Mr Kurt Adorna claims that he did not give the car battery to Mr Ashley-Cooper.

[19] Mr Jayden Moore was present during most of the discussions between Mr Ashley-Cooper and Mr Kurt Adorna in relation to the battery. I found Mr Moore to be a reliable and credible witness. He had a good recollection of what was said in those discussions and answered questions put to him in a direct and responsive manner. In addition, Mr Moore was, in my view, an independent witness; he gave the following evidence in relation to his working relationship with Mr Ashley-Cooper:[18]

> "3. I know Anthony Ashley-Cooper ("Tony") through my work at PBMY. I did my apprenticeship with Tony as my supervising tradesperson.
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> 4. I handled working with Tony a lot better than most people, most other people took him too seriously. I got on well with him. He got cranky easily but I got on well with him. He is a great tradesperson, very knowledgeable. It was sort of, there is the right way, the wrong way and Tony's way to do things."

[20] Because of his independence and reliability as a witness, I prefer Mr Moore's account of the conversations between Mr Ashley-Cooper and Mr Kurt Adorna concerning the alleged gift of the car battery over the evidence given by Mr Kurt Adorna, Mr Stephen Adorna, and Mr Ashley-Cooper. Mr Moore's evidence, which I accept, was as follows:[19]

> "6. I was at work on a Friday in either June or July, I'm not sure what day it was exactly. Myself, Kurt and Tony were in the work shed and were talking. Kurt has a 4WD. Tony was talking about a jump starter pack that he has.
>
> Kurt said "I bet you it can't start my car with no battery in it."
>
> Tony said "I bet it can" or words to that effect.
>
> 7. Kurt went and drove his car around the shed. Tony hooked up the jump starter. Kurt has two batteries in his car. One for the accessories and one for driving the car. The starter pack started the car with one battery. It didn't work with the other battery.

[18] Ex R9

[19] Ibid

Kurt said "This battery is fucked, I'm gonna get a new one."

Tony said "Well I'll have that one."

Kurt didn't respond to this. He didn't say that Tony could have the battery but he didn't say he couldn't either.

Kurt started to take the battery out of the car. Tony took the battery, went inside the work shed and put it on charge. Kurt went and parked his car.

8. The next day, on the Saturday, Tony came into work. I was working that day as well. Tony and I were chatting and I saw him check the battery. He said the indicator light showed it was charged. I saw Tony take the battery off charge and put it in to his car.

9. On the Monday I saw Kurt in the factory and he asked me how the battery was going.

I said "It's going good, it's in Tony's car."

He laughed it off, I don't think he believed me.

He said "I'll check it later."

10. Later that day he asked me again how the battery was and I had to tell him again that it was in Tony's car.

He said "OK, I'll come out and get it."

11. I had two further conversations with Kurt along these lines about the battery.

12. On the following Friday I was in the shed with Tony and Kurt came up to us, he said words to the effect of:

"I'm coming out to get the battery."

Tony said "Well its in my car, I can't drive if you take the battery out."

As far as I recall Kurt then left.

13. About a week later I went to the toilet and on my way back out, the roller door to the shed was shut as it was cold, I could hear yelling on the other side of the door. I saw Steve Adorna, Kurt's dad, and said words to the effect of:

"That's your son in there."

Steve said "Really?"

14. Both of us walked in to the shed together and saw Tony and Kurt arguing.

> Tony said "I'll give it back when I get a battery."
>
> Kurt said "Are you serious! I'll drive you down the road and get your battery."
>
> Tony said "I'm perfectly capable of driving down and getting my own battery."
>
> Kurt yelled "Are you serious."
>
> Tony "Yeah I'm serious."
>
> Kurt threw a tape measure of mine on the ground which broke. He replaced it the next day.

15. I heard Steve say to Tony "make him wait for the battery."

16. On the next Monday morning I was inside the shed grinding a bow rail, it takes a couple of hours. The door to the shed was down again as it was still cold. Tony's ute was parked just outside the shed but I could not see it. Later in the day it had warmed up so the door was up and I could see Tony's car was still parked at the entrance to the shed.

17. One of the guys, Rob, needed to get in the shed with the forklift and the year (sic) was blocking the entrance. Tony went and got his keys, got into his car and tried to start the car. However, nothing happened. I heard Tony say:

> "Kurt's taken me battery, I'm going to see Rhys."
>
> I saw Tony walk up the mezzanine stairs past Steve's [Adorna] workbench. I did not hear what was said."

[21] Both Mr Ashley-Cooper and Mr Kurt Adorna agree that just before Mr Kurt Adorna smashed the tape measure on Friday, 28 June 2019, Mr Ashley-Cooper said to Mr Kurt Adorna words to the effect, "I think it's time for you to go, bye bye little boy, off you go."[20]

[22] Based on Mr Moore's account of the conversation when Mr Ashley-Cooper first took possession of the battery, I am satisfied that there was a genuine misunderstanding between Mr Ashley-Cooper and Mr Kurt Adorna. Mr Ashley-Cooper thought that Mr Kurt Adorna did not want the battery because he believed it was beyond repair and gave it to him. Mr Kurt Adorna believed that Mr Ashley-Cooper would try to get the battery working, but he would retain ownership of it.

[23] Palm Beach does not contend that Mr Ashley-Cooper refused to return the battery to Mr Kurt Adorna, but does submit that Mr Ashley-Cooper unreasonably resisted returning the battery to Mr Kurt Adorna. It is necessary to consider the timeline of events to evaluate this allegation. Although I accept Mr Moore's account of the contested conversations between Mr Ashley-Cooper and Mr Kurt Adorna in relation to the battery, I am satisfied that Mr Moore's

[20] Ex A1 at annexure C, page 2; Ex R6 at [8]

recollection of the timing of some of the events is not accurate. In particular, I accept Mr Ashley-Cooper's evidence that it took him about a week to fix the battery.[21] As a consequence, the events described in paragraphs [8] to [12] of Mr Moore's witness statement took place about a week later than Mr Moore recalls. I find that the conversation Mr Moore describes in paragraph [12] of his statement took place on about Friday, 21 June 2019.

[24] I find that the relevant events in connection with this allegation took place in the following timeframe:

- Mr Ashley-Cooper first took possession of the battery on 14 June 2019;[22]
- Mr Ashley-Cooper took about a week to fix the battery;[23]
- on Friday, 21 June 2019, Mr Kurt Adorna and Mr Ashley-Cooper had the conversation Mr Moore describes in paragraph [12] of his statement;
- on Thursday, 27 June 2019, Mr Kurt Adorna asked Mr Ashley-Cooper for his battery back. Mr Ashley-Cooper called Mr Kurt Adorna an "Indian giver".[24] Mr Ashley-Cooper told Mr Kurt Adorna that he had not got a new battery yet.[25] Mr Moore was not present during this discussion;
- on Friday, 28 June 2019, there was a further conversation between Mr Ashley-Cooper and Mr Kurt Adorna about the return of the battery. That is the conversation in which Mr Ashley-Cooper told Mr Kurt Adorna that he would give the battery back when he got a new battery and Mr Kurt Adorna smashed Mr Moore's tape measure.[26] Mr Stephen Adorna told Mr Ashley-Cooper to make Mr Kurt Adorna wait for the battery;[27] and
- Mr Kurt Adorna took the battery out of Mr Ashley-Cooper's car, without permission, on Tuesday, 2 July 2019.

[25] It is apparent from this timeline of events that Mr Ashley-Cooper had use of the battery for about a week and one half from the time it was fixed on about 21 June 2019 until it was taken out of his car by Mr Kurt Adorna on Tuesday, 2 July 2019. That is a reasonably limited period of time in circumstances where I accept that Mr Ashley-Cooper went to considerable efforts to fix the battery over a period of about one week. The reasonableness of Mr Ashley-Cooper having the use of the battery over this period, in recognition of the work he did in fixing it, is supported by Mr Stephen Adorna's statement (albeit denied by him) on 28 June 2019 to Mr Ashley-Cooper to make Mr Kurt Adorna wait for the battery. Also of relevance is that the battery in question was one of two batteries in Mr Kurt Adorna's car. Mr Kurt Adorna used one battery for driving his car and the other battery, which Mr Ashley-

[21] Ex A1 at annexure C, page 1

[22] Ex A1 at annexure C, page 1

[23] Ibid

[24] Ex A1 at annexure C, page 1; PN282

[25] Ex R6 at [7]; Ex A1 at annexure C, page 2

[26] Ex R9 at [14]

[27] Ex R9 at [15]

Cooper fixed, was used for accessories.[28] There is no suggestion that Mr Kurt Adorna was unable to drive his car because one of his batteries was being fixed and then used by Mr Ashley-Cooper.

[26] Mr Ashley-Cooper did not refuse to return the battery to Mr Kurt Adorna. It was reasonable for Mr Ashley-Cooper to take some time to obtain a replacement battery before giving the battery back to Mr Kurt Adorna. No evidence was adduced as to what happened to the battery Mr Ashley-Cooper took out of his car in order to replace it with Mr Kurt Adorna's battery or why Mr Ashley-Cooper could not simply swap the batteries back. If Mr Ashley-Cooper had retained Mr Kurt Adorna's battery until at least the week commencing 8 July 2019, then I would have been satisfied that Mr Ashley-Cooper unreasonably resisted returning the battery to Mr Kurt Adorna. However, I am not so satisfied having regard to the timeframe set out above and the fact that Mr Ashley-Cooper only had use of the battery for about one and a half weeks.

[27] Mr Clarke considered the issue when it was raised with him at the time and told both Mr Kurt Adorna and Mr Ashley-Cooper to "move on – end of story".[29] In my view, this was an appropriate response. Similarly, Ms Onley gave evidence in her witness statement about a conversation she had with Mr Clarke at the time of the incident and then stated:[30]

> "We agreed that Kurt had gone about it the wrong way but that the battery should be left with Kurt. We decided to leave it at that."

[28] In all the circumstances, I am satisfied that Mr Ashley-Cooper did not unreasonably resist returning the battery to Mr Kurt Adorna.

Second alleged valid reason – deflation of tyre

[29] I accept Mr Kurt Adorna's unchallenged evidence that his driver's side front car tyre was deflated on 3 July 2019 and there was no valve in his tyre when he inspected it at work on that day.

[30] By way of context, it was on the day prior, 2 July 2019, that Mr Kurt Adorna removed the battery from Mr Ashley-Cooper's car without his permission. Mr Ashley-Cooper realised that his battery had been removed when he went to move his car to make it easier for a forklift to pass. Mr Ashley-Cooper's car would not start, so he opened the bonnet and noticed that the battery had been taken. Mr Ashley-Cooper then said, in the presence of Mr Moore, Mr Mawson and Mr Brad Horton, words to the effect, "The little prick took the battery back".[31] I accept that everyone present, including Mr Ashley-Cooper, then laughed.[32]

[31] Mr Ashley-Cooper did not approach Mr Kurt Adorna about the battery being taken from his car, but he did complain to Mr Clarke on 2 July 2019 about Mr Kurt Adorna

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[28] Ex R9 at [7]

[29] Ex R5 at [15]-[16] and annexure RC1, 2 July 2019

[30] Ex R12 at [12]

[31] Ex A2 at page 15; Ex A1 at annexure C, page 2; ExR9 at [17]

[32] Ibid

removing the battery from his car.[33] Mr Clarke told Mr Ashley-Cooper that he did not have an issue with Mr Kurt Adorna taking the battery because it was Mr Kurt Adorna's battery.[34]

[32] Mr Ashley-Cooper contends that Mr Clarke told him that he had spoken to Mr Kurt Adorna about the removal of the battery from Mr Ashley-Cooper's car and during that conversation Mr Clarke said to Mr Kurt Adorna that it was a "cunt act". I reject that contention. It was denied by Mr Clarke[35] and Mr Kurt Adorna could not recall the comment.[36] It is also inconsistent with Mr Clarke's view that he did not have an issue with the removal of the battery[37] and the fact that Mr Clarke told both employees to "move on – end of story".[38]

[33] Mr Kurt Adorna believes that it was Mr Ashley-Cooper who removed the valve from his tyre and deflated it. Mr Kurt Adorna believes that Mr Ashley-Cooper took such action in retribution for Mr Kurt Adorna's removal, without permission, of the battery from Mr Ashley-Cooper's car on the previous day.

[34] There is no dispute on the evidence and I find that Mr Ashley-Cooper arrived at work on 3 July 2019 at about 7:01am and parked behind Mr Kurt Adorna's car. Mr Ashley-Cooper then walked past the driver's side of Mr Kurt Adorna's car on his way to the lunch room for the purpose of clocking-on for work. After some events which will be described in further detail below, Mr Ashley-Cooper walked past the driver's side of Mr Kurt Adorna's car on his journey from the lunch room back to his car. Mr Ashley-Cooper accepts that on the way in to the staff room he noticed that Mr Kurt Adorna had parked on a witch's hat, so on his way back out of the staff room Mr Ashley-Cooper says that he "walked over and picked up the other [unpinned] witch's hat and put it on Kurt's bonnet. The air was still in his tyre at the time I did this."[39]

[35] By way of background, Mr Ashley-Cooper gave evidence, which I accept, that he and other employees of Palm Beach regularly put a witch's hat on Mr Kurt Adorna's car as a light hearted way of reminding him that he had parked on witch's hats which were being used to designate a safe walkway area. Mr Ashley-Cooper also gave unchallenged evidence, which I accept, that about 60 people would have walked past Mr Kurt Adorna's car on the morning of 3 July 2019 to clock-on for work.

[36] Mr Daube arrived at work at about 7am on 3 July 2019. On 4 July 2019, Mr Daube sent an email to Mr Clarke, setting out his account of what he saw on the previous day:

> "When arriving at work yesterday morning 3rd July 2019 I saw Tony Cooper bending down to the drivers side Tyre of a car parked outside the lunch room. I have no idea who's [sic] car it was or what he was doing."

[37] In Mr Daube's witness statement, he described the incident in the following way:[40]

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[33] PN1240; Ex R5 at [15]

[34] Ex R5 at [15]

[35] PN1169-1172

[36] PN1415-1418

[37] Ex R5 at [15]

[38] Ex R5 at annexure RC1, 2 July 2019

[39] Ex A1 at annexure C, page 3; Ex A2 at page 20

[40] Ex R10 at [7]

> "7. As I approached The Camry I saw Tony Cooper kneeling down at the front drivers side wheel of The Camry. I had to step around him to continue walking in to the building…"

[38] The difference between "kneeling down" and "bending down" in these accounts was raised with Mr Daube in cross examination. Mr Daube ultimately accepted that his contemporaneous account was more reliable[41] and he recalled seeing Mr Ashley-Cooper bending down (lower than waist height)[42] near the front wheel of the car and there was a witch's hat in the vicinity.[43] Mr Ashley-Cooper denies that he was bending down by the tyre of Mr Kurt Adorna's car.[44] I prefer Mr Daube's evidence to Mr Ashley-Cooper's evidence in relation to this issue. Mr Daube's evidence is supported by his contemporaneous email sent to Mr Clarke on the day after the incident. Mr Daube was firm in his oral evidence as to what he saw on the morning of 3 July 2019. Mr Daube also made appropriate concessions in his evidence. He accepted in cross examination that he could not say with any certainty what Mr Ashley-Cooper was doing, or whether he was interfering with a tyre, when Mr Daube saw him bending down near the driver's side front tyre of Mr Kurt Adorna's car.[45] He also accepted that whatever he "saw was in that 10 seconds or so between Mr Ashley-Cooper walking out and you walking in" to the lunch room.[46] Further, Mr Daube knew who Mr Ashley-Cooper was but did not work with him. There is no basis to find that Mr Daube was being untruthful or had a motive to lie.

[39] There is significance to Mr Daube's evidence that he saw Mr Ashley-Cooper "bending down to the driver's side tyre of a car parked outside the lunch room".[47] There is no doubt that car was Mr Kurt Adorna's car. This evidence gives rise to a question of why Mr Ashley-Cooper was bending down near the front driver's tyre of Mr Kurt Adorna's car on the morning of the day (3 July 2019) on which Mr Kurt Adorna discovered that his front driver's tyre was deflated and had had the valve removed from it. Mr Ashley-Cooper's explanation is that "on the other side of the path I did slightly bent [sic] over and pick up the unpinned witch's hat and placed it on Kurt's bonnet".[48] Mr Daube gave unchallenged evidence, which I accept, that the cars between which he walked to get to the lunch room "were parked either side of the path way that leads in to the building".[49] On the left side of the path way as Mr Daube walked towards the lunch room was Mr Kurt Adorna's car; there was another car on the right side of the path way.[50] The unpinned witch's hat which Mr Ashley-Cooper says he "slightly bent over" to pick up was located on the "other side of the path". That is, the unpinned witch's hat was located on the right hand side of the path as one walks between the cars on the way in to the lunch room. The right hand side of that path is next to the passenger's side of the car parked next to Mr Kurt Adorna's car, not the driver's side of Mr Adorna's car. Because Mr Daube saw Mr Ashley-Cooper bending down on the driver's side

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[41] PN1944

[42] PN1938

[43] PN1929-1931; PN1945-1949

[44] See, for example, PN381-382

[45] PN1948

[46] PN1961

[47] Ex R10 at annexure A; PN1945-1949

[48] Ex A2 at page 20

[49] Ex R10 at [5]

[50] Ex R10 at [6]

of Mr Kurt Adorna's car and the unpinned witch's hat which Mr Ashley-Cooper says he "slightly bent over" to pick up and put on Mr Kurt Adorna's car was on the other side of the path, it follows that Mr Ashley-Cooper's explanation that he was "slightly bent over" to pick up a witch's hat does not explain why he was bending down near the front driver's tyre of Mr Kurt Adorna's car on the morning of 3 July 2019. No other explanation was given by Mr Ashley-Cooper as to why he was bending down near the front driver's tyre of Mr Kurt Adorna's car on the morning of 3 July 2019.

[40] There is CCTV footage of part of the car park in which Mr Ashley-Cooper parked his car on 3 July 2019, together with the lunch room where Mr Ashley-Cooper clocked-on. The CCTV footage of the car park only shows the back driver's side portion of Mr Kurt Adorna's car; it does not show the front driver's tyre of Mr Kurt Adorna's car. The CCTV footage of the car park and the lunch room reveals the following sequence of events on the morning of 3 July 2019:

- at 7:01am Mr Ashley-Cooper arrives in the car park and parks behind Mr Kurt Adorna's car (a light blue Toyota Camry);
- at 7:01:18 Mr Ashley-Cooper exits his car;
- at 7:01:20 Mr Ashley-Cooper walks between Mr Kurt Adorna's car and another car on his way in to the lunch room;
- at 7:01:27 Mr Ashley-Cooper enters the lunch room;
- at 7:01:56 Mr Ashley-Cooper exits the lunch room towards the car park;
- at 7:02:03 Mr Daube walks between Mr Kurt Adorna's car and another car on his way in to the lunch room;
- at 7:02:04 Mr Ashley-Cooper appears between Mr Kurt Adorna's car and another car, looks around and then, at 7:02:08, walks back in the direction of the lunch room;
- at 7:02:13 Mr Daube enters the lunch room; and
- at 7:02:54 Mr Ashley-Cooper walks between Mr Kurt Adorna's car and another car in the direction of his own car and then gets in to his own car and drives off at 7:03:07.

[41] Mr Ashley-Cooper had access to the CCTV footage prior to the hearing.[51] It is apparent from the CCTV footage that:

- at 7:02:04, Mr Ashley-Cooper was located between the driver's side of Mr Kurt Adorna's car and another car, he looked around and then, at 7:02:08, walked back in the direction of the lunch room.[52] We know from the CCTV footage that Mr Ashley-Cooper did not re-enter the lunch room at that time; and

[51] PN298-299

[52] PN374

- there was a 46 second period between when Mr Ashley-Cooper walked back in the direction of the lunch room at 7:02:08 (but did not re-enter the lunch room) and when he walked between the driver's side of Mr Kurt Adorna's car and another car in the direction of his own car at 7:02:54.[53] Mr Ashley-Cooper got in to his own car and drove off at 7:03:07. It was put to Mr Ashley-Cooper that he was around the area of Mr Kurt Adorna's car for a while.[54] Mr Ashley-Cooper's response was that he "had to walk past Kurt's car to – because he's parked next to the main entrance into the kitchen". That does not explain why Mr Ashley-Cooper was in the vicinity of Mr Kurt Adorna's car for 46 seconds. Even if this was the period of time when Mr Ashley-Cooper picked up a witch's hat from the other side of the path and placed the witch's hat on the bonnet of Mr Kurt Adorna's car, that would not account for much of the 46 second period of time between 7:02:08 and 7:02:54.

[42] I accept Ms Onley's evidence that the CCTV footage of the car park was reviewed from the time when Mr Kurt Adorna arrived at work to when it was discovered that his tyre was deflated and the only person who seemed to loiter in the area was Mr Ashley-Cooper.[55] This evidence, of itself, is relevant and of some utility but it is far from conclusive, because the CCTV footage does not show exactly where Mr Ashley-Cooper was in the 46 second period to which I have referred, nor does it show the portion of Mr Kurt Adorna's car near his front driver's tyre. As a result, it is possible that another employee or person removed the valve from Mr Kurt Adorna's tyre without ever appearing on the CCTV footage.

[43] The allegation that Mr Ashley-Cooper deflated Mr Kurt Adorna's tyre on 3 July 2019 by removing the valve from it was squarely put to Mr Ashley-Cooper.[56] He denied any involvement in the deflation of Mr Kurt Adorna's tyre.[57]

[44] At 8:48am on 3 July 2019, Mr Brendan Hodge, one of Mr Kurt Adorna's work colleagues, sent him a photograph by text message of a tyre of his car.[58] I accept Mr Kurt Adorna's evidence that there was no text accompanying the photograph. It is not known when the photograph was taken. It is not apparent from the photograph whether the tyre is at the front or rear of the vehicle, or on the driver's side or the passenger's side. The tyre depicted in the photograph is parked on top of a witch's hat. Mr Kurt Adorna gave evidence, which I accept, that when he saw his car later on 3 July 2019, the deflated driver's side front tyre was situated on top of a witch's hat.[59] The photograph does not show whether the valve was in the tyre. There is no doubt that the tyre depicted in the photograph is not 'dead flat', which is how Mr Kurt Adorna found it later in the day. In my view, the tyre was deflated, at least in part, at the time the photograph was taken, because in the photograph the witch's hat appears, in part, to be sunken into the tyre.

[45] On 3 July 2019, Mr Clarke and Ms Onley interviewed Mr Ashley-Cooper. The allegation that Mr Ashley-Cooper had taken the valve out of Mr Kurt Adorna's tyre was put

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[53] PN2180-2184

[54] PN297

[55] PN2179; PN2188

[56] PN283; PN308; PN381-384

[57] PN308; PN381-384

[58] Ex R7

[59] PN1513-1517

to Mr Ashley-Cooper. His initial response was to say "no comment", but later in the interview he denied the allegation and said that he put a witch's hat on the bonnet of Mr Kurt Adorna's car, as he had done many times in the past.[60] I accept Ms Onley's evidence that at the end of the interview Mr Ashley-Cooper began to yell angrily, saying words to the effect, "you never investigated the battery incident properly", and continued to yell about Mr Clarke not talking to all the witnesses before getting up and walking out.[61]

[46] Having regard to all the evidence relevant to this allegation and applying the *Briginshaw* principle, I have reached a state of satisfaction or actual persuasion that Mr Ashley-Cooper did remove the valve from Mr Kurt Adorna's tyre and thereby deflated the tyre on 3 July 2019. The principal reasons for making this finding are as follows:

- In the period leading up to 3 July 2019, Mr Ashley-Cooper had been in dispute with Mr Kurt Adorna about the car battery which Mr Ashley-Cooper fixed and then used in his car. Mr Kurt Adorna asked for the battery back. Mr Ashley-Cooper called him an "Indian giver". On 2 July 2019, Mr Kurt Adorna removed the battery from Mr Ashley-Cooper's car without his permission. I accept that Mr Ashley-Cooper laughed with other employees who were present when he found out about the removal of the battery from his car and Mr Moore observed that Mr Ashley-Cooper was not furious or angry when he agreed to give the battery back and his mood seemed "normal" when he found out that the battery had been removed from his car.[62] However, I do not accept Mr Ashley-Cooper's evidence that he was not annoyed about Mr Kurt Adorna's removal of the battery from his car without permission.[63] That evidence is inconsistent with Mr Spence's evidence that Mr Ashley-Cooper was angry about the removal of the battery from his car during his discussion with Mr Stephen Adorna on 3 July 2019. It is also inconsistent with the fact that Mr Ashley-Cooper complained to Mr Clarke on the afternoon of 2 July 2019 about the removal of the battery from his car. Mr Clarke told Mr Ashley-Cooper that he did not have an issue with Mr Kurt Adorna removing the battery because he owned the battery. It was therefore clear to Mr Ashley-Cooper that his employer was not going to take any action against Mr Kurt Adorna for the removal of the battery from Mr Ashley-Cooper's car without his permission. It follows that Mr Ashley-Cooper had a motive to take some act of retribution towards Mr Kurt Adorna.

- The next day, 3 July 2019, Mr Kurt Adorna discovered that his driver's side tyre was 'dead flat' and the valve had been removed from his tyre. I accept it is possible that a person other than Mr Ashley-Cooper may have removed the valve or it may have become dislodged because it was faulty or for some other reason. I have had regard to those possibilities in making my findings of fact in relation to this allegation;

- There is no dispute that Mr Ashley-Cooper was in the vicinity of the driver's side of Mr Kurt Adorna's car on the morning of 3 July 2019.

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[60] PN1314

[61] Ex R12 at [16]

[62] PN1799 & PN1806

[63] PN281; PN309

- I consider Mr Daube to be an independent and reliable witness who does not have any motive to lie. I accept Mr Daube's evidence, supported by his contemporaneous note, that he saw Mr Ashley-Cooper bending down to the front driver's tyre of Mr Kurt Adorna's car on the morning of 3 July 2019.

- Mr Ashley-Cooper's evidence that he was "slightly bent over" to pick up a witch's hat does not explain why he was bending down to the front driver's tyre of Mr Kurt Adorna's car, because the unpinned witch's hat which Mr Ashley-Cooper "walked over and picked up"[64] was on the other side of the path.

- There is a 46 second period between 7:02:08 and 7:02:54, at the start and finish of which Mr Ashley-Cooper is visible in the CCTV footage standing next to the driver's side of Mr Kurt Adorna's car. Even if this was the period of time when Mr Ashley-Cooper picked up a witch's hat from the other side of the path and placed the witch's hat on the bonnet of Mr Kurt Adorna's car, that would not account for much of the 46 second period of time between 7:02:08 and 7:02:54.

Third alleged valid reason – threat concerning Mr Kurt Adorna

[47] On the afternoon of 3 July 2019, Mr Stephen Adorna had a discussion with Mr Ashley-Cooper. Mr Sam Spence was present during the discussion. It was during this discussion that Palm Beach contends Mr Ashley-Cooper made a threat concerning Mr Kurt Adorna. Mr Ashley-Cooper denies making any such threat.

[48] Mr Stephen Adorna gave the following evidence in his witness statement in relation to this issue:

> "11. Later that day I was in front of the bundy clock in the factory. I was working on the panel cutting machine. Tony approached me and said "I had nothing to do with his tyre".
>
> I said "I was told you'd taken the valve out"
>
> He said "Who told you that?"
>
> I said "It doesn't matter who told me, that's just what I heard"
>
> He said "I'm gonna bash your son"
>
> I said "You can't do that, you'll get sacked"
>
> He said words to the effect of "I'm unsackable. To get me off your son they are gonna have to knock me out."

[49] Mr Stephen Adorna made the following handwritten note in relation to the incident and provided it to Mr Clarke:

[64] Ex A1 at annexure C, page 3

> "I Stephen Adorna do declare this statement to be honest as possible that at Tuesday afternoon Tony Copper [sic] made a threatening statement to punch Kurt Adorna lights out and I Stephen Adorna told him (Tony Copper [sic]) that if you do you will be sacked his response they can't sack me.
>
> He also mentioned that he could not care less who stepped in you would have to knock me out. I've taken on bigger things than this.
>
> 4-7-2019
>
> Stephen Adorna"

[50] During cross-examination, Mr Stephen Adorna gave evidence as follows in relation to this issue:[65]

> "So what exactly was said to you? Tell the court now what was said to you by Tony following him coming to you to raise the topic of the tyre?---He made the threat about bashing my son.
>
> What exactly did he say? Try and use the words as carefully as you can? What did you say to him and what did he say to you?---Well, he said to me that, "I'm going to bash your son if he does make me angry".
>
> "If he does make me angry"?---Yes, and I said to him, "You cannot touch him. If you do you're going to get the sack".
>
> You're sure it was, "If he does make me angry", or - - -?---Well, yes, if he got provoked or got angry, yes.
>
> "If I get provoked or I get angry"?---Yes."

[51] When Mr Stephen Adorna was asked in cross examination whether Mr Ashley-Cooper said "punch his lights out" or "bash him", he replied "what's the difference?"[66]

[52] Mr Spence gave the following evidence in relation to this issue:[67]

> "Did you see any conversations between Tony and anyone else regarding the battery or what was happening?---I witnessed a conversation between Tony and Steve.
>
> And what was that conversation?---About how Kurt took – no, how Tony took – Kurt took the battery off Tony.
>
> Can you remember a bit more detail about the conversation?---It was more about, like, Tony said, like, it was pretty not on that, like, Kurt took the battery out of Tony's car without letting him know, and pretty much leaving him stranded there with, like, no battery in his car. Sorry I'm taking a while, it's just been like a long time.

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[65] PN1670-1675

[66] PN1695

[67] PN829-836 & PN844-848

> That's okay, take your time?---Then it was something about Tone's health condition, and, like, if he had, like – if he had a doctor's appointment, or something very important to him, like, he would have been very pissed off, and, like, he would have, like, confronted Kurt about it type thing. That's about it. It was a long time ago.
>
> You mentioned he said he would have confronted Kurt?---Yes.
>
> Can you remember if he told Steve that he wanted to bash Kurt?---I don't think it was like – I think it was more like hit him, not bash. I don't know. It was more – from my recollection, it was more like – I don't know, it was weird. It wasn't – it didn't – like, it wasn't a threat to me, but I wouldn't say it was a threat. It was just like, I don't know – I don't know, it's weird.
>
> Without meaning to put words in your mouth, is it fair to say your recollection is a bit hazy?---Yes.
>
> No disrespect. Is it Tony made some comment about hitting Kurt or wanting to hit Kurt?---Yes, in the scenario that if he had an appointment, or something that he had to be at. But other than that, no. If that makes sense.
> …
>
> About that conversation? What did you hear?---Tony was just angry.
> …
>
> Do you remember the words now, or not?---Not really.
>
> Did Steven say anything?---I think he said, like, "That's not on by Kurt. Like, he should have come and told you that he was taking the battery." I think he could have said, "Stuff him, you should have just kept the battery." Type of thing. Tony should have kept the battery, type thing. And Steve was like, I don't know, kind of like understanding. "Yeah, I can understand where you're coming from", type of thing. About being frustrated. And that's about it."

[53] Mr Stehen Adorna was, understandably, supporting his son in his dispute with Mr Ashley-Cooper. I consider that Mr Stephen Adorna's recollection of his discussion with Mr Ashley-Cooper has been coloured by his desire to support his son.

[54] Although Mr Spence's recollection of the conversation he witnessed between Mr Ashley-Cooper and Mr Stephen Adorna was "a bit hazy", I accept that he was a truthful witness. He attended the Commission to give evidence pursuant to an order. He did not make a witness statement in the proceedings. I accept that he did his best to recall the conversation. His answers to the questions put to him were direct and responsive. I consider him to be an independent witness. I prefer Mr Spence's evidence in relation to this contested conversation over the evidence given by Mr Stephen Adorna and Mr Ashley-Cooper.

[55] Further, Mr Spence's account of the conversation has a ring of truth to it. It would be entirely plausible for an employee who had had a battery removed from their car without their permission to think about the consequences of such action and to make a comment such as if they had needed to attend a doctor's appointment or some other important event, then they

would have been very annoyed about the removal of the battery from their car and they would have confronted the person who took it. In addition, the idea that the confrontation between Mr Ashley-Cooper and Mr Kurt Adorna would only have happened if certain hypothetical events had transpired, namely, a need to attend a medical appointment or some other important event, is consistent with the oral evidence given by Mr Stephen Adorna that Mr Ashley-Cooper told him that "I'm going to bash your son if he does make me angry".

[56] Even on Mr Stephen Adorna's account (given in his oral evidence), there was no present threat to "bash' his son or "punch his lights out"; the threat was conditional on Mr Kurt Adorna making him angry in the future.

[57] Applying the *Briginshaw* principle, I find that Mr Ashley-Cooper did not make a threat to physically harm Mr Kurt Adorna. I find that Mr Ashley-Cooper expressed his frustration to Mr Stephen Adorna about his son taking the battery from his car without his permission and said that if he had needed to attend a doctor's appointment or some other important event, he would have been very annoyed and would have confronted Mr Kurt Adorna and hit him. Mr Ashley-Cooper was addressing a hypothetical scenario which did not happen, and which both parties to the conversation knew at the time had not happened. For those reasons, this incident did not provide a sound, defensible or well-founded reason for Palm Beach to dismiss Mr Ashley-Cooper.

Fourth alleged valid reason – unauthorised absence from work

[58] There is no dispute that on 1 July 2019 Mr Ashley-Cooper was absent from work from 11:15am until 2:50pm. Mr Ashley Cooper did not clock-off from work during this period.

[59] Mr Ashley-Cooper gave evidence that he left the workplace on 1 July 2019 in order to attend the premises of Cougar Fabrications in Erina, to make exhaust rings for a boat being constructed by Palm Beach.[68] Mr Ashley-Cooper says it took him about 45 minutes each way to drive to and from Cougar Fabrications.[69] Mr Ashley Cooper also says that on his way back from Cougar Fabrications he called in at his home, which is about 4.8 km from his work at Palm Beach, to find a part needed for work.[70] While he was looking for the part, Mr Ashley-Cooper says that his daughter parked behind him, so he decided to drive his second car back to work, rather than ask his daughter to move her car.[71] Mr Ashley–Cooper says he was at home for about 15 minutes.[72]

[60] Mr Ashley-Cooper gave evidence that he has attended the premises of Cougar Fabrications, which is owned by a friend of his, on many occasions during his employment with Palm Beach for the purpose of making exhaust rings. Mr Ashley-Cooper says he used stainless steel off-cuts given to him by the owner of Cougar Fabrications, together with the equipment at Cougar Fabrications including power rollers,[73] to make the exhaust rings.

[68] PN396

[69] PN394

[70] PN428

[71] PN428

[72] PN427

[73] PN411

Cougar Fabrications does not charge Palm Beach for the use of its equipment and stainless steel off-cuts to make exhaust rings.[74]

[61] Mr Moore gave evidence that he attended the premises of Cougar Fabrications on one occasion about three years ago for the purpose of making exhaust rings.[75] At that time, Cougar Fabrications had machines that Palm Beach did not have, including a press, roller and guillotine.[76] Mr Moore also gave evidence that in the last few years prior to his dismissal Mr Ashley-Cooper brought into work his guillotine, press and little set of rollers,[77] with the result that there should be no need to go to Cougar Fabrications to make exhaust rings.[78] Mr Moore did, however, make the point that Cougar Fabrications have a better press and "way better rollers" than those Mr Ashley-Cooper took into Palm Beach.[79]

[62] Mr Ashley-Cooper gave evidence that he undertook between 300 and 400 work-related journeys during his employment with Palm Beach and never sought permission to leave the work premises for such trips.[80] Mr Ashley-Cooper also gave evidence that he has never heard of the reinforcement at toolbox meetings of any requirement to have off-site absences approved by management, contrary to the evidence given by Mr Clarke.[81]

[63] Mr Graham gave evidence that he was aware for years of Mr Ashley-Cooper coming and going from the workplace without seeking permission.[82] Mr Graham did not have any reason to suspect that Mr Ashley-Cooper was not attending to work errands during his absences from the workplace.[83]

[64] I am satisfied that Mr Ashley-Cooper was absent from work on 1 July 2019 for the purpose of attending the premises of Cougar Fabrications to make exhaust rings for a boat being constructed by Palm Beach. That Palm Beach has over the last few years obtained the use of equipment and material which can be used to make exhaust rings does not, in my view, make it implausible that Mr Ashley-Cooper attended the premises of Cougar Fabrications to make exhaust rings on 1 July 2019. The fact that Cougar Fabrications has a better quality press and rollers then Palm Beach provides a rational and reasonable explanation as to why Mr Ashley-Cooper, the head Metal Fabricator at Palm Beach, may have exercised his judgement to make the exhaust rings off-site rather than on Palm Beach's premises. I infer that is what Mr Ashley-Cooper did on 1 July 2019.

[65] I also accept Mr Ashley Cooper's evidence that, for many years prior to his dismissal, he came and went from the workplace with the knowledge of Palm Beach's most senior on-site employee, Mr Graham (Production Manager). This is consistent with Mr Ashley-Cooper being largely left to "run his own race" insofar as the undertaking of metal fabrication work at Palm Beach was concerned. I further accept Mr Ashley-Cooper's evidence, consistent with

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[74] PN397-398

[75] PN1751-1756

[76] PN1756

[77] PN1765-1771

[78] PN1760-1762

[79] PN1777-1780

[80] Ex A1 at annexure C, page 5

[81] Ex A1 at annexure C, page 5; Ex R5 at [21]

[82] PN1010-1014

[83] PN1015-1016

his practice, that he was not told in toolbox meetings that he needed to obtain permission before leaving work to undertake a work-related task.

[66] For the reasons given, I reject the contention that Mr Ashley-Cooper took an unauthorised absence from work on 1 July 2019.

Fifth alleged valid reason – aggressive behaviour

[67] Save for the incidents between Mr Ashley-Cooper and Mr Stephen Adorna and/or Mr Kurt Adorna, which are dealt with elsewhere in this decision, the alleged aggressive behaviour on which Palm Beach relies took place well before Mr Ashley-Cooper's dismissal, including the allegations that Mr Ashley-Cooper was aggressive towards Mr Mawson in early 2018,[84] Mr Pilon in about September 2018,[85] and Mr Graham, Mr Clarke and Mr Richards in April 2019.[86]

[68] The alleged aggressive behaviour on which Palm Beach relies was known about by Palm Beach at the time and was not the subject of disciplinary action against Mr Ashley-Cooper.[87] In fact, Mr Graham frankly conceded in his witness statement that he "usually just tried to calm things down and move on" and he now realises the he "should have been keeping better notes and dealing with these situations differently".[88]

[69] Because Palm Beach had full knowledge of the alleged aggressive conduct on Mr Ashley-Cooper's part and, despite this, chose to retain Mr Ashley-Cooper's services, Palm Beach did not have a valid reason to dismiss Mr Ashley-Cooper on the basis of such conduct.[89] However, the alleged aggressive conduct on which Palm Beach relies and its response, or lack thereof, to such conduct are matters which I will take into account under s 387(h) of the Act.

Sixth alleged valid reason – taking wood and melamine

[70] There is no dispute that on Saturday, 22 June 2019 Mr Ashley-Cooper attended work and took wood and a sheet of melamine from Palm Beach's workplace and used them for his own purposes. Palm Beach contends that Mr Ashley-Cooper did not have permission to take such materials and use them for his own purposes.

[71] Palm Beach was not aware that Mr Ashley-Cooper had taken the wood and melamine at the time it made the decision to dismiss him. It was later in the afternoon of the day on which Mr Ashley-Cooper was dismissed (4 July 2019) that Ms Onley was reviewing CCTV footage and discovered that Mr Ashley-Cooper had taken wood and melamine from its premises on Saturday, 22 June 2019.

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[84] Ex R3 at [4]

[85] Ex R11 at [4]

[86] Ex R4 at [7]; Ex R5 at [9]-[11]

[87] Ex R3 at [11]; Ex R11 at [8]-[9]; Ex R4 at [3]-[18]; Ex R5 at [9]-[11]

[88] Ex R4 at [11]

[89] *Toll Holdings Limited v Johnpulle* at [15]

[72] Facts in existence at the time of the dismissal, but which only come to light later, may make a termination not "harsh unjust or unreasonable" in circumstances where it might otherwise be.[90]

[73] In the present case, I am satisfied that it is appropriate to consider Mr Ashley-Cooper's conduct in taking wood and melamine from the premises of Palm Beach on 22 June 2019. Palm Beach was not aware of that conduct at the time it dismissed Mr Ashley-Cooper. Further, Palm Beach had no reason to suspect that Mr Ashley-Cooper was engaging in such conduct. Although Ms Onley discovered the CCTV footage of Mr Ashley-Cooper taking the wood and melamine on the afternoon of his dismissal, I do not consider there was any failure on the part of Palm Beach to make reasonable inquiries which would have brought the existing facts to its knowledge before the dismissal occurred.

[74] Mr Ashley-Cooper contends that he was entitled to take the wood and melamine from Palm Beach's premises and use it for his own purposes pursuant to a practice which he says was in place at Palm Beach's workplace. The practice, so Mr Ashley-Cooper contends, was for employees to take material from the scrap or off-cut piles in Palm Beach's facility known as the 'wood shop' and use it for their own purposes.[91] Sometimes, Mr Ashley-Cooper contends, employees would write their name on the material they intended to take before taking it home.

[75] Part of the evidence on which Mr Ashley-Cooper relies in support of the alleged practice is an occasion when Mr Graham took a piece of metallic grey MDF from Palm Beach's premises and used it for his own purposes.[92] I reject the contention that this evidence establishes or supports the existence of the practice for which Mr Ashley-Cooper contends. First, Mr Graham is the most senior employee on site. He is the Production Manager and reports directly to the Chief Executive Officer of Palm Beach.[93] I accept Mr Graham's evidence that he has the authority to decide whether an employee, including himself, may be permitted to take any material from Palm Beach's premises for their own use.[94] Secondly, the piece of metallic grey MDF which Mr Graham took had the word "Poppy", which happens to be the name of Mr Graham's daughter, machined in to it by CNC machine.[95] Mr Graham did not ask for the word "Poppy" to be machined in to the piece of MDF; it was just a coincidence.[96] Thirdly, I accept Mr Graham's evidence that the piece of metallic grey MDF with the word "Poppy" machined into it was a cover sheet[97] and was essentially not usable because the word "Poppy" was cut through half the thickness of the MDF, with the result that it was not safe for use as a hatch or anything like that.[98]

[76] The evidence adduced in these proceedings does not establish a practice of the kind for which Mr Ashley-Cooper contends. The evidence establishes that employees would only take material, whether or not in a scrap or off-cut bin, from Palm Beach's premises if they first

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[90] *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1

[91] PN452-454

[92] PN784; PN937-938

[93] PN1054-1061

[94] PN946

[95] PN938

[96] PN942

[97] PN943

[98] PN1053; PN944-945

sought and obtained permission from a manager to do so. Mr Ashley-Cooper did not seek or obtain permission from any manager or employee of Palm Beach before taking the wood and melamine he loaded on to his ute on Saturday, 22 June 2019.

[77] The material Mr Ashley-Cooper took from Palm Beach's premises on 22 June 2019, together with a description of the way in which such material is used by Palm Beach in its production processes, may be summarised as follows:

Material	**Use by Palm Beach**
1 full sheet of white, shiny melamine[99] Mr Ashley-Cooper used the melamine, which he cut up into strips on 22 June 2019, as a kick plate for his new kitchen at home.[100]	Used for making moulds, plugs and patterns.[101] Palm Beach purchases this material from an external supplier.[102]
2 sheets of about 4mm plywood[103] 1 of the 2 sheets had glue or contact adhesive on its surface[104]	Used for making templates,[105] head liners (like a ceiling panel) and side liners for boats.[106] The plywood is covered by upholstery.[107] The thin plywood usually arrives at Palm Beach's premises because it is used as a cover sheet for the delivery of teak and other expensive wood bought by Palm Beach.
1 sheet of about 3mm craftwood/MDF[108]	Used for making patterns and templates throughout a boat and for covers to protect furniture and the boat.[109] The thin craftwood/MDF usually arrives at Palm Beach's premises because it is used as a cover sheet for the delivery of teak and other expensive wood bought by Palm Beach.
1 sheet of about 20mm or 25mm plywood[110] Mr Ashley-Cooper had written his name on this piece of plywood a long time before he took it from the workplace. The piece of plywood was originally located in what Mr	Used for making sub-floor or flooring generally (underneath carpets) in a boat.[114] Also used for making hatches or temporary hatches around a boat to stop people falling into holes.[115] It could also be used to make temporary benches.[116]

[99] PN508; PN1114; PN1116

[100] PN475; PN509

[101] PN921; PN1064-1066; PN1115

[102] PN921; PN1118

[103] PN923 & PN925-926; PN1120

[104] PN928; PN1128

[105] PN929; PN1046; PN1129-1130

[106] PN924; PN1121

[107] PN924

[108] PN926

[109] PN927; PN1124-1125

[110] PN930; PN1132

Ashley-Cooper described as the "off-cut – the scrap heap", but another employee took it from there to his work area.[111] Mr Ashley-Cooper took the plywood from the employee's work area.[112] Mr Ashley-Cooper wanted the plywood to make a bench out of it.[113]	

[78] It is apparent from the CCTV footage of Mr Ashley-Cooper cutting the melamine into strips and then taking those strips and the wood and loading them on to his ute in clear vision of the camera that he was not acting by stealth or in an attempt to hide what he was doing.[117] I accept that Mr Ashley-Cooper honestly believed that he was entitled to take the melamine and wood from Palm Beach's premises and use them for his own purposes. However, Mr Ashley-Cooper did not have a reasonable basis for holding that belief. There was no practice of the kind for which he contends. He did not seek permission from Mr Graham or any other manager to take the material.[118] Instead, Mr Ashley-Cooper thought he knew best and assumed that he was entitled to take the material, which he thought was scrap[119] and would otherwise have to be cut up and put in the bins for disposal at Palm Beach's cost.[120] As a Metal Fabricator, Mr Ashley-Cooper did not work with the wood in the wood shop[121] and plainly did not appreciate how the material in the wood shop was used across Palm Beach's production processes. That was all the more reason why Mr Ashley-Cooper should have sought and obtained permission to take any material from his employer's wood shop.

[79] For the reasons given, I am satisfied that on Saturday, 22 June 2019 Mr Ashley-Cooper attended work and took wood and a sheet of melamine from Palm Beach's workplace without his employer's permission. The material Mr Ashley-Cooper took was of use by Palm Beach and, in the case of the sheet of shiny, white melamine, was purchased by Palm Beach for use in its production processes. Mr Ashley-Cooper's conduct in taking this material from his employer's premises, without permission, and using it for his own purposes gave Palm Beach a sound, defensible and well-founded reason for Mr Ashley-Cooper's dismissal.

Seventh alleged valid reason – secretly recording termination meeting

[80] Mr Ashley-Cooper gave evidence that he recorded his termination meeting with Mr Clarke and Ms Onley on 4 July 2019. Mr Ashley-Cooper did not obtain permission to record that meeting. Mr Ashley-Cooper did not inform Mr Clarke or Ms Onley that he was recording

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[114] PN1134

[115] PN931

[116] PN931

[111] PN629

[112] PN629-630

[113] PN629

[117] PN636

[118] PN785

[119] PN509-511

[120] PN786

[121] PN504

the meeting.[122] Mr Ashley-Cooper attended the meeting with his mobile phone (already recording) inside an envelope.[123]

[81] Palm Beach did not become aware that Mr Ashley-Cooper had secretly recorded the termination meeting until he filed his reply witness statement in these proceedings. It was, therefore, not one of the reasons on which Palm Beach relied in making its decision to dismiss Mr Ashley-Cooper. However, Palm Beach contends that Mr Ashley-Cooper's conduct in secretly recording the termination meeting provided it with a further valid reason for his dismissal. Palm Beach contends that Mr Ashley-Cooper's conduct in secretly recording the meeting was destructive of trust and confidence in the employment relationship.[124] Palm Beach does not suggest that Mr Ashley-Cooper's recording of the termination meeting was unlawful.[125]

[82] Mr Clarke and Ms Onley attended the termination meeting with a termination letter already typed up and signed. The decision to dismiss Mr Ashley-Cooper had been made before he attended that meeting.[126] The first thing that happened in the meeting was Mr Clarke handed Mr Ashley-Cooper the termination letter and told him that his employment was terminated immediately for gross misconduct.[127] Having regard to that sequence of events, the secret recording of the termination meeting did not in fact destroy or damage trust and confidence in the employment relationship, because prior to the commencement of the meeting (and the secret recording of it) Palm Beach had already made a final decision to terminate the employment relationship. The purpose of the termination meeting was to inform Mr Ashley-Cooper of that fact and to provide him with the termination letter. In those particular circumstances, the act of secretly recording the termination meeting did not, in my view, provide a valid reason for the dismissal.[128] The secret recording of the termination meeting would have been significant to my consideration of whether or not to order the reinstatement of Mr Ashley-Cooper, had he succeeded in his argument that his dismissal was harsh, unjust and/or unreasonable.

Conclusion on valid reason

[83] For the reasons given, I am satisfied on the evidence adduced that there was a sound, defensible or well-founded reason for Mr Ashley-Cooper's dismissal related to his conduct in deflating Mr Kurt Adorna's tyre and taking Palm Beach's wood and melamine from its premises without its permission. Accordingly, there were valid reasons for Mr Ashley-Cooper's dismissal within the meaning of s 387(a) of the Act.

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[122] PN1153-1155; PN2092-2095

[123] PN222-231

[124] PN2720

[125] PN2723

[126] Ex R12 at [20]-[21]; Ex R5 at [22]

[127] PN1289; Ex R12 at [22]; Ex R5 at [25]

[128] *Moran v KDR Victoria Pty Ltd T/A Yarra Trams* [2018] FWC 6144 at [84]

Was Mr Ashley-Cooper notified of the reasons for his dismissal and given an opportunity to respond (s 387(b) & (c))?

[84] It is necessary to consider and take into account whether Mr Ashley-Cooper was notified of any valid reason(s) for his dismissal and whether he was given an opportunity to respond to any reason(s) related to his capacity or conduct.

[85] In *Crozier v Palazzo Corporation Pty Ltd,*[129] a Full Bench of the Australian Industrial Relations Commission dealing with a similar provision of the *Workplace Relations Act 1996* (Cth) stated the following:[130]

> "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for the 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 170(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. Much like shutting the stable door after the horse has bolted."

[86] The criterion concerning whether an employee was provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity should be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.[131]

[87] I have found that there were two valid reasons for Mr Ashley-Cooper's dismissal; first, deflating Mr Kurt Adorna's tyre and secondly, taking material from Palm Beach's premises without permission. As to the first of these reasons, I am satisfied that Mr Ashley-Cooper was notified of the reason and given a chance to respond to it in the meeting on 3 July 2019 before the decision was made on 4 July 2019 to terminate his employment. As to the second valid reason, Mr Ashley-Cooper was not notified of the reason nor was he given a chance to respond to it before the decision was made to terminate his employment. That is because Palm Beach did not know about the conduct at the time it made the decision to terminate Mr Ashley-Cooper's employment.

Was there an unreasonable refusal to allow Mr Ashley-Cooper to have a support person present (s 387(d))?

[88] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, it is relevant to consider and take into account whether the employer unreasonably refused the support person being present.

[89] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer

[129] (2000) 98 IR 137

[130] Ibid at [73]

[131] *RMIT v Asher* (2010) 194 IR 1 at 14-15

> unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[132]

[90] By letter to him dated 4 July 2019, Mr Ashley-Cooper was informed that he was entitled to have a support person present with him at the meeting later that day.

[91] Mr Ashley-Cooper did not request that a support person be present during any discussion relating to his dismissal. In those circumstances, I find there was no unreasonable refusal by Palm Beach to allow Mr Ashley-Cooper to have a support person present to assist at any discussions relating to dismissal.

Warnings about unsatisfactory performance (s 387(e))

[92] Mr Ashley-Cooper's dismissal did not relate to unsatisfactory performance. Accordingly, this factor is not relevant.

Impact of Palm Beach's size on procedures followed in effecting the dismissal (s 387(f))

[93] Palm Beach had 66 employees at the time it dismissed Mr Ashley-Cooper. Palm Beach is also part of a larger multinational group of companies, with the parent company located in Singapore.

[94] In all the circumstances, I find that the size of Palm Beach's enterprise was not likely to impact on the procedures followed in effecting the dismissal.

Absence of dedicated human resource management specialists or expertise (s 387(g))

[95] Although Palm Beach's parent company in Singapore has employees with human resources expertise, there is no dispute and I find that Palm Beach did not have any dedicated human resource management specialists or expertise at the time that Mr Ashley-Cooper was dismissed.

[96] In all the circumstances, I find that the absence of dedicated human resource management specialists in Palm Beach's enterprise had an impact on the procedures followed in effecting the dismissal because basic notions of procedural fairness, such as giving an employee an opportunity to respond to a number of concerns or allegations which were known at the time, were, for the most part, not accorded to Mr Ashley-Cooper. But the absence of such specialists and expertise in a medium size enterprise which is part of a larger multinational group did not excuse Palm Beach from failing to afford Mr Ashley-Cooper procedural fairness in connection with the termination of his employment.

Other relevant matters (s 387(h))

[97] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

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[132] Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1542]

Employment history at Palm Beach

[98] Mr Ashley-Cooper was employed by Palm Beach for about 8.5 years prior to his dismissal. I accept Mr Graham's evidence that Mr Ashley-Cooper did a good job most of the time.[133] There is no doubt that Mr Ashley-Cooper is an experienced and highly competent Metal Fabricator. There is no evidence to suggest that the quality of his work was ever questioned or below expectations. However, it is apparent from the evidence adduced in these proceedings that Mr Ashley-Cooper can be abrasive and difficult to work with.[134] These interpersonal difficulties seem to stem from what Mr Moore described as Mr Ashley-Cooper's strongly held beliefs about how particular tasks should be undertaken:[135]

> "It was sort of, there is the right way, the wrong way and Tony's way to do things."

[99] Mr Ashley-Cooper's response to conflict in the workplace became apparent during his cross examination, including his acceptance that he said to Mr Kurt Adorna, "Bye bye little boy, off you go".[136] Mr Ashley-Cooper's answer to the following question was also revealing:[137]

> "You're not slow to try and put people in their place, are you Mr Ashley-Cooper? --- No, of course not. I haven't got time to be tactful."

[100] Mr Ashley-Cooper has the right to express his view about the way work should be undertaken, particularly where a person's health or safety may be at risk or where there is the prospect of damage to equipment or property if work is undertaken in a particular manner. However, Mr Ashley-Cooper needs to appreciate that his view will not always be accepted by his employer and, ultimately, management within Palm Beach has the authority to issue lawful and reasonable directions in the workplace and employees, including Mr Ashley-Cooper, must comply with them.

[101] One good example of Mr Ashley-Cooper's problematic attitude and approach concerns the locking of a shed on Palm Beach's premises around Christmas 2018 and Easter 2019. Mr Ashley-Cooper placed his own personal lock on the shed in question on public holidays.[138] The shed contains Palm Beach's tools and equipment, as well as some of Mr Ashley-Cooper's tools. The shed has its own lock.[139] Mr Ashley-Cooper placed his own lock on the shed on public holidays because he believes that other employees of Palm Beach are not qualified to use the tools (owned by Palm Beach) in the shed, such as a lathe and welder, and he wanted to prevent them from doing so.[140] This is so notwithstanding the fact that Mr Graham, Production Manager, and Mr Clarke, Construction Manager, were of the view that the relevant employees had more than enough experience to use the tools in question.[141] It is

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[133] PN1023

[134] See, by way of example only, Ex R8 at [3], Ex R4, Ex R9 at [4]

[135] Ex R9 at [4]

[136] PN248-252

[137] PN253

[138] PN699

[139] PN700

[140] PN702-715; PN720; PN1027

[141] PN1028; PN1185

not to the point that Mr Pilon had broken the lathe when using it in the past.[142] Managerial employees such as Mr Graham and Mr Clarke have the authority to decide which tradespersons are permitted to use Palm Beach's tools and equipment at its workplace.

[102] In Christmas 2018, Mr Clarke instructed another employee, Mr Ken Jensen, to remove Mr Ashley-Cooper's locks from the shed, which he did, so that employees could access tools in the shed and undertake work. On Good Friday 2019, Mr Clarke cut Mr Ashley-Cooper's lock off the shed so that Mr Jensen and Mr Pilon could obtain the tools and equipment they needed to do their job.

[103] On Saturday, 20 April 2019, the day following Good Friday, Mr Ashley-Cooper attended work and saw that his locks had been cut off the shed. He welded his locks back together on the Saturday afternoon so that employees of Palm Beach could not access the shed and use the tools in it on Sunday, 21 April 2019 or Easter Monday, 22 April 2019.[143]

[104] On Tuesday, 23 April 2019, Mr Ashley-Cooper confronted Mr Clarke about cutting off his locks from the shed. Mr Clarke gave evidence, which I accept, that he had the following discussion with Mr Ashley-Cooper in the board room:[144]

> "I said words to the effect of "I cut the locks off as Ken and Andrew needed to do their work".
>
> He said "Those blokes aren't qualified to use the machinery."
>
> I said "Yes they are and it's our container and we need to let guys work."
>
> Tony stood up and slammed two fists down on the desk and started shouting at me words to the effect of "You don't have the right to do that, they are not qualified."

[105] Mr Ashley-Cooper agrees that he did tell Mr Clarke that the employees concerned were not qualified to use the lathe machine and the TIG Welder, however he denies that he slammed two fists on the table and says that his medical condition at the time was affecting his arthritis. I do not accept Mr Ashley-Cooper's denial in that regard. Mr Ashley-Cooper had strong views about the use of the tools by the employees concerned and even employees such as Mr Moore, who got on well with him, found Mr Ashley-Cooper quick to get cranky.[145]

[106] On 26 April 2019, Mr Ashley-Cooper participated in a discussion with Mr Clarke, Mr Graham and Mr Mark Richards, Chief Executive Officer of Palm Beach, in relation to the placement of locks on the shed. At the conclusion of the conversation Mr Ashley-Cooper took home a boot load of his tools from the shed.

[107] I am satisfied on the evidence adduced in these proceedings that Mr Ashley-Cooper was, at times, abrasive and aggressive in the workplace when other employees disagreed with him about how or what work was to be done. However, I am satisfied that in relation to the occasions when Mr Ashley-Cooper is alleged to have pushed, shoved or pulled another

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[142] PN2034-2035

[143] PN726; PN734; PN742

[144] Ex R5 at [10]-[11]

[145] Ex R9 at [4]

employee from equipment, it was a 'two-way street', with both employees involved to a similar extent. Further, because of the inaction taken by Palm Beach in response to such matters, the conduct was condoned and not addressed in a satisfactory way.

[108] Mr Ashley-Cooper was good at the technical parts of his job and was largely left to run his own race. He was confrontational about matters of importance to him. Management effectively took the view that Mr Ashley-Cooper was too hard to deal with and, as a result, did not seek to counsel or discipline him.[146]

[109] On balance and having regard to his relatively lengthy period of employment (8.5 years), his technical competence and good work most of the time, and his interpersonal difficulties which were not well managed or addressed, I consider that Mr Ashley-Cooper's length and quality of his employment with Palm Beach weighs to a moderate extent in favour of his argument that his dismissal was unfair.

Procedure leading up to termination

[110] Palm Beach readily concedes that its managers who were involved in the process leading up to the termination of Mr Ashley-Cooper's employment do not have expertise or experience in human resources.[147] As a consequence, the procedure adopted was less than desirable and weighs in favour of Mr Ashley-Cooper's argument that his dismissal was unfair. In particular, the only allegation put to Mr Ashley-Cooper for his response prior to his dismissal was the allegation that he deflated Mr Kurt Adorna's tyre; Mr Ashley-Cooper was not given any opportunity to show cause as to why his employment should not be terminated; the termination letter asserts that Mr Ashley-Cooper engaged in "gross misconduct" and then refers to Mr Ashley-Cooper refusing to return the car battery in circumstances where Palm Beach had informed Mr Ashley-Cooper two days before the dismissal that there was no issue, "move on – end of story"; the termination letter unfairly characterised Mr Ashley-Cooper's absence from work on 1 July 2019 as a "fraudulent offence"; and after deciding to dismiss Mr Ashley-Cooper, Palm Beach went trawling through CCTV footage to see what else they could compile against him.[148]

Summary dismissal

[111] Mr Ashley-Cooper was summarily dismissed by Palm Beach on the ground of gross misconduct. The proportionality of the summary nature of Mr Ashley-Cooper's dismissal must be weighed against the gravity of his misconduct in respect of which Palm Beach acted in deciding to dismiss him.[149]

[112] In *Sharp v BCS Infrastructure Support Pty Ltd*,[150] a Full Bench of the Commission discussed the question of whether particular conduct by an employee warranted their summary dismissal as an "other relevant matter" within the meaning of s 387(h) of the Act (references omitted):

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[146] Ex R4 at [11]

[147] PN2154-2158

[148] PN1278

[149] *Johnson v Northwest Supermarkets Pty Ltd* [2017] FWCFB 4453 at [5]; *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033 at [34]

[150] [2015] FWCFB 1033

[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).”
>
> **[35]** In the Decision, the Vice President, correctly, did not attempt to address the parties’ submission concerning “serious misconduct” in the context of his consideration of whether there was a valid reason for the dismissal, but only as a relevant matter under s.387(h). His findings at paragraph [55] and [56] that Mr Sharp’s conduct was “serious misconduct” was, we consider, responsive to the submission of BCS noted in the first sentence of paragraph [52] that “the Applicant’s conduct constituted serious misconduct justifying immediate dismissal”. That is, “serious misconduct” was used as a shorthand expression to described misconduct of a nature that justified summary dismissal. A finding of that nature was a matter which was open to be taken into account as relevant under s.387(h) because it involved an assessment of the seriousness of the conduct in question.”

[113] I will now consider whether Mr Ashley-Cooper’s conduct warranted his summary dismissal.

[114] Mr Ashley-Cooper’s conduct in taking Palm Beach’s material from its premises without permission was inappropriate and wrong on his part. An employee has no right to take their employer’s property for their own use without permission from their employer. However, the seriousness of Mr Ashley-Cooper’s conduct in this regard is ameliorated by reason of his honest belief, albeit a belief held without a reasonable basis, that he was entitled to take the material pursuant to a practice which he believed existed at the workplace. Mr Ashley-Cooper did not intentionally steal his employer’s property. If the only valid reason for Mr Ashley-Cooper’s dismissal had been his taking of the material without permission, I would have readily concluded that his conduct did not warrant his summary dismissal. However, this conduct must be viewed alongside the second valid reason for Mr Ashley-Cooper’s dismissal.

Central to the second valid reason for Mr Ashley-Cooper’s dismissal is my finding that he removed the valve from Mr Kurt Adorna’s tyre and thereby deflated it. Such conduct was serious, notwithstanding Mr Kurt Adorna’s evidence that he was able to put another valve into the tyre and inflate it for use. The conduct in which I have found Mr Ashley-Cooper engaged showed a willingness by him to take matters into his own hands in circumstances where he first reported an issue (the taking of the battery from his car) to management and he was not satisfied with the decision to take the matter no further. I am satisfied that Mr Ashley-Cooper’s conduct was wilful and repugnant to the employment relationship.

[115] For the reasons given, I find that Mr Ashley-Cooper’s conduct the subject of the valid reasons for his dismissal warranted his summary dismissal.

Personal circumstances

[116] Mr Ashley-Cooper is about 64 years old. He has not been able to find alternative employment since his dismissal, notwithstanding the reasonable efforts which I am satisfied he has made to find alternative employment.

[117] The consequences of the dismissal for Mr Ashley-Cooper and his family have been significant. They support his argument that his dismissal was harsh, but must be balanced

against all other relevant circumstances, including the gravity of Mr Ashley-Cooper's conduct.

Other potential reasons for dismissal

[118] Mr Ashley-Cooper submits that his age, health, the fact that he made a workers' compensation claim shortly before his dismissal, and he had recently trained-up an apprentice metal worker who has taken over his duties and responsibilities following his dismissal were part of the reason for his dismissal, albeit it is not contended they were the predominant reason.

[119] I do not accept this argument. Mr Ashley-Cooper did make a workers' compensation claim shortly before his dismissal for hearing loss. I am satisfied that Palm Beach was aware that Mr Ashley-Cooper had made such a claim prior to his dismissal. However, I accept the evidence given by Palm Beach's witnesses that this claim did not have any bearing on the decision to dismiss Mr Ashley-Cooper. This denial is supported by the fact that Mr Ashley-Cooper made a workers' compensation claim against Palm Beach in about 2015 and it did not have an adverse impact on his employment with Palm Beach. In addition, I accept Ms Onley's evidence that numerous other employees of Palm Beach have made workers' compensation claims against Palm Beach and have not had their employment terminated. As to the allegation that the dismissal was connected to Mr Ashley-Cooper's age, I reject it. A number of Palm Beach's employees are older, including Mr Mawson, who is 71 years old, and remains employed by Palm Beach on a full time basis. I am not persuaded on the evidence adduced that Mr Ashley-Cooper's health had any bearing on Palm Beach's decision to dismiss him. Finally, although Palm Beach has decided, at this stage, not to replace Mr Ashley-Cooper and is instead using Mr Moore, who became a qualified tradesperson in April 2019, to undertake the metal work required in the business, it is not unusual for an employer to assess whether it needs to replace an employee who has been dismissed on the grounds of misconduct. I am satisfied on the evidence that the decision to dismiss Mr Ashley-Cooper was not in any way motivated by the absence of a need for two qualified metal workers.

Conclusion

[120] After considering and taking into account each of the matters specified in s 387 of the Act, my value judgment is that Palm Beach's dismissal of Mr Ashley-Cooper was not harsh, unjust or unreasonable. Palm Beach had two valid reasons for Mr Ashley-Cooper's dismissal. The gravity of Mr Ashley-Cooper's misconduct outweighs the procedural unfairness associated with the termination process, together with the length and quality of his employment with Palm Beach. Further, in my assessment, Mr Ashley-Cooper's dismissal was not disproportionate to his misconduct and was not otherwise harsh.

[121] Mr Ashley-Cooper's unfair dismissal application is dismissed.

DEPUTY PRESIDENT

Appearances:

Mr R de Meyrick, of counsel, with *Mr P Moore*, solicitor, for the applicant.

Mr G Fredericks, of counsel, with *Mr A Wilson.* solicitor, for the respondent.

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