

[2020] FWC 1400

The attached document replaces the document previously issued with the above code on 14 April 2020.

The reference in the first sentence of paragraph [102] to “Sumont” is corrected to state “Motorcycle Trading Pty Ltd”.

Callum Young
Associate to Deputy President Asbury

Dated 15 April 2020

[2020] FWC 1400 [Note: An appeal pursuant to s.604 (C2020/4656) was lodged against this decision - refer to Full Bench decision dated 13 November 2020 [[\[2020\] FWCFB 5983](#)] for result of appeal.]



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Stephen Hohns

v

Sumont Pty Ltd T/A Brisbane Motorcycles

(U2019/4050)

DEPUTY PRESIDENT ASBURY

BRISBANE, 14 APRIL 2020

Application for an unfair dismissal remedy.

Background

[1] This Decision concerns an application for an unfair dismissal remedy under s. 394 of the *Fair Work Act 2009* (the Act) made by Mr Stephen Hohns. Mr Hohns was employed by Sumont Pty Ltd t/a Brisbane Motorcycles (Sumont) from 30 July 2018. Mr Hohns was dismissed on 20 March 2019 and his dismissal took effect from that date. Sumont operates a motorcycle sales and service business. Mr Hohns was employed as Motorcycle Salesperson. The matter was not resolved at conciliation and was allocated to me for hearing.

[2] Mr Hohns asserted in his Form F2 Application that on 20 March 2019 at 5.30 pm he was informed by the store manager that he did not fit in with the direction that the owners had for the store and they were letting him go, effective immediately. Mr Hohns said that he was not given any warning of issues with his conduct or work performance. A Form F3 Response was filed by Sumont on 2 May 2019 indicating that the contact person for Sumont was Mr James Mutton, who signed the Form F3 in the capacity of General Manager of Sumont. Mr James Mutton is the son of the Directors of Sumont Mr Brett Mutton and Mrs Gay Mutton.

[3] In its response Sumont asserted that it afforded Mr Hohns procedural fairness by notifying him of the reason for his dismissal and that it was felt that Mr Hohn knew exactly why his employment was terminated. It was further asserted that Mr Hohns had made no effort to contact Mr James Mutton for further clarification of the reasons for dismissal and that this supported the “fact” that Mr Hohns knew those reasons.

[4] The application has some history. Directions were issued for a hearing which was listed for 29 July 2019. The parties filed submissions and statements of evidence generally in accordance with those Directions. Sumont’s material was filed one day late on 3 July 2019 by Mr James Mutton who also provided a witness statement on behalf of Sumont. A Member Assisted Conciliation Conference was conducted on 24 July 2019. Mr James Mutton participated in that Conference on behalf of Sumont. Following the Conference, at the request of the Mr James Mutton the hearing date was vacated so that Mr James Mutton could seek the

agreement of Mr Brett Mutton to terms of settlement discussed at the Member Assisted Conciliation Conference. Ultimately the matter was not resolved the Member of the Commission who conducted the Conciliation Conference returned the file to me to listed for hearing.

[5] Prior to the hearing Sumont Pty Lt Ltd sold Brisbane Motorcycles to Motorcycle Trading Pty Ltd. Mr James Mutton attempted to withdraw from the proceedings and informed the Commission that he was an employee of Motorcycle Trading Pty Ltd. Sumont did not nominate an alternative contact person and an email address which had been provided for Mr Brett Mutton was disconnected. When Mr Brett Mutton insisted on being communicated with via telephone notwithstanding that he was informed that this is not an appropriate mechanism for communication relating to the hearing of an unfair dismissal application, it was then necessary to correspond with Mr Brett Mutton by registered mail.

[6] Given the lack of an alternative contact person, and Mr James Mutton's previous involvement in the matter, the Commission continued to communicate with him. On 5 August 2019 Mr James Mutton sent correspondence advising that he no longer worked for Sumont and was unable to assist further with the matter. When the Commission sought further information Mr James Mutton responded by advising that Sumont had sold Brisbane Motorcycles to Motorcycle Trading Pty Ltd. Mr James Mutton also advised that he was an employee of Motorcycle Trading Pty Ltd and that a "transfer" had occurred on 1 August 2019.

[7] When further attempts to obtain information about when the sale of Brisbane Motorcycles had been finalised and about Motorcycle Trading Pty Ltd, the Commission undertook an ASIC search which indicated that Mr James Mutton is the sole Director of that Company and that Sumont and Motorcycle Trading Pty Ltd have the same registered address. Further the address for the Directors of both Sumont and Motorcycle Trading Pty Ltd is identical. I assume that the address for the Directors is Mr Brett Mutton's residential address evidenced by the fact that he received registered mail from the Commission directed to that address. The ASIC search also indicated that Motorcycle Trading Pty Ltd was formed on 5 February 2019 over one month prior to Mr Hohns' dismissal.

[8] Mr James Mutton continued to obfuscate about the date of the sale. Upon becoming aware of the sale Mr Hohns raised issues about whether there had been an attempt to delay the hearing of his application to allow the sale to be finalised so that Sumont could avoid any liability for unfairly dismissing Mr Hohns. At a Mention/Conference on 4 September 2019, I asked Mr Hohns whether he sought to make an oral application to join Motorcycle Trading Pty Ltd to his unfair dismissal application. Mr Hohns sought to make such application and I accepted that application pursuant to s 586 of the Act (the joinder application).

[9] I took this course because Mr James Mutton had made a series of assertions to the Commission via email which in my view were disingenuous. Further, Mr James Mutton refused numerous opportunities to explain the status of Motorcycle Trading Pty Ltd and the timing of the sale and continued to dissemble about the matters before the Commission. I considered that as at 4 September 2019 *prima facie* there was an arguable case that Motorcycle Trading Pty Ltd should be joined to Mr Hohns' unfair dismissal application to ensure that any Order which might be made in Mr Hohns' favour should his application be successful would have efficacy and that this was the most efficient manner to deal with the joinder application given Mr James Mutton's conduct.

Attempts to conduct a hearing

[10] Mr Hohns' unfair dismissal application and the joinder application were listed for Hearing on 25 September 2019. A Statement containing further Directions for the Hearing was issued on 4 September 2019 requiring that Sumont and Motorcycle Trading Pty Ltd file submissions and statements of evidence in relation to the joinder application by 18 September 2019.

[11] On 13 September 2019 Mr James Mutton filed a contract for the sale of Brisbane Motorcycles signed on 10 July 2019 and on 18 September 2019 Mr James Mutton filed a copy of a cheque for stamp duty on the sale dated 1 August 2019. The documents were not accompanied by an outline of submissions or a witness statement and no material in relation to the joinder application was filed by Sumont.

[12] By that time Mr James Mutton had also made an application under s. 587 of the Act (which I accepted as an application in the form of an email) seeking that the joinder application be dismissed and foreshadowed an application for costs. Mr James Mutton sought that the s. 587 application be determined without a hearing on the basis of material he had filed.

[13] I declined this request and Mr James Mutton was informed that the s. 587 application and any application he may make for costs would be considered at the hearing on 25 September 2019. My reasons for declining to deal with the s. 587 application on the basis of the material filed by Mr James Mutton was that there was insufficient evidence upon which I could be satisfied as to whether there was a basis to join Motorcycle Trading Pty Ltd to Mr Hohns' unfair dismissal application without hearing from Mr James Mutton and giving Mr Hohns an opportunity to cross-examine Mr James Mutton and be heard in relation to the material filed by Mr James Mutton.

[14] I also considered that:

- Mr James Mutton was involved in the application against Sumont by virtue of the fact that Sumont had not nominated an alternative contact person for Mr Hohns' unfair dismissal application;
- Mr James Mutton had provided a witness statement on behalf of Sumont which had not been withdrawn;
- Mr Brett Mutton had advised that he would not be attending a hearing of the application and had resisted any involvement in the proceedings; and
- Mr James Mutton is the son of Mr Brett Mutton and had the role of General Manager of Sumont.

[15] The 25 September hearing was vacated at the request of Mr James Mutton and was relisted for 4 October 2019, a date that Mr James Mutton advised that he would be available to attend. No sooner had the 25 September hearing date been vacated and a listing notice issued for 4 October 2019 than Mr Brett Mutton advised – contrary to his previous position – that he had planned to attend the hearing on 25 September and was not available on 4 October 2019. A date suitable to both Mr Brett Mutton and Mr James Mutton was agreed with all parties and the hearing was listed on 31 October 2019. Mr Hohns was required to adjust his schedule to accommodate these changes at some inconvenience given he had commenced alternative employment.

[16] The parties were informed that the hearing on 31 October 2019 would consider the following matters:

1. Mr Hohns' unfair dismissal application against Sumont Pty Ltd (merits);
2. Mr Hohns' application to join Motorcycle Trading Pty Ltd to that unfair dismissal application (the joinder application);
3. Mr James Mutton's application for costs (in the event such an application was made); and
4. Mr James Mutton's application to dismiss the joinder application in relation to Motorcycle Trading Pty Ltd.

[17] At the hearing Mr Hohns represented himself and gave evidence on his own behalf. Mr Hohns also sought to tender a Statutory Declaration made by Mr Jayson Russell, formerly the Store Manager who dismissed Mr Hohns. I did not accept the statement of Mr Russell which Mr Hohns sought to tender on the basis that Mr Russell was not available to attend the hearing or to be cross-examined. Mr James Mutton conducted the case for Sumont and also gave evidence on its behalf. Evidence for Sumont was also given by Mr Darren Hayes, Workshop Manager. A statement made by Mr Jayson Russell which was filed by Sumont was withdrawn on the basis that Mr Russell had been dismissed between making the statement and the hearing.

[18] I did not find Mr James Mutton to be a credible witness and where his evidence was inconsistent with that of other witnesses, I preferred their evidence. My reasons for forming this view about Mr James Mutton's credit are that while not untruthful, his email correspondence with the Commission was disingenuous. Where information was provided to the Commission by Mr James Mutton it was incomplete in significant respects.

[19] In his email correspondence to the Commission Mr James Mutton also complained at length about the time and effort he was required to expend responding to Mr Hohns' application and alleged harassment by the Commission. When Mr James Mutton's email correspondence is considered chronologically and in the context of the circumstances as they existed at the time it was sent, it is apparent that Mr James Mutton's conduct was the principal cause of the time and effort expended in dealing with the involvement of Motorcycle Trading Pty Ltd.

[20] If Mr James Mutton had been open and candid about the dealings between Sumont and Motorcycle Trading Pty Ltd and provided information in a timely manner and in the form requested by the Commission, he would have avoided the inconvenience about which he now complains. Further, Mr Hohns was subjected to significant inconvenience and delay in having his application dealt with because of the conduct of Mr James Mutton. I set out below a summary of the email exchanges with Mr James Mutton upon which I base my views about his conduct.

Conduct of Mr James Mutton

[21] Mr Hohns' application for an unfair dismissal remedy was made on 9 April 2019. On 2 May 2019 Sumont filed a Form F3 Employer Response to the application. The Form F3 was signed on behalf of Sumont by Mr James Mutton who stated that he held the position of General Manager and that he was the contact person with respect to Mr Hohns' unfair dismissal application. At no time prior to the hearing or during its course was any alternative contact person nominated by Sumont despite this being repeatedly pointed out to Mr Brett Mutton and

Mr James Mutton. Rather the Commission was informed by Mr James Mutton that it should contact his father, Mr Brett Mutton in circumstances where Mr Brett Mutton was difficult to contact and stated repeatedly that he was suffering from brain cancer and could not participate in a hearing or otherwise respond to the application.

[22] A conciliation conference was conducted on 20 May 2019 by a Fair Work Conciliator. The matter was not settled and was referred for arbitration and subsequently allocated to me. On 21 May 2019 I issued Directions for a hearing which was to be conducted on 29 and 30 July 2019. The Application was directed to file his material by Monday 10 June and the Sumont by Tuesday 2 July 2019.

[23] Mr Hohns complied with the Directions and filed a witness statement and an outline of argument. Sumont did not comply with the Directions. Records on the file indicate that telephone contact was made with Sumont on 2 July 2019 and the Commission staff member was informed by “Sam” that Mr James Mutton was on leave and that the Commission should email Sumont in relation to the matter. On 3 July 2019 an email was received from Mr James Mutton attaching a witness statement made by him and statements made by Mr Darren Hayes, Workshop Manager and Mr Jayson Russell, Store Manager. Sumont did not file an outline of argument as required by the Directions and the document list filed by Mr James Mutton was blank.

[24] On 3 July 2019 a Commission staff member again made contact with Mr James Mutton in relation to these documents and was advised by email from Mr James Mutton on 4 July 2019 that Sumont’s view was that its witness statements combined with the fact that Mr Hohns had only his own witness statement would be enough to settle the matter. Sumont also filed an outline of argument on 4 July 2019.

[25] As previously noted, Motorcycle Trading Pty Ltd was established on 5 February 2019 and in his capacity as its Director, Mr James Mutton signed a contract on 10 July 2019 to purchase Brisbane Motorcycles from Sumont Pty Ltd, the Directors of which were his parents Mr Brett Mutton and Mrs Gay Mutton.

[26] On 24 July 2019 a Member Assisted Conciliation was conducted by Commissioner Booth. Mr James Mutton represented Sumont at the Member Assisted Conciliation. The material on the file indicates that terms of settlement were agreed in principle between the parties and that Mr James Mutton undertook to discuss the settlement with Mr Brett Mutton and to advise by 12.45 pm on 25 July 2019 whether the settlement was agreed. The file also contains correspondence from Mr James Mutton which indicates that he was having difficulty persuading Mr Brett Mutton to sign the terms of settlement, but that with more time this situation may change and requesting an extension to the deadline for agreeing with those terms until 30 July 2019. The email also states that Mr Brett Mutton is battling brain cancer and has an appointment with a neurologist on 30 July and that if he is given positive news at that appointment Mr Brett Mutton will have a changed view and be more likely to listen to Mr James Mutton’s recommendation that he sign the settlement terms.

[27] The extension was granted and the hearing dates listed for 29 and 30 July 2019 were vacated to allow Mr Brett Mutton to consider the settlement terms. On 5 August 2019 Mr James Mutton corresponded with the Associate to Commissioner Booth in the following terms:

“Unfortunately as of the 31st of July I no longer work for Sumont Pty Ltd and am therefore unable to assist with this matter any further. I am not sure who will be best to contact regarding the matter as Sumont Pty Ltd is no longer trading as Brisbane Motorcycles either.”

[28] According to Mr James Mutton’s evidence to the Commission, a cheque was drawn by Motorcycle Trading Pty Ltd made out to the Office of State Revenue for stamp duty on the sale on 1 August 2019. However, that evidence was not filed with the Commission until 18 September 2019. Mr James Mutton said nothing about the sale of Brisbane Motorcycles at or before 24 July when he attended a Member Assisted Conciliation Conference on behalf of Sumont. Mr James Mutton must have known at that time that he had signed the sale contract and that the sale would be completed in the near future. The effect of Mr James Mutton’s conduct was to delay the hearing of Mr Hohns’ unfair dismissal application until after the sale was effected.

[29] The file was returned to me and by notice sent to the parties on 27 August 2019 I listed the matter for Mention/Conference by telephone on 4 September 2019. In response to the Notice of Listing, Mr James Mutton sent the following email to my Chambers:

“As mentioned previously my employment with Sumont Pty Ltd has ended. As the matter is between Sumont Pty Ltd and Mr Hohns I do not feel that I have any place in making comment or speaking on behalf of Sumont Pty Ltd any more and will subsequently not be attending the below telephone conference.

If you require evidence to support my statement that I am no longer employed by Sumont Pty Ltd I am happy to provide this to sever my relationship with this matter for good.”

[30] On 29 August 2019, I instructed my Associate to send correspondence to Mr James Mutton informing him I required further information about Brisbane Motorcycles as it appeared that Mr Mutton was still communicating with my Chambers using the same email address he had previously used to communicate with the Commission, and which included “@brisbanemotorcycles”. That correspondence also indicated to Mr James Mutton that if he wished to provide further evidence about his involvement in this matter (or lack thereof), he could make a statutory declaration detailing all of the circumstances upon which he asserted that his employment with Sumont Pty Ltd had ended and that the Company was no longer trading as Brisbane Motorcycles, including details of whether some other entity is now trading as Brisbane Motorcycles. Mr James Mutton was also asked to nominate a person who was authorised to speak on behalf of Brisbane Motorcycles. Further, Mr James Mutton was advised that if a statutory declaration was not received from him by 30 August 2019 answering the questions set out in the email I would issue a notice requiring him to attend the Mention/Conference on 4 September 2019 by telephone.

[31] Mr James Mutton responded on 29 August by email in the following terms:

“Brisbane Motorcycles was purchased by Motorcycle Trading Pty Ltd which is now the legal entity trading as Brisbane Motorcycles. I now work for Motorcycle Trading Pty Ltd. This can be confirmed by checking the ASIC Registry for the name Brisbane Motorcycles. I am not exactly sure what date the transfer would have been completed however I along with all other employees at Brisbane Motorcycles commenced employment with the new Entity on the 1st of August 2019.

My previous statements whilst employed by Sumont were true and correct and I am able to attend any hearing to verify my statements.”

[32] In response to Mr James Mutton's invitation to do so, I caused an ASIC search to be conducted which indicated that Mr James Mutton is the sole Director of Motorcycle Trading Pty Ltd and that it was formed on 2 February 2019. The ASIC search also indicated that the registered address for Motorcycle Trading Pty Ltd is the same as the registered address for Sumont. Further the address for the Directors of Sumont (Mr Brett Mutton and Mrs Gay Mutton) registered with ASIC is the same as the address registered for Mr James Mutton the sole Director of Motorcycle Trading Pty Ltd. As previously noted Mr Brett Mutton and Mrs Gay Mutton are the parents of Mr James Mutton. The ASIC search did not indicate when the sale of Brisbane Motorcycles to Motorcycle Trading Pty Ltd was finalised.

[33] On Thursday 29 August I caused my Associate to respond to the email and informed Mr James Mutton that I still required his attendance at the Conference in relation to Mr Hohns' unfair dismissal application and that if he did not confirm attendance I would issue an Order requiring him to attend. Mr James Mutton responded by email in the following terms:

"I do not work for Sumont Pty Ltd. The matter is between Sumont and Mr Hohns.

If Mr Hohns feels the need to start a new proceeding against me personally or the new Legal entity that I work for I will deal with it. I can attend any hearing to verify the evidence that I have previously given as required by law however I will not be spending any more time dealing with this matter."

[34] On 3 September 2019, as foreshadowed, I issued an Order requiring that Mr James Mutton be available to attend a conference before the Commission by telephone at 9.00 am on Wednesday 4 September 2019. Mr James Mutton responded by email asking what the Commission would like to inform itself of or would like clarified. The email concluded by stating that Mr James Mutton was happy to assist by answering questions relating to information that he had previously given but would not be speaking on behalf of Sumont. My Associate responded by informing Mr James Mutton that I continued to have questions about the status of Brisbane Motorcycles which I would put to him at the Conference on 4 September and that he was required to attend.

[35] Mr Mutton again corresponded with my Associate at 3.04 pm on 3 September alleging that he was being harassed and that he had nothing to do with the matter or Sumont. At 4.37 pm on 3 September 2019 my Associate communicated by email with Mr James Mutton advising that Mr Hohns' unfair dismissal application needed to be dealt with and there was no intention to harass Mr Mutton. The correspondence also informed Mr James Mutton of the results of the ASIC search that I had caused to be conducted and that as a former manager of Sumont Pty Ltd and a Director of Motorcycle Trading Pty Ltd, and in the absence of any information from Sumont about who would be the appropriate person for the Commission to contact, I remained of the view that he was the appropriate person to deal with this application. Prior to the Conference email correspondence was also received from Mr Hohns querying the timing of the sale of Brisbane Motorcycles and its impact on his unfair dismissal application.

[36] The Mention/Conference proceeded on 4 September 2019 with Mr Hohns and Mr James Mutton in attendance. Mr James Mutton said that Sumont Pty Ltd was no longer registered and according to legal advice he had obtained, the matter was between Mr Hohns and Sumont Pty Ltd and not Motorcycle Trading Pty Ltd. Mr Mutton also queried why Sumont was not in attendance at the Mention/Conference and maintained that it should be.

[37] During the Conference Mr Hohns again raised questions about the timing of the sale of the business Motorcycle Trading Pty Ltd and asserted that it was undertaken to avoid

responding to his unfair dismissal application. I asked Mr Hohns whether he was seeking to amend his application by adding Motorcycle Trading Pty Ltd as a respondent. Mr Hohns stated that he did wish to seek to amend his application in this regard.

[38] I accepted Mr Hohns' request as an oral application pursuant to s. 586 which permits the Commission to correct and amend an application. I did so because at that point it was clear that Mr James Mutton had withheld information about the sale of Brisbane Motorcycles and had not availed himself of an opportunity to provide such information. Further, there was no information before me about the timing of the sale. All of that information was known by Mr James Mutton who had taken no steps to inform the Commission about these matters. I indicated to the parties that I would consider the joinder application at the same time as Mr Hohns' unfair dismissal application was considered. A Statement including further Directions and a listing for a hearing on 25 September was issued on 4 September 2019.

[39] In that Statement I set out a timetable for Motorcycle Trading Pty Ltd to file in the Commission and serve on Mr Hohns an outline of submissions and statements of evidence in relation to why it was asserted that Motorcycle Trading Pty Ltd should not be joined to Mr Hohns' unfair dismissal application. The Directions also required Sumont to file and serve material in relation to its views about whether Motorcycle Trading Pty Ltd should be joined to Mr Hohns' application.

[40] Attempts to email the Statement and Directions to Mr Brett Mutton were unsuccessful with a message being received that the email address which had been provided for Mr Brett Mutton was disconnected. Mr James Mutton later confirmed in discussions with my Associate that he had disconnected the email address because Mr Brett Mutton was no longer involved with Brisbane Motorcycles.

[41] When telephone contact was made with Mr Brett Mutton he insisted that he would only communicate by telephone and refused to provide an alternative email address for correspondence. Mr Brett Mutton also advised that he could not read or write due to the effects of his medical condition and was unable to obtain assistance to communicate with the Commission. File notes made by my Associate also indicate that Mr Brett Mutton stated on a number of occasions that he would not be able to attend any hearings in relation to the matter. Requests from my Associate for a medical certificate or other documentation to verify Mr Brett Mutton's assertions about his medical condition were not responded to. From 4 September 2019 all correspondence was copied and sent to Mr Brett Mutton by registered mail directed to the address for Sumont Pty Ltd in ASIC records.

[42] On 4 September 2019, Mr James Mutton emailed my Chambers thanking me for the Statement and Directions issued that day and indicating that he now understood exactly what was required of him. Mr James Mutton indicated that he would be filing details of the contract between Brisbane Motorcycles Trading Pty Ltd and Sumont for the sale of Brisbane Motorcycles and sought an Order that these be kept confidential. Mr James Mutton also requested information about whether any non-compliance by the Directors of Sumont with the Directions would result in Motorcycle Trading Pty Ltd being wrongly joined to the application.

[43] Mr James Mutton's gratitude was short-lived. On 9 September 2019 Mr James Mutton emailed my Chambers complaining that he had not received a response to his email of 4 September and that he required a response in order to file material on behalf of Motorcycle Trading Pty Ltd. Mr James Mutton also complained of the fact that the lack of response had

taken 5 days off his preparation time. Further, Mr James Mutton stated that he had “been made aware” that a Director of Sumont had been in contact with the Commission “after the appropriate method to contact the Company was taken”. Mr James Mutton went on to request that:

“As there is now a line of communication between Sumont Pty Ltd and the Fair Work Commission I would like to request that upon providing adequate evidence that confirms there is no legal jurisdiction for myself or Motorcycle Trading Pty Ltd to be joined to this case and that the Commission is now able to pursue this matter with the correct respondent Sumont Pty Ltd the order requiring myself to attend the hearing is revoked.”

[44] On 9 September my Associate responded to Mr James Mutton providing him with information in relation to making an application for an Order restricting the publication of evidence. Mr James Mutton was informed that the hearing on 25 September would determine the joinder application and that Directions for the hearing on 25 September had been sent by registered mail to Mr Brett Mutton at the address registered with ASIC for Mr Brett Mutton in his capacity as a Director of Sumont Pty Ltd. Mr James Mutton was also informed that the hearing on 25 September would proceed, regardless of whether or not Sumont filed any material and that the views of Sumont were not determinative of the joinder application. Mr James Mutton was given a further 5 days to file his material on behalf of Motorcycle Trading Pty Ltd.

[45] Between 10 and 17 September Mr James Mutton sent numerous emails making assertions including:

- The proceedings against him and Motorcycle Trading Pty Ltd were unfair and “borderline unlawful”;
- He was given insufficient time at the outset to submit a statutory declaration which would have established that he had nothing to do with the matter and that the business was sold with all employees being re-employed rather than transferred;
- The application by Mr Hohns to join Motorcycle Trading Pty Ltd to his unfair dismissal application had been “prompted” by me and was unfair and vexatious;
- The Commission had every opportunity to send letters to the registered address for the Directors of Sumont; and
- Mr James Mutton was unaware that “his responsibilities as the listed Respondent for Sumont Pty Ltd continued after his employment was terminated” and he had not been notified otherwise.

[46] On 13 September 2019 Mr James Mutton filed a copy of the contract for the sale of Brisbane Motorcycles indicating that it was signed on 10 July 2019. On 18 September 2019 Mr James Mutton filed a document which included a copy of a cheque made out to the Commissioner of State Revenue for stamp duty on the sale dated 1 August 2019. This material was not accompanied by a witness statement.

[47] In response to Mr James Mutton’s emails my Associate sent numerous emails explaining that in relation to the application to join Motorcycle Trading Pty Ltd to Mr Hohns’ unfair dismissal application:

- Mr James Mutton was not personally a Respondent to any proceedings before the Commission;

- Motorcycle Trading Pty Ltd was a Respondent to the joinder application and the hearing on 25 September 2019 would provide an opportunity for Mr James Mutton to argue against that application.
- There was no order of the Commission requiring Mr James Mutton to attend the Commission on 25 September 2019; and
- If Mr James Mutton failed to attend that hearing I would decide the joinder application on the basis of the material on the file.

[48] In relation to Mr Hohns' unfair dismissal application against Sumont, Mr James Mutton was also informed in numerous emails sent from my Chambers that:

- Mr James Mutton was nominated as the contact person for Sumont and had provided a witness statement in relation to Mr Hohns' unfair dismissal application against that Company;
- Sumont had not nominated an alternative contact person or representative and requests for Sumont to do so had not been complied with;
- Mr James Mutton had not withdrawn his witness statement and had repeatedly confirmed that he would be giving evidence in the proceedings;
- Mr James Mutton is not prevented from representing Sumont if that Company maintains the nomination of Mr James Mutton as its representative in these proceedings given his father's stated health issues and apparent inability to engage with the Commission;
- The fact that Mr James Mutton is representing Sumont or giving evidence on its behalf does not make him a Respondent to Mr Hohns' unfair dismissal application; and
- If Mr James Mutton wished to withdraw as the representative of Sumont and/or withdraw his witness statement in the proceedings between Mr Hohns and Sumont he was free to do so.

[49] In an email of 18 September 2019 Mr James Mutton asserted that he had now provided "indisputable evidence that there has been a legitimate sale of the business and that Motorcycle Trading Pty Ltd is an entirely separate legal entity" and that "the Fair Work Commission has no legal Jurisdiction to join Motorcycle Trading Pty Ltd to this matter." Mr James Mutton went on to demand that the application to join Motorcycle Trading Pty Ltd to this matter be "cancelled" and stated that if this was not done by 20 September 2019 an adjournment of the hearing on 25 September was requested so that Mr James Mutton could make a complaint against me. Mr James Mutton further pointed out that this was the third time that he had requested details as to how to make a formal complaint against me. In an email sent on 18 September 2019 my Associate apologised for not sending information about how to make a complaint in response to Mr James Mutton's earlier requests and provided a link to assist him in this regard. That email also repeated information contained in earlier emails to Mr James Mutton and pointed out that there were disputed facts and the Commission was required to conduct a hearing.

[50] With apparent disregard for numerous attempts to explain matters to him, Mr James Mutton sent a further email on 18 September stating that although technically no proceeding had been brought against Motorcycle Trading Pty Ltd, the Company and Mr James Mutton as its representative, had incurred costs while dealing with a vexatious application. After again asserting that I had prompted Mr Hohns to make an application to join Motorcycle Trading Pty Ltd to his unfair dismissal application, Mr James Mutton indicated that he wished to make an application under s. 587 of the Act to have the joinder application dismissed on the grounds that it was vexatious and had no reasonable prospects of success.

[51] On 18 September 2019 my Associate corresponded with Mr James Mutton and informed him that if he wished to make an application under s. 587 of the Act to dismiss the joinder application then he could do so by completing a Form F1 or that I would accept his email as an application if he so requested. Mr James Mutton was further informed that if he made such an application it would be listed for hearing on 25 September 2019, with all other matters.

[52] On 20 September 2019 at 2.23 pm Mr James Mutton emailed my Associating requesting that his email of 18 September 2019 be accepted as an application under s. 587 of the Act to dismiss the application to join Motorcycle Trading Pty Ltd to Mr Hohns' unfair dismissal application. Mr James Mutton also stated in that email that it was unlikely he could attend the hearing on 25 September 2019 due to the absence of staff and requested that the joinder application be dismissed without a hearing.

[53] In the alternative, Mr James Mutton requested an adjournment of the hearing on 25 September 2019 to another date. Further, Mr James Mutton indicated that he would be making an application for costs against Mr Hohn if he was required to attend a hearing at all. After initially refusing the adjournment on the basis that Mr James Mutton had ample time to arrange attendance on 25 September 2019, I granted the adjournment when Mr James Mutton indicated that he would attend a hearing if it was after 30 September and other than on 3 October 2019.

[54] I decided to grant the adjournment sought by Mr James Mutton on the basis that Mr Brett Mutton had consistently indicated that he would not attend any proceedings and had not nominated an alternative person to represent Sumont. I also considered that the fact that Mr James Mutton was the nominated contact person for Sumont and an alternative contact had not been nominated by Sumont despite this being repeatedly pointed out to Mr James Mutton and Mr Brett Mutton in numerous emails sent to them. The parties were notified that the hearing listed for 25 September 2019 was cancelled and confirmation was sought in relation to their availability on 4 October 2019. Notification of these matters was sent to Mr Brett Mutton by registered mail in the absence of any appropriate alternative method of communication.

[55] On 24 September 2019 after being notified of the cancellation of the 25 September hearing, Mr Brett Mutton contacted my Associate by telephone complaining about the cancellation and asserting that he had made arrangements to attend that hearing. This complaint was contrary to a file note made by my Associate on 18 September 2019 indicating that Mr Brett Mutton had stated that he would not be attending any hearings. A notice of listing was issued on 25 September 2019 (by email to Mr James Mutton and by registered mail to Mr Brett Mutton) for a hearing to be conducted on 4 October 2019 to deal with the following matters:

1. Mr Hohns' unfair dismissal application against Sumont Pty Ltd (merits);
2. Mr Hohns' application to join Motorcycle Trading Pty Ltd to his unfair dismissal application;
3. Mr James Mutton's application to dismiss Mr Hohns' application to join Motorcycle Trading Pty Ltd to his unfair dismissal application.

[56] Notwithstanding that the matters to be determined at the hearing were clearly set out in the Notice of Listing, after receiving it, Mr James Mutton sent an email to my Associate seeking to clarify whether the hearing on 4 October 2019 was to address the joinder application in relation to Motorcycle Trading Pty Ltd and asking whether the date and time had been confirmed with Sumont. In that email Mr James Mutton stated that he did not wish to end up in

a situation where he made plans for 4 October and then needed to change the date and that he wanted confirmation about whether a representative of Sumont would be in attendance at the hearing before amending his schedule.

[57] Mr Brett Mutton also contacted my Associate by telephone advising that he was not available on 4 October 2019. On 25 September 2019 I caused my Associate to send an email to Mr James Mutton and a letter by registered post to Mr Brett Mutton restating the matters that would be dealt with at the hearing on 4 October. In relation to the non-availability of Mr Brett Mutton on that date, the email again pointed out the following matters:

- As at 25 September Mr James Mutton was still the nominated person to represent Sumont and no steps had been taken by Sumont to advise of an alternative representative;
- As at 25 September Mr James Mutton had provided a witness statement in relation to the unfair dismissal application made against Sumont and had indicated that he wished to give evidence in those proceedings;
- Mr James Mutton was the General Manager of Sumont at the time that Mr Hohns was dismissed; and
- Where there are disputed factual matters the Commission is required under the Act to hold a hearing in order to resolve them and cannot act on the basis of assertions made in telephone calls, emails or other written communication.

[58] The email pointed out that Mr James Mutton was involved in some way in all matters that were to be determined by the Commission at the hearing on 4 October 2019. The email also explained to Mr Brett Mutton and Mr James Mutton that there were numerous options for Sumont to be represented at the hearing including: Mr Brett Mutton attending in person or by telephone or video link or by being represented by the Company's currently nominated contact person Mr James Mutton or by nominating another representative.

[59] Further the email again explained to Mr James Mutton that he was free to choose whether or not he attended the hearing or whether or not he would represent Sumont or whether or not he would give evidence on behalf of Sumont. I also indicated (again) that Mr James Mutton was under no compulsion to attend the hearing for the purposes of representing Motorcycle Trading Pty Ltd and could simply rely on the material he had filed. The email concluded by indicating that the repercussions of Sumont and Motorcycle Trading Pty Ltd failing to avail themselves of the opportunity to put their cases at the hearing had been explained on numerous occasions.

[60] Mr James Mutton continued to email my Associate taking issue with various matters including that he had not been provided with information about how to make a costs application against Mr Hohns. That information was provided to Mr James Mutton and he was informed that if he made an application for costs it would be heard and determined with the other matters at the hearing on 4 October 2019.

[61] On 27 September 2019 Mr James Mutton again sent an email to my Chambers stating that as it was still unclear whether he was going to be "forced to be the Respondent for Sumont Pty Ltd" he would be standing by all of his previous statements about Mr Hohns. Mr James Mutton also withdrew a witness statement that had been provided on behalf of Sumont by Mr Jayson Russell. Mr James Mutton stated that Mr Russell had been dismissed because he misconducted himself within the first week of being employed by Motorcycle Trading Pty Ltd.

Further, Mr James Mutton provided a string of text messages between himself and Mr Russell in relation to Mr Hohns' dismissal.

[62] On 1 October 2019 Mr Brett Mutton sent a handwritten letter by mail to my Chambers advising that he had planned to attend the hearing on 25 September 2019 (notwithstanding his previous advice to my Associate that he would not attend) and asserting that the hearing date had changed without reference to him. Mr Brett Mutton also asserted that I had refused to correspond with him by telephone and that he had informed my Associate that Motorcycle Trading Pty Ltd had nothing to do with the matter of Mr Hohns' unfair dismissal application and that Mr Brett Mutton was the correct person to respond on behalf of Sumont. Mr Brett Mutton sought an adjournment of the hearing on 4 October 2019 and sought that the hearing take place on a date between 29 October and 1 December 2019 as he would be out of the State after 1 December 2019.

[63] After seeking the views of Mr Hohns and Mr James Mutton I determined to grant an adjournment of the hearing on 4 October and to conduct a hearing on 31 October 2019. I did so because Mr Brett Mutton indicated that he wished to attend and that date was within the window provided by him and Mr James Mutton indicated that he was available on that date and would attend. Mr Hohns also indicated that he would again rearrange time off from his new employment and could attend on 31 October 2019. On 1 October 2019 I caused my Associate to forward an email to the parties again setting out all the matters to be dealt with at the hearing. The email also stated that I was endeavouring to have one hearing to deal with all matters to avoid costs associated with parties potentially having to attend the Commission on more than one occasion.

Evidence and submissions

[64] Mr Hohns' evidence can be summarised as follows. Mr Hohns commenced employment with Sumont on 30 July 2018 as a Salesperson. Mr Hohns was initially employed as a Sales Person at Sumont's Windsor branch, but moved to Sumont's Caboolture branch in December 2018.

[65] Mr Hohns role involved sales of motorcycles. Mr Hohns said that he would complete paperwork for sales and refer customers on to the Accessories department so that jackets and other accessories for the motorcycle could be sold to the customer. Mr Hohns would also direct customers to Mr Jayson Russell, the Business Manager at the time, who looked after finance for customers. Mr Hohns stated that his duties also included looking after customers and finding out what date they wanted to pick up the motorcycle; talking to the accessories department to find out what accessories were sold to the customer; and filling out a workshop request which was provided to the workshop to finalise fitting of accessories to the motorcycle, so the motorcycle would be available for delivery to the customer.

[66] Mr Hohns stated that on 20 March 2019 he was pulled aside by Mr Jayson Russell, Business Manager for Sumont, who said he had been told to inform Mr Hohns that he "didn't fit in with the direction the Muttons had for the store and they were letting him go". It is Mr Hohns evidence that Mr Russell did not give him any reason for his dismissal, and Mr Hohns only became aware of the reason when he received the Form F3 employer response filed by Sumont in response to this application. Mr Hohns states he asked Mr Russell what he was supposed to have done, and that Mr Russell said he didn't really know, and Mr Hohns could

call Mr James Mutton if he wanted to. Mr James Mutton was the Manager of Brisbane Motorcycles.

[67] Mr Hohns' dismissal took effect on 20 March 2019, and he was paid one weeks' pay in lieu of notice and two weeks of accrued annual leave. Mr Hohns was not provided with a termination letter. Mr Hohns states that he was never made aware of any issues with his performance or conduct, and up until the time of his dismissal had only ever received positive feedback. Mr Hohns also believed he had positive working relationships with Mr Darren Hayes, the Workshop Manager, and with Ms Danielle Marie who worked in the Accessories department. Further, Mr Hohns stated that the first time he was made aware of the reasons for his dismissal was when he received the Form F3 filed by Sumont in response to his unfair dismissal application.

[68] Sumont submitted that the reasons for Mr Hohns' dismissal were failing to follow procedures and that Mr Hohns was not selling enough motorcycles as a salesperson. Mr James Mutton stated that his Store Manager, Mr Russell, made him aware that Mr Hohns was not following processes. The statement of Mr James Mutton filed by the Respondent prior to the hearing does not provide information about what processes Mr Hohns was alleged to have not followed.

[69] Mr James Mutton states that he spoke to Mr Hohns personally about his failure to follow processes at a meeting Mr Hohns had called in relation to Mr Hohns requesting a pay rise. Mr James Mutton said that during that meeting he told Mr Hohns that he needed him to "step up." Mr James Mutton could not say when this meeting occurred. Mr Mutton put to Mr Hohns at the hearing that he had said to Mr Hohns that they expected more out of him when Mr Hohns had asked about an increase in pay. Mr Hohns' version of events was that he was told by Mr Mutton that he would need to take on more responsibility in order to get a pay rise and that Mr James Mutton's comments were not a warning and did not raise an issue with his performance.

[70] In response to a question from me asking for specific details of the process that Mr Hohns was said to have failed to follow, Mr James Mutton said that one process was a 15 step sales process, which was in place to ensure sales were being made and to ensure a high standard of customer experience. Mr James Mutton also said that one of the other issues Mr Russell had complained of was that Mr Hohns was not recording customer details correctly in a customer reference book. Mr Mutton stated that customer details were required to be recorded in this book so that the business could follow up with customers if sales were not made at the time.

[71] Mr James Mutton said that both Mr Russell and Mr Hohns were involved in selling motorcycles, and Mr Russell would step in to help out if Mr Hohns was busy. Mr Russell was the business manager who managed finance and also managed Mr Hohns, who was the only full time sales person at the Caboolture branch.

[72] In his oral evidence Mr James Mutton said that the problems with Mr Hohns were so broad that it wasn't just one specific thing, and that Mr Hohns consistently did not follow a range of processes. These included the recording of details in the customer reference book, as well as a process regarding the provision of workshop requests to the workshop and a procedure that was in place where a sales person was supposed to refer customers to the manager before they left the store, if they were not able to assist the customer on that occasion. Mr Mutton also said at the hearing that he was unable to produce proof that Mr Hohns was not referring customers to the manager.

[73] In relation to workshop requests, Mr James Mutton said there was a process in place for delivery of motorcycles which included the sales person filling out a workshop request and taking this to the workshop manager. The workshop manager was then required to make sure that the motorcycle was fuelled and ready for delivery to the customer. Mr Mutton said that Mr Hohns would only do this some of the time, and that because it wasn't done 100% of the time, "that 5% of the time would cause huge problems".

[74] At the hearing, Mr James Mutton could not recall details of a specific incident where Mr Hohns had failed to complete this task, but referred to an occasion where the wrong bike was given to a customer. In response to a question about why he could not have reviewed the business records and provided details about these incidents, Mr James Mutton said he did not think to do this when he was preparing his evidence and could only recall that there was an incident where the wrong motorcycle was prepared for delivery and given to a customer. That motorcycle was also subject to finance. This meant the customer was riding uninsured on the motorcycle in question as the VIN number on the motorcycle was different to that recorded as the motorcycle sold to the customer. Mr James Mutton said this was the responsibility of the sales person who sold the motorcycle and that he knew Mr Hohns had sold the motorcycle.

[75] Mr Hayes stated that he had regular issues with workshop requests made by Mr Hohns and that these requests would often have an incorrect VIN number. Mr Hayes said that this caused a lot of confusion in the workshop and would result in the wrong motorcycle being delivered to the customer, or customers turning up to collect a motorcycle that was not ready. Mr Hayes did not tender documents or some other evidence of these instances.

[76] Mr Hayes said that once a workshop request was completed it was thrown away, but that this was converted into an electronic job card. In response to a question from me, Mr Hayes accepted that he did not have copies of workshop requests made by Mr Hohns that contained the alleged errors as he did not think to keep them at the time and nor could Mr Hayes give any specific examples.

[77] Mr Hayes also asserted that Mr Russell had many issues with Mr Hohns as well, and that Mr Hayes complained to Mr Russell that Mr Hohns' performance was making his job difficult. Mr Hohns disputes that Mr Hayes or Mr Russell ever spoke to him about these issues. Mr Hayes agreed that he had never spoken to Mr Hohns about these issues directly but said that he raised them with Mr Russell and Mr James Mutton.

[78] Mr Hayes stated that "things were improving" since Mr Hohns had been dismissed but accepted that mistakes still occurred in the business. Mr Hohns asked Mr Hayes why he didn't tell him that he had issues with Mr Hohns. Mr Hayes said he did not raise issues with Mr Hohns because Mr Hayes was not the Sales Manager and that his process was to raise issues with Mr Russell who would identify where the issue occurred. Mr Hayes also said that it was Mr Russell's job to tell Mr Hohns that he was not doing his job correctly or that errors were the fault of Mr Hohns. Mr Hohns put to Mr Hayes that he could not recall any incident where he had failed to complete a workshop request, and in response Mr Hayes stated they were going to go backwards and forwards arguing about it, but that there were situations involving Mr Hohns where there was no stock number or an issue with the recording of a VIN number.

[79] At the hearing I put the proposition to Mr James Mutton that he was asserting Mr Hohns had caused the incorrect motorcycles to be delivered to customers but could not provide details

about which motorcycles or customers were involved. Mr Mutton said it was an example of many issues that arose by not following the process, and that the process wasn't followed probably hundreds of times in different ways shapes or forms, and this was just an example of how serious not following process can be and this was a serious matter.

[80] I also put to Mr James Mutton that if this was so serious it would be expected that an employee would be given a warning. Mr James Mutton said he was not aware that giving an employee a written warning was 100% necessary, and that as long as they sat down and had a performance meeting and warned that the employee that if this continued their employment would be terminated this would suffice. Mr James Mutton states that this occurred between Mr Jayson Russell and Mr Hohns about one month before Mr Hohns' dismissal. Mr James Mutton accepted there was no diary note or record of this meeting made by Mr Russell, and that Mr Russell only told him verbally that he had given Mr Hohns this warning.

[81] As previously stated, Sumont filed a witness statement from Mr Russell. Mr Russell did not attend the hearing as he had also been dismissed by Sumont, presumably at a time after Mr Hohns' dismissal. Mr James Mutton stated at the hearing that Mr Russell would not be called to give evidence in relation to these issues as Mr Russell had been dismissed. I did not have regard to his statement on the basis that when it was filed it was not signed by Mr Russell and Mr Russell was not in attendance at the hearing to attest to the truth of his statement and to be available for cross examination by Mr Hohns.

[82] Mr Hohns put to Mr James Mutton in cross-examination that if Mr Hohns was failing to put information in the customer reference books to enable customers to be followed up, how was Mr Hohns able to sell so many motorcycles? In response to this, Mr Mutton disagreed that Mr Hohns was selling a lot of motorcycles, and said that Mr Hohns evidence that he was selling 23 motorcycles a month was below the standard which was 35 motorcycles per month. Mr Hohns states the figure of 23 motorcycles a month included when he was at the Windsor branch and that he actually sold a lot more when he moved to the Caboolture branch. Mr Hohns stated that he sold 36 motorcycles in December 2018, 35 in Caboolture and 1 in Windsor, and 38 motorcycles in January 2019. Mr Hohns tendered sales reports as evidence of his sales. Mr James Mutton disputed the figures Mr Hohns had tendered, stating that they only showed Mr Hohns sold more than 35 motorcycles in those two months.

[83] Mr James Mutton said in his professional opinion, and based on the current sales within the business, that if there was a salesperson on their own with no competing salespersons, 35 motorcycles would be an absolute minimum if processes were being followed correctly. Mr Mutton stated if there was a second salesperson this may drop a little but reiterated if there was only one sales person 35 motorcycle sales was the expectation.

[84] Mr Hohns agreed that a salesperson should be selling 35 motorcycles per month. Mr Hohns stated that in the two months where he sold 36 and 38 motorcycles he was the sole sales person, and that in February 2019 he sold 21 motorcycles but this was due to the fact that there was another sales person working at that time. Mr Hohns also said that the number of motorcycles he sold in January 2019 was actually 40. I put to Mr Hohns that there were months where he didn't sell near that number of motorcycles. Mr Hohns responded by saying that he was on his own for the two months in Caboolture where he sold 36 motorcycles and 40 motorcycles and that in months when he sold fewer motorcycles there was another salesperson working in the business.

[85] Mr James Mutton stated that if Mr Hohns had followed the Respondent's sales procedures there was ample opportunity for Mr Hohns to have sold more than 35 motorcycles a month, and that the dealership was on track to sell 60 motorcycles for the current month. I put to Mr Mutton that this was only 30 bikes per salesperson, and Mr James Mutton said that the one of the two employees is a trainee.

[86] In cross-examination Mr James Mutton asked Mr Hohns why he didn't call him personally if he had an issue with the decision to terminate his employment. Mr Hohns said that he had been terminated, and there was no point calling Mr James Mutton given that the decision had already been taken.

[87] In response to a question from me about how long Mr Hohns considered he would have remained in employment but for his dismissal, Mr Hohns said he had no reason to doubt his long term future at Brisbane Motorcycles and had declined a job opportunity to stay with the business. Mr Hohns said that he obtained other employment on 16 July 2019 and was receiving a higher wage than he had been paid while employed by Sumont. Mr Hohns tendered pay records indicating that he was paid a base wage of \$794.70. Mr Hohns' final payslip shows that his earnings for the period from 30 July 2018 to 20 March 2019 \$51,723.02. The parties did not dispute that Mr Hohns' average earnings were \$1560.00 per week.

[88] In relation to the sale of the business, Mr James Mutton tendered a contract under which Sumont Pty Ltd sold the business known as Brisbane Motorcycles to Motorcycle Trading Pty Ltd and that the business was sold as a going concern on a "walk in walk out" basis. The date of the contract is recorded as being 10 July 2019. Mr James Mutton also tendered a copy of cheque made out to the Commissioner of State Revenue and dated 1 August 2019 for stamp duty on the sale.

[89] Mr James Mutton stated variously that there was a transfer between Sumont and Motorcycle Trading Pty Ltd and later that all employees of Brisbane Motorcycles who were employed by Sumont were offered new employment with Motorcycle Trading Pty Ltd. According to Mr James Mutton, employees who had previously been employed by Sumont, including Mr James Mutton, started new employment with Motorcycle Trading Pty Ltd the purchase of the business was completed on 1 August 2019. Mr James Mutton confirmed that the Directors of Sumont are his parents and that he was the General Manager of Brisbane Motorcycles prior to purchasing the business.

[90] Mr Hohns stated that Mr James Mutton knew he was going to be taking over Brisbane Motorcycles, and that everyone was aware of this from December 2018. Mr Hohns also said that he did not realise that Mr James Mutton was also creating his own company to takeover Brisbane Motorcycles.

Whether Motorcycle Trading should be joined to Mr Hohns' application

[91] I have set out in some detail the conduct of Mr Brett Mutton and Mr James Mutton in relation to responding to Mr Hohns' application because it is relevant to whether Motorcycle Trading Pty Ltd should be joined to Mr Hohns' application and to the credit of Mr James Mutton as a witness. As previously noted, I did not find Mr James Mutton to be a credible witness and my views in this regard are based on his conduct in relation to the matters for determination.

[92] If each piece of correspondence is considered separately, it could be argued that Mr James Mutton simply demonstrated a lack of understanding of the processes followed by the Fair Work Commission in dealing with an unfair dismissal application and misconceived the distinction between representing a party or giving evidence on behalf of a party and being a respondent in a proceeding.

[93] However, in my view when the correspondence and its timing is considered from a global perspective, and in the context of the background facts, it is apparent that Mr James Mutton was primarily motivated by a desire to frustrate and delay the hearing of Mr Hohns' unfair dismissal application until the sale of Brisbane Motorcycles was finalised. I have also concluded that Mr James Mutton was disingenuous and deliberately failed to provide all relevant information in his correspondence with the Commission and that this conduct was also intended to delay and frustrate the hearing of Mr Hohns' application.

[94] It is improbable that the purchase of Brisbane Motorcycles by Motorcycle Trading Pty Ltd was an impromptu transaction undertaken in a short time frame. The sum of money which changed hands was not inconsiderable. Motorcycle Trading Pty Ltd was established on 5 February 2019 and it is improbable that it was established for any reason other than the purchase of Brisbane Motorcycles. Mr James Mutton signed the contract to purchase the business on 10 July 2019 and paid stamp duty on the sale on 1 August 2019. In my view it is more probable than not that at all times Mr James Mutton engaged with the Commission he was in possession of information that was directly relevant to whether Motorcycle Trading Pty Ltd could have been joined to Mr Hohns' application. Rather than simply placing those facts before the Commission Mr James Mutton obfuscated and concealed them until after the sale of the business was completed.

[95] The facts were that Motorcycle Trading Pty Ltd was established on 5 February 2019. Mr Hohns was dismissed on 20 March 2019. The contract between Sumont and Motorcycle Trading Pty Ltd for the sale of Brisbane Motorcycles was signed on 10 July 2019 and staff of Sumont commenced working for Motorcycle Trading Pty Ltd on 1 August 2019. While it is improbable that the plans for the sale were in train well before 10 July 2019, there is no evidence that it took effect before Mr Hohns was dismissed.

[96] All that Mr James Mutton had to do to defend the joinder application was to put these facts before the Commission in a timely manner. Instead Mr James Mutton attended a Member Assisted Conciliation Conference after the contract for the sale was signed and purported to be representing Mr Brett Mutton in those proceedings. Mr James Mutton took a settlement proposal to Mr Brett Mutton on 24 July 2019 and obtained an adjournment of the hearing on 25 July on the basis that he wanted time to attempt to persuade Mr Brett Mutton to accept the settlement. Conveniently for Mr James Mutton the extension of time he sought to obtain Mr Brett Mutton's views about settling Mr Hohns' application coincided with the hearing date for that application and resulted in an adjournment until after the sale took effect.

[97] Thereafter Mr James Mutton stated on several occasions that he was now an employee of Motorcycle Trading Pty Ltd and did not disclose that he was also the sole Director of that Company. Contrary to Mr James Muttons' views, it is not the Commission's role in proceedings where there are disputed facts, to make inquiries and obtain evidence which should be placed before the Commission by parties to establish their cases. Rather it is the Commission's role to give parties an opportunity to put their cases. Mr James Mutton was given an opportunity on 29 August 2019 to provide a statutory declaration to the Commission

in relation to the questions surrounding the involvement of Motorcycle Trading Pty Ltd in Mr Hohns' unfair dismissal application.

[98] Mr James Mutton failed to take advantage of that opportunity and later complained that he was given insufficient time to respond to the questions he had been asked. Rather than seeking an extension of time in which to provide the information Mr James Mutton or making any effort to provide the information in the form requested, Mr James Mutton embarked on a campaign by email to bombard my Associate and me with questions about processes which were in my view, posed with the intent of delaying proceedings rather than genuinely seeking information. Quite simply I do not accept that Mr James Mutton's conduct in repeatedly asking the same questions was due to any lack of capacity or inability to understand the responses he received. When it suited, Mr James Mutton could invoke legislative provisions such as s. 587 of the Act. In my view the conduct of Mr James Mutton was unreasonable and designed to hinder the Commission and the conduct of Mr Hohns' application.

[99] In the face of Mr James Mutton's refusal to answer straightforward questions about Motorcycle Trading Pty Ltd, and in response to Mr James Mutton's assertion that a simple ASIC search would provide relevant information, the Commission undertook that search. The search showed that Mr James Mutton is the sole Director of Motorcycle Trading Pty Ltd and had neglected to advise that this was the case. It was only when the results of the search were put to Mr James Mutton and Directions were issued for the hearing of the joinder application that he provided contract documents to evidence the date of the sale. These documents were provided on 18 September 2019 – approximately one week before the hearing date of 25 September 2019. The documents were not appended to a witness statement as required by the Directions.

[100] At that point, Mr James Mutton was still nominated as the contact person for Sumont and no alternative contact person had been provided. Mr Brett Mutton had indicated that he would not be attending any hearing and the Commission was required to resort to sending documents to Mr Brett Mutton by registered mail. Mr James Mutton had also provided a witness statement to the Commission in relation to the case for Sumont and had indicated that he would be giving evidence on behalf of Sumont.

[101] The Commission also had knowledge of the fact that the Directors of Sumont are Mr James Mutton's parents and that the Directors of Sumont and Motorcycle Trading Pty Ltd had the same address as registered with ASIC, which appeared to be Mr Brett Mutton's residential address. Mr James Mutton's insistence in communication with the Commission that he was having difficulty communicating with Mr Brett Mutton is risible. Mr Brett Mutton is the father of Mr James Mutton. At the time those assertions were made Mr James Mutton was entering into a contract with Mr Brett Mutton for the purchase of Brisbane Motorcycles and they had the same address registered with ASIC in their capacity as Directors of Motorcycle Trading Pty Ltd and Sumont Pty Ltd respectively. In all of the circumstances it is improbable that Mr James Mutton and Mr Brett Mutton were not in contact and this is evidenced by the timing of the adjournment requests that were made by them.

[102] I do not accept that there was any vexatious conduct on the part of Mr Hohns in seeking to join Motorcycle Trading Pty Ltd to his application and that application had some prospects of success, depending on the timing of the sale of the business. Mr Hohns took issue with the timing of the sale and there was nothing inappropriate in the Commission accepting an oral application to join Motorcycle Trading Pty Ltd to the substantive application. If it was so

obvious that the joinder application was misconceived then I can only wonder at why it took so long for Mr James Mutton to produce the documents to establish that this was so. In my view the answer is that Mr James Mutton was seeking to disrupt and delay the hearing of Mr Hohns' unfair dismissal application.

[103] Notwithstanding my views about Mr James Mutton's unreasonable behaviour, in order for Motorcycle Trading Pty Ltd to be joined to Mr Hohns' unfair dismissal application it would be necessary to find that Mr Hohns' employment had transferred from Sumont Pty Ltd to Motorcycle Trading Pty Ltd before Mr Hohns was dismissed or at least that Mr James Mutton was acting in his capacity as Director of Motorcycle Trading when he dismissed Mr Hohns.

[104] On the basis of the evidence before me I am unable to accept that there was a transfer of Mr Hohns' employment from Sumont Pty Ltd to Motorcycle Trading Pty Ltd. When Mr Hohns was dismissed he was employed by Sumont. If the employment of any employees of Sumont Pty Ltd transferred to Motorcycle Trading Pty Ltd then I am satisfied that this occurred after Mr Hohns was dismissed. When Mr James Mutton dismissed Mr Hohns he did so in the capacity of General Manager of Sumont Pty Ltd. Accordingly I refuse Mr Hohns' application to join Motorcycle Trading Pty Ltd to Mr Hohns' unfair dismissal application.

[105] In doing so I note that if responding to the joinder application caused Mr James Mutton to incur costs then this is a situation that is entirely of his own making. If Mr James Mutton had simply complied with the request made by me at the outset and provided a statutory declaration evidencing the timing of the sale of Brisbane Motorcycles, the matters involving Motorcycle Trading Pty Ltd could have easily and efficiently been resolved. For the reasons set out above it was necessary to hold a hearing in relation to the joinder application and there was no basis for dismissing it under s. 587 of the Act as sought by Mr James Mutton and Mr James Mutton's application in this regard is refused.

[106] Mr James Mutton has indicated that he may make an application for costs against Mr Hohns. My provisional view in relation to such application is that any costs incurred by Mr James Mutton are entirely attributable to his own unreasonable conduct and that an application for costs made by him would be vexatious. I also note that notwithstanding he was provided with information about how to make a costs application and informed that it would be heard with the other matters listed for hearing, Mr James Mutton has not made such application. I turn now to consider whether Mr Hohns was unfairly dismissed.

Whether Mr Hohns was unfairly dismissed

Preliminary matters

[107] It is not in dispute that Mr Hohns' application was made within the period required in s.394(2) of the Act. It is also not in dispute that Mr Hohns is a person protected from unfair dismissal and that Sumont is not a small business. The dismissal was not a case of redundancy.

Legislation

[108] In deciding whether a dismissal was unfair on the grounds that it was harsh, unjust or unreasonable, the Commission is required to consider the criteria in s.387 of the Act, as follows:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[109] The matters in s.387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust or unreasonable. I turn now to consider each of those matters in the present case.

Was there a valid reason for dismissal of the Applicant? – s. 387(a)

[110] A valid reason for dismissal is a reason that is sound, defensible and well founded and valid in the context of the employee's capacity or conduct, based on the operational requirements of the business.¹ Capacity is the employee's ability to do the job as required by the employer. Capacity also includes the employee's ability to do the work he or she was employed to do. The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.²

[111] To determine whether there was a valid reason for a dismissal relating to conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred, on the basis of the evidence before the Commission. The test is not whether the employer believed on reasonable grounds, after sufficient inquiry that the employee was guilty of the conduct. Further, to constitute a valid reason for dismissal, the Commission must assess whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct.³

[112] The employer bears the onus establishing that there was a valid reason for dismissal. In the present case Mr Brett Mutton and Mr James Mutton decided to dismiss Mr Hohns and the decision was communicated through Mr Russell. It is asserted that Mr Hohns failed to follow

procedures and that this was a valid reason for dismissal. I do not accept that it has been established that Mr Hohns engaged in conduct which constituted a valid reason for dismissal. If I accept all of the evidence placed before me by Sumont it does not establish that Mr Hohns engaged in conduct that was of sufficient gravity or seriousness such as to justify dismissal. Taken at its highest the evidence establishes no more than that Mr Hohns may have made some errors in the manner in which he undertook his work.

[113] Firstly, there was insufficient evidence to establish that Mr Hohns actually did make errors that were of any significance and secondly if he did make some errors I am not satisfied that they were sufficiently serious to justify dismissal. Mr James Mutton produced no evidence of dates or specific instances of errors made by Mr Hohns and I do not accept that any errors that Mr Hohns may have made were of sufficient gravity to justify dismissal. I also do not accept that Mr Hohns' sales performance was a valid reason for dismissal. During the period he was employed by Sumont Mr Hohns sold numbers of motorcycles sufficient to earn an amount that was in excess of his base salary and on average resulted in total earnings of double the amount of his base salary.

[114] I accept Mr Hayes' evidence that there were some errors made by Mr Hohns which impacted on the workshop. However, the lack of specificity makes it improbable that these were of such significance that dismissal was a sound, defensible or well-founded response.

Was the Applicant notified of the reason for his dismissal? – s. 387(b)

[115] It has been held that as a matter of logic an employee cannot have been given an opportunity to respond to any reason for dismissal based on capacity or conduct in circumstances where the employee is not notified of the reason. An employee must be given an opportunity to respond to the reason for dismissal before the decision to terminate is made.⁴

[116] In the present case I am not satisfied that Mr Hohns was notified of the reason for his dismissal so that he was afforded procedural fairness. In particular I do not accept the assertion made by Mr James Mutton that the fact that Mr Hohns was informed that if he wanted to know the reason for dismissal he should contact Mr James Mutton is sufficient to properly address the consideration in s. 387(b) of the Act.

[117] The decision to dismiss the Applicant was communicated to him as a *fait accompli* and he cannot be blamed for declining to take up the offer to contact Mr James Mutton to find out the reason for that decision. To find otherwise would be contrary to the plain words of s. 387(b) which requires consideration of whether a person is notified of the reason for dismissal. An employer cannot abrogate the requirements of procedural fairness by simply asserting that if the dismissed employee contacted the decision maker her or she would have been informed of the reason.

Was the Applicant given an opportunity to respond to the reason for his dismissal based on his conduct? – s. 387(c)

[118] Given my finding that Mr Hohns was not notified of the reason for his dismissal based on his conduct it follows that he was not given an opportunity to respond to that reason.

Was there an unreasonable refusal by the Respondent to allow the Applicant to have a support person? – s. 387(d)

[119] There is no positive obligation on an employer to offer an employee the opportunity to have a support person⁵. The inquiry in s. 387(c) is directed to whether any request was unreasonably refused. There is no evidence that Mr Hohns was denied the assistance of a support person at the discussion in which he was dismissed, although given the brevity of the discussion and the lack of advance notice it would have been pointless for Mr Hohns to have made the request in any event.

Was the Applicant warned about the unsatisfactory performance before the dismissal? – s. 387(e)

[120] I am not satisfied that Mr Hohns was warned about any issues that Sumont or its Directors or Managers had with his performance. I do not accept that the discussion Mr James Mutton had with Mr Hohns was a warning. Mr James Mutton did not dispute that the discussion was initiated by Mr Hohns in order to ask for a wage increase. The fact that Mr James Mutton told Mr Hohns that he would need to step up if he wanted a wage increase does not constitute a warning. I am also of the view that if there were any significant issues with Mr Hohns' conduct or performance Mr James Mutton would have said more than simply that Mr Hohns had to step up.

[121] For the reasons set out above I did not find Mr James Mutton to be a credible witness and I do not accept his evidence that he warned Mr Hohns about his work performance.

Did the size of the employer's enterprise impact on the procedures followed in effecting the dismissal of the Applicant? – s. 387(d)

[122] Sumont is not a small business as defined in the Act and had some 43 employees at the point Mr Hohns was dismissed. Mr James Mutton showed that he was perfectly capable of researching various provisions of the Act in his defence of Mr Hohns' unfair dismissal application and while I have had regard to the size of the enterprise, I have also had regard for the fact that Sumont's General Manager Mr James Mutton could have devoted his research skills to identifying appropriate procedures for effecting a fair dismissal.

Did the absence of dedicated human resource management specialists or expertise in the enterprise impact on the procedures followed in effecting the Applicant's dismissal? – s. 387(e)

[123] Sumont does not have dedicated human resource management specialist or expertise and this is a matter to which I have had regard. However, as I have noted above, based on his conduct of the defence on behalf of Sumont, its General Manager Mr James Mutton had the ability to research the requirements of the Act to effect a fair dismissal and did not do so.

Are there any other relevant factors? – s. 387(h)

[124] There are no other relevant factors advanced by the parties.

Conclusion in relation to whether the dismissal was unfair

[125] On balance and after considering the matters in s. 387 of the Act, I am satisfied that Mr Hohns' dismissal was unfair. Mr Hohns had worked for Sumont for over six months and had not received any warnings about his conduct, capacity or work performance. There was no valid reason for the dismissal and it was effected in a way that was devoid of procedural fairness.

Remedy

[126] Given that I have found that Hohns' dismissal was unfair, it will be necessary to consider the question of remedy. As required by s.390 of the Act, I am satisfied that Hohns was a person protected from unfair dismissal and that he has been unfairly dismissed. I am also of the view that Mr Hohns should have a remedy for his unfair dismissal. Mr Hohns seeks compensation.

[127] Reinstatement is the primary remedy for unfair dismissal. Compensation can only be awarded where the Commission is satisfied that reinstatement is inappropriate. In the present case it is my view that reinstatement is inappropriate. Mr Hohns does not seek reinstatement and the business where he previously worked has had a change of ownership. Accordingly, I have determined that Mr Hohns should be awarded an amount of compensation for his unfair dismissal.

[128] In relation to the assessment of compensation, s. 392 of the Act provides as follows:

“392 Remedy—compensation

Compensation

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

Criteria for deciding amounts

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

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

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

Shock, distress etc. disregarded

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

Compensation cap

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

- (a) the amount worked out under subsection (6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

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

- (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;

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

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

[129] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.⁶ That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;⁷ *Jetstar Airways Pty Ltd v Neeteson-Lemkes*⁸ and *McCulloch v Calvary Health Care (McCulloch)*.⁹

[130] In *McCulloch*, the Full Bench considered, in some detail, the question of how a contingency discount should be applied to the calculation of the remuneration the dismissed person would have received, or would have been likely to receive, if the person had not been dismissed. The Full Bench pointed out in *McCulloch* that a deduction for contingencies is applied to prospective losses, or losses occasioned after the date of the hearing. The Full Bench also noted that at the time of the hearing any such impact on the earning capacity of the dismissed person between the date of dismissal and hearing will be known, and a finding can be made on the basis of whether the dismissed person's earning capacity has in fact been affected during the relevant period.

[131] I turn now to the particular criteria I am required to consider in deciding the amount of compensation to be awarded to Mr Hohns for his unfair dismissal.

The effect of the order on the viability of the Respondent – s. 392(2)(a)

[132] Mr Brett Mutton’s refusal to engage with the Commission or to respond to Mr Hohns’ unfair dismissal application in any meaningful or relevant manner means that there is no evidence of the effect that an order for compensation will have on the viability of Sumont. The conduct of Mr Brett Mutton and Mr James Mutton has resulted in a considerable delay to Mr Hohns application being heard and for reasons which I set out below I am of the view that this was a deliberate attempt to delay proceedings until the sale of the business could be effected.

[133] The contract for the sale of the business indicates that Mr Brett Mutton received a not inconsiderable sum for the sale of the business. At the time this application was heard Sumont was registered as a Company. Accordingly, I am satisfied that the order for compensation I intend to make against that Company will not affect its viability.

Length of service – s. 392(2)(b)

[134] Mr Hohns was employed by the Respondent for a relatively short period of some seven months. This is not a consideration in favour of an award of compensation at the higher end of the scale and is a matter to which I have had regard in determining the appropriate amount of compensation.

Remuneration that would have or would likely have been received – s. 392(2)(c)

[135] This consideration requires an assessment of how long Mr Hohns would have remained in employment but for his dismissal. Mr Hohns had been employed for a relatively short period of seven months. The business in which Mr Hohns was employed was sold with effect from 1 August 2019. It was sold to Mr James Mutton who had some issues with Mr Hohns’ work performance which as the new owner Mr James Mutton would have been entitled to raise with Mr Hohns. As the new owner Mr James Mutton may also have been entitled to determine that he wished to restructure the operations and to reduce the number of sales staff.

[136] However none of the issues at the point Mr Hohns was dismissed were matters that would have given a fair and reasonable employer cause to dismiss Mr Hohns without warning him about the matters and giving him an opportunity to address them. It is also the case that Mr James Mutton stated that on 1 August 2019 all staff of Brisbane Motorcycles commenced employment with Motorcycle Trading Pty Ltd.

[137] In all of the circumstances I find that but for his unfair dismissal Mr Hohns would have remained in employment for a further 8 weeks. In that period Mr Hohns would have received remuneration totalling \$12,480.00 gross based on his average earnings of \$1,560 per week and superannuation contributions of \$605.60 for that period in accordance with the contribution amount shown on Mr Hohns’ payslip, which appears to have been calculated by reference to his base salary.

Efforts to mitigate loss – s. 392(2)(d)

[138] I accept that Mr Hohns made reasonable efforts to mitigate his loss and that he obtained other employment with effect from 16 July 2019. I have decided not to make a deduction from the compensation to be awarded to Mr Hohns on this basis.

The amount of any remuneration earned since dismissal – s. 392(2)(e)

[139] Mr Hohns obtained alternative employment on 16 July 2019 which is outside the 12 week period I have determined as the period he would have remained in employment

The amount of any income reasonably likely to be earned during the period between the making of the order for compensation and the actual compensation – s. 392(2)(f)

[140] Given the period which has elapsed since Mr Hohns was dismissed and the period I have determined that Mr Hohns would have remained in employment but for his unfair dismissal, I have determined that no adjustment to the amount of compensation is warranted on this basis.

Any other matter that the FWC considers relevant – s. 392(2)(g)

[141] I have had regard to the fact that Mr Hohns was paid one weeks wages in lieu of notice and his accrued entitlements on termination of his employment. That amount based on the payslip provided by Mr Hohns was \$2,115.00 gross for wages and \$75.70 for superannuation contributions which were paid on the one weeks notice. That amount will be deducted from the amount of compensation I have determined to award.

Deduction for misconduct

[142] Mr Hohns did not engage in misconduct and I make no deduction in relation to this matter.

Conclusion in relation to compensation

[143] In summary my conclusions in relation to compensation are:

1. An order for the payment of compensation would not affect the viability of Sumont's business (s.392(2)(a)).
2. The length of Mr Hohns service does not favour the making of an order for compensation at the higher end of the scale (s.392(2)(b)).
3. The remuneration that Mr Hohns would have been likely to receive, but for his dismissal, is \$12,480.00 in wages and \$605.60 in superannuation contributions (s.392(2)(c)).
4. I make no deduction for contingencies given the period I have assessed that Mr Hohns would likely have remained in employment.
5. I make no deduction on account of a failure to mitigate loss (s.392(2)(d)).
6. I make no deduction for remuneration earned since dismissal (s.392(2)(e)).
7. I make no deduction for income likely to be earned during the period between the making of the order and the actual compensation (s.392(2)(f)).

8. I deduct \$2,115.16 for wages in lieu of notice and \$75.70 for superannuation contributions paid in relation to wages in lieu of notice s. 392(2)(g).
9. I make no deduction for misconduct (s.392(3)).
10. The amount of compensation payable to Mr Hohns is \$10,364.84 for lost wages to be taxed according to law and \$529.90 in superannuation contributions to be paid to Mr Hohns nominated superannuation fund.

[144] An Order requiring that Sumont pay to Mr Hohns the amount of \$10,364.84 for lost wages to be taxed according to law and \$529.90 into Mr Hohns' nominated superannuation fund within 14 days will issue with this Decision. Mr Hohns' application to join Motorcycle Trading Pty Ltd to his unfair dismissal application is dismissed as is the application by Mr Mutton under s. 587 of the Act.



DEPUTY PRESIDENT

Appearances:

Mr S Hohns on his own behalf.

Mr J Mutton on behalf of Sumont and Motorcycle Trading Pty Ltd.

Hearing details:

31 October.

2019.

Brisbane.

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¹ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371.

² *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 AIRCFB 11 May 2000 at [62]

³ *Bista v Glad Group Pty Ltd* [2016] FWC 3009.

⁴ *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport*, Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at para. 75, [(2000) 98 IR 137].

⁵ Explanatory Memorandum to Fair Work Bill 2008 at para. 1542.

⁶ (1998) 88 IR 21.

⁷ [2013] FWCFB 431.

⁸ [2014] FWCFB 8683.

⁹ [2015] FWCFB 2267.