



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Haruka Nakamura

v

Retail Staff Pty Ltd

(U2020/9551)

COMMISSIONER HUNT

BRISBANE, 15 MARCH 2021

Application for an unfair dismissal remedy – alleged assault in workplace – valid reason for dismissal – dismissal not harsh, unjust or unreasonable – application dismissed.

[1] On 13 July 2020, Ms Haruka Nakamura made an application for unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act) to the Fair Work Commission (the Commission) alleging she had been unfairly dismissed by her employer, Retail Staff Pty Ltd (Retail Staff/the Respondent).

[2] Ms Nakamura commenced employment with the Respondent on 12 December 2017. At the time of her dismissal, she was working on a casual basis as a Car Detailer Supervisor/Car Wash Attendant. She was employed on a student visa, working a maximum of 20 hours per week during study weeks. She was dismissed on 9 July 2020.

[3] The matter did not resolve at conciliation and was allocated to me for consideration. The Respondent did not raise any jurisdictional objections to the application. Directions were issued and the matter was heard before me on 6 and 12 October 2020.

[4] At the hearing Ms Nakamura was represented by Mr Hiwa Zandi, Senior Solicitor of Phoenix Law & Associates. I granted leave for Ms Nakamura to be represented pursuant to s.596(2)(a) of the Act. The Respondent was represented by Ms Carli Stieper, Head of Employee Relations, Retail Staff. A Japanese interpreter was also in attendance.

[5] In addition to Ms Nakamura giving evidence and being cross-examined, the following witnesses evidence has been taken into consideration:

- Ms T, current employee of the Respondent;
- Ms Yumiko Nogiwa, current employee of the Respondent;
- Mr D, current employee of the Respondent;
- Mr Aaron Thompson, Handwash Attendant;
- Mr Balhar Singh, Site Manager;
- Ms Karlee Berg, Operations Manager; and
- Ms Cara Verster. Account Manager.

[6] I have made a confidentiality order relevant to one of Ms Nakamura's witnesses on account of her allegation that she was sexually assaulted. I shall refer to her in these proceedings as Ms T. I have made a confidentiality order relevant to one of the Respondent's employees, who is referred to as Mr D.

Background

[7] The Respondent supplies labour hire to clients on a temporary basis. One of its clients is Hoppy's Handwash Café at Bermuda on the Gold Coast. Hoppy's provides car cleaning services, dog washing bays and has an onsite café. Ms Nakamura worked there for approximately two and a half years.

[8] On 24 June 2020, an incident occurred between Ms Nakamura and Mr D, who was a co-worker of Ms Nakamura's. At approximately 3:00pm, Ms Nakamura finished her shift and was walking to her car when she spotted Mr D on a smoking break.

[9] Ms Nakamura and Mr D began talking when an argument erupted regarding their mutual friend, Ms T, whom Mr D had dated for a period of less than six months, concluding approximately April 2020. Ms T had alleged that one day earlier she had been sexually assaulted while at her workplace by a member of the public. While exactly what happened next is disputed by the parties, a physical altercation took place. The physical altercation was reported immediately by Mr D to Mr Singh, Supervisor on duty.

[10] On 4 July 2020, Ms Nakamura made the following post on Facebook:

"I just would like my friends to know and think about this story.

My friend had a sexual assault. She talked about it to her friend who is ex-boyfriend because she wanted him to help her broken heart. But he didn't believe that happened on her. He told her "show me a proof or call cops".

She really got a shock and her heart has completely broken. She cut her wrist to die by herself. She is still alive but she was dead. Now she worries nobody believes her. She can't sleep well every night and dreaming everyone calls her liar. He never admits it's his fault.

Some people say call cops if someone got sexual assault. But, at first, we should believe their story. And care for their broken heart. Cops can find and catch the criminals but can't care for them. They don't want anyone to know what they have been done. They just want someone who close to them to care for them. Of course never forgive the criminals. But we should prioritise the victims care. It's very important things. And you might hurt someone you care about if you don't know it.

I would like to share the story for my hurt friend and to prevent all my friends from harming their loved ones.

Thank you for reading."

[11] The physical altercation was not reported by Mr D to more senior staff until 7 July 2020 following Mr D becoming aware of the Facebook post made by Ms Nakamura. Mr D reported the incident to Ms Karlee Berg, Operations Manager of Retail Staff.

[12] The following day on 8 July 2020, Mr D was interviewed about the incident. The attached statement was prepared:

“Employee of Retail Staff Pty Ltd

08/07/2020 -KB Called [Mr D] I advised Karlee Berg, Retail Staff Manager on 8/7/2020 that Haruka Nakamura had punched me in the face at work. I advised her that I have already reported it to the site manager Balhar Singh but that I could not see that he has not done anything about it.

The incident occurred over behind the dog washing area whilst I was on my break at about 3pm when Haruka came over to where I was standing and got angry at me for not believing that [Ms T] was raped at work. Haruka started yelling at me and pushed me hard, then just punched me in the face. I was shocked and grabbed her arms and stopped her from doing anything further and then walked away and went and told the site manager Balhar that there was an incident and a big issue. Balhar was too busy to speak with me so I asked to go home as I was very angry I knew I shouldn't not be at work in that mind frame.

I wasn't that hurt physically by what she did but I was just so angry that she would do that to me and it was humiliating to be hit at work. I was in complete shock that she punched me. No one else witnessed the incident as it was just the two of us behind the dog wash area but Aaron Thompson (another colleague) was nearby and would of heard her getting completely worked up at me but he wouldn't of seen her hit me. but when he was walking away after it had happened he walked past me and I told him what had happened, that she hit me.

Following the incident, I completely avoided Haruka and I was concerned that no one was following up on my complaint so when I could see that no action had been taken at site I followed up with Retail Staff Management.”

[13] This same day, Ms Nakamura was advised by telephone by Ms Berg that she was required to attend a meeting on 9 July 2020. An email was sent to Ms Nakamura by Ms Berg following this phone conversation which read:

“Hi Haruka,

Thank you for your information today regarding an alleged incident where it has been outlined that you have physically hit a co-worker while on shift.

When I asked you did you hit your co-worker [Mr D] in the face, you confirmed that you did.

When I asked you why you did that you confirmed that it was because he said something you did not like about another co-worker as you were angry.

When I asked you if you were aware that hitting someone is assault you confirmed that you were.

When I asked you if you were aware that this is a breach of workplace health and safety and policy and procedures you confirmed that you were.

As I outlined to you, this is an ongoing investigation and I request that you meet with me at Hoppys tomorrow morning at 8:30am to discuss it further.

You are able to bring a support person with you to this meeting as disciplinary action may be a result of this incident.

Please confirm via reply to this email that you will attend the requested meeting at 8:30am tomorrow.

Thanks”

[14] Prior to the meeting on 9 July 2020, Ms Nakamura declined an interpreter or a support person. Ms Berg put to Ms Nakamura the allegations and asked if she would like to add anything. Ms Nakamura failed to provide any further information and as a result, the Respondent terminated her employment that afternoon at 4:30pm. The termination letter provided:

“9 July 2020

Haruka Nakamura
[address redacted]

Dear Haruka Nakamura

Termination of your casual employment

I am writing to you about the termination of your casual employment with Retail Staff Pty Ltd.

I refer to our meeting on 8 July 2020 which was attended by you. During the meeting we discussed the allegations raised against you, during another separate investigation, that you punched a co- worker in the face at work on the 24 June 2020 at our host employer Hoppy’s site.

On 8th July 2020, you were advised that the alleged incident had come to our attention where you had punched an employee in the face during work. Through your own admission you have confirmed that you did punch an employee in the face in the workplace. When questioned, your response to this behaviour was that you were very angry at your co-worker for not trusting something your friend was trying to tell him.

Following completion of our investigation, I again meet with you today 9 July 2020, where you were given a final opportunity to provide further information regarding the incident. You did not provide any further information and your response was not considered satisfactory.

At both meetings you were given the opportunity to have a support person and an interpreter present. You declined both times.

As discussed during the meetings, your conduct during that incident:

- was breach of Workplace Health and Safety policy and our Code of Conduct.
- had the potential to cause a serious and imminent risk to the health or safety of a person.
- In Retail Staffs opinion was conduct in the course of your employment which constitutes engaging in assault and in the circumstances your continued employment would be unreasonable.

Whilst your responses have been considered, we consider that your actions constitute serious misconduct warranting summary dismissal.

Therefore, your casual employment will be terminated effective today.

You will be paid any outstanding pay up to and including your last day of employment. This includes superannuation.

You may seek information about minimum terms and conditions of employment from the Fair Work Ombudsman. If you wish to contact them you can call 13 13 94 or visit their website at www.fairwork.gov.au.

Some termination payments may give rise to waiting periods for any eligible applicable Centrelink payments. If you need to lodge a claim for payment you should contact Centrelink immediately to find out if there is a waiting period.

Yours sincerely,

Karlee Berg
Client Services Manager”

[15] The following day on 10 July 2020, Ms Nakamura sent a message to eight staff on the staff messaging platform ‘Band’. This message read:

“I’m so sorry guys I cannot work with you guys anymore. Couple weeks ago, I hit [Mr D] because he insulted my friend. He said a lot of her bad things by then. And she has terrible mental illness and tried to kill herself. The Psychiatrist told her she needed hospital treatment and it will spend to treatment more than 10 years. So I couldn’t forgive his behaviour against her.

It was of course my fault that I hit him. I knew if I hit him, I will be fired at work. I was ready for that. For protecting her emotions. The company decided to fire me. I accept this reality, but if I have any chance, please think about why I hit him. I think it was the justice for my friend. I put her feelings in my fist. Why Infinite violence is allowed, not a single punch. I apologised him but he is nothing to say against her.

I really sorry I cannot work with you guys anymore. I was enjoying every moment at work. Good luck and take care. P.S Early Easter eggs for all my friends!!

Kind regards.

Haruka Nakamura”

Relevant Legislation

[16] Section 394 of the Act sets out:

“394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.”

[17] Further, ss.385 and 387 provide:

“385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

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

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

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

[18] There are no jurisdictional considerations for the Commission to consider and the application was made within the statutory time limit. Accordingly, it is necessary to determine if the dismissal was unfair having regard to the considerations in s.387 of the Act.

Evidence of Ms Nakamura

[19] Ms Nakamura stated that an incident occurred on 24 June 2020 after she had finished her shift at 3:00pm. Ms Nakamura indicated that she saw Mr D standing near the dog wash as she was going to her car.

[20] Ms Nakamura gave evidence that she and Mr D began talking about their mutual friend, Ms T. Ms Nakamura alleged that Ms T had been sexually assaulted the day before at another Hoppy's outlet by a member of the public, including having scratches on her chest and back. Mr D laughed and said, "*It's just from a training accident.*" Ms Nakamura said that Mr D provoked her and made her angry, which led to her approaching him and she tried to push him. She said that he grabbed her arms strongly. She said that she tried to shake him off and it was like punching him, but she did not actually punch him.

[21] Ms Nakamura's evidence was that this incident happened out of work hours and outside the workplace perimeter, meaning that the incident could not be a workplace incident. She agreed that she was wearing a work uniform at the time.

[22] Ms Nakamura submitted images identifying the location of where the incident occurred, which was along a footpath between the road and the workplace. She indicated in these images that the altercation transpired partly on the footpath and partly on the road. She stated that because she was standing on the road and he was standing on the kerb, he would be at around 190cm tall and she is 165cm tall. She stated that it is not possible for her to have punched his head or face.

[23] In evidence before the Commission, Ms Nakamura said that she and Mr D had been friends for approximately three years. She considered him to be a close friend. He had been dating Ms T, but not at the time of the incident. She stated that the three of them would go to dinner together and to Mr D's home to watch movies.

[24] She stated that Ms T was experiencing a lot of pain, and she wanted Mr D to help make her pain go away, particularly as they used to date. She wanted him to believe Ms T had been sexually assaulted, as she considered that would assist in Ms T's healing.

[25] Ms Nakamura asserted that when she approached Mr D on 24 June 2020 it was as a friend and not as an employee. The conversation occurred after she had finished work.

[26] She asserted that Mr D can't have been too upset about the incident as the three of them caught up on one occasion after 24 June 2020, outside of work. Further, Mr D had shown her a picture of his baby niece on his phone.

[27] She acknowledged that she tried to contact Mr D through the "Band" application. She wanted him to apologise for not believing Ms T's allegation. Mr D repeatedly told her that he required evidence, or she should go to the police to report the allegation. She thinks that she sent three or four messages in the two weeks following the alleged sexual assault. She thinks Mr D blocked her from the application.

[28] Ms Nakamura stated that Ms T harmed herself on 25 June 2020, which resulted in Ms Nakamura becoming desperate for Mr D to believe Ms T's account.

[29] In cross-examination, Ms Nakamura was asked why she elected not to have an interpreter or support person present at the meeting on 9 July 2020. She answered that she

thought she was being questioned about Ms T's situation. She said that she didn't ask. She stated that she did not read the email sent by Ms Berg on 8 July 2020, but responded, agreeing to attend the meeting.

[30] It was put to Ms Nakamura that she has acted as an interpreter for her Japanese-speaking colleagues in their discussions with management, as well as a support person for them, at times. She agreed.

[31] Ms Nakamura denied saying to Ms Berg on 8 July 2020 that she had punched Mr D.

[32] Relevant to the message sent to work colleagues on 'Band' on 10 July 2020, Ms Nakamura was asked why she posted it saying she punched Mr D, if she now denied having punched him? She stated that it might have come across that way because of google translate.

Evidence of Ms T

[33] Ms T made a witness statement in these proceedings. She has worked with Ms Nakamura and has known her since 2013 when they were both living in Japan.

[34] She stated that she was sexually assaulted at work on 23 June 2020 and had spoken to Mr D about this incident, as he was her ex-boyfriend and close friend. She stated that on 24 June 2020, Ms Nakamura came home and told her about how she had tried to punch Mr D, but did not hit him. When Ms T asked why Ms Nakamura had tried to punch him, Ms Nakamura said that when discussing Ms T's sexual assault, he had laughed and said Ms T's injury had come from a training incident.

[35] Ms T noted in her evidence that Ms Nakamura said she was glad that she did not hit Mr D, and was glad he did not get hurt. Further, Ms T noted that Ms Nakamura was a good worker and had a trusting relationship with management, other workers and customers.

[36] Ms T stated that she believed that Mr D had made a false report to the Respondent. She considered that the Respondent only believed his story because he is Australian, and Ms Nakamura is Asian.

Evidence of Ms Yumiko Nogiwa

[37] Ms Nogiwa made a witness statement in these proceedings and was not required for cross-examination. She is employed at Hoppy's Bermuda and worked alongside Ms Nakamura. She stated that on 24 June 2020, Ms Nakamura had finished work and came to say goodbye before going to her car which was located behind the dog wash. Ms Nogiwa noted that some workers were working on a customer's car, but Mr D was having a smoking break.

[38] Ms Nogiwa's evidence was that after a few minutes, Mr D came back covering his cheek with his hand and stated that Ms Nakamura had punched him. However, she could not see any injury, swelling or redness. She stated that he offered to his manager to go home and he did go home. She did not believe that he had reported the incident to management prior to leaving.

[39] Ms Nogiwa stated that she had talked to Ms Nakamura on the phone after work and Ms Nakamura had said that she was upset because Mr D had insulted a friend and she had tried to punch him but could not reach.

[40] Ms Nogiwa's evidence was that Ms Nakamura was a hard worker and she could not believe Ms Nakamura would punch Mr D.

Evidence of Mr D

[41] The Respondent did not file a witness statement for Mr D and had thought it was not prudent for him to attend the Commission and give evidence. I informed the Respondent that his attendance was necessary and if he did not come voluntarily to give evidence, the Commission would order his attendance. He attended voluntarily on the second day of the hearing and gave oral evidence.

[42] In examination-in-chief, Mr D was shown a picture of the grassed area near the dog wash. He stated that he was standing behind the dog wash where the artificial grass is. He said that people normally park their cars near the dog wash. He showed the Commission where Ms Nakamura was standing having regard to the picture of the area – he marked it. He explained that the area in which he was standing is where all of the smokers go to have a cigarette, as long as nobody is using the dog wash. It is near the tree.

[43] He stated that on 24 June 2020 he was having a cigarette. Ms Nakamura had clocked off for the day, however he was having a busy day. He stated that she came out and was talking to him. She told him that Ms T had been sexually assaulted and had scratches on her body. He suggested that perhaps it was a training accident. He said that Ms Nakamura came straight at him and punched him in the face. He said that he nearly tripped on the roots of the tree, however he saved himself from falling over the roots.

[44] His evidence is that he grabbed her hands and said to her words to the effect, "*Why would you do this, why would you do this at work?*" He then walked back along the grass and into the car wash.

[45] He considered that she had sounded irritated in her voice, and he suggested that she had not liked his suggestion that perhaps Ms T's injuries were from a training accident.

[46] When he walked back into the car wash he saw Mr Thompson who was situated at the greeter box. Mr Thompson appeared to be looking to see what the commotion was. Mr D spoke with Mr Thompson and said that Ms Nakamura had hit him.

[47] He then informed Mr Singh that Ms Nakamura had punched him. He suggested that Mr Singh ought to have known he was not happy; in fact he was angry at what had just happened. He told Mr Singh that he wanted to clock off and go home. Mr D thought that Mr Singh would have followed the incident up, but after two weeks he hadn't done anything about it.

[48] Mr D said the following day Ms Nakamura was sending him messages. He had earlier blocked her from his phone. He didn't want messages about Ms T coming through to his phone, but Ms Nakamura was sending him messages from Ms T's phone because her own phone was blocked by him. He said that she also sent messages through Band.

[49] Mr D stated that before the incident he and Ms Nakamura had been friends, but they were naturally going their separate ways after he had broken off his relationship with Ms T. He stated that following the incident she kept on messaging him telling him it was his fault that Ms T had been sexually assaulted.

[50] Mr D stated that Ms Nakamura and Ms T would constantly message him about his late mother who had passed away when he was aged 17. They messaged him saying that Ms T had “powers”, and they would inform him how disappointed his late mother was in him.

[51] He stated that he saw the Facebook message at [10]. Two people from work asked him about it. He then went to Frank, the General Manager and asked for something to be done about it. He informed Frank about being punched by Ms Nakamura, and Frank’s assistant, Tabut asked him to screenshot the messages and write down what happened. Tabut informed him that an investigation would be commenced; it was commenced the next day.

[52] Mr D was asked about Ms Nakamura’s English communication skills. He stated that he always communicated with her in English inside and outside of work. He considered that her command of the English language was quite good.

[53] In cross-examination Mr D stated that he had dated Ms T for a period of about 5.5-6 months. He stated that he had known Ms Nakamura and Ms T for a few years. He agreed that Ms Nakamura visited his home a lot of times.

[54] He agreed that there had been no other incidents with Ms Nakamura, and mainly it was a working relationship. Only when he was dating Ms T did he see a lot of Ms Nakamura outside of work.

[55] He agreed that following the incident on 24 June 2020, he showed Ms Nakamura a picture of his new baby niece, but he says he did so because he was showing everybody at work and couldn’t leave her out.

[56] Mr D conceded that on a night after the incident had occurred, he met with Ms Nakamura and Ms T outside of work. He stated that they had wanted to explain themselves. They came to his house, but he didn’t want them to come inside of his house, and he expected to sit in their car outside of his house. However, once he was in their car, they drove to a carpark at IGA, Nerang. He asked them a few times where they were going as he felt unsafe. They said to him, “*We’ll be there soon.*”

[57] While in the car with them, they spoke about his mother and how disappointed she is in him. While he felt unsafe during the car ride, when he arrived at IGA he felt safe.

[58] He stated that he was hoping to hear the truth from them relevant to the alleged sexual assault, but he considered that he never was told the truth. He stated that as soon as they were done talking, he asked them to take him home. He stated that he didn’t want to hear anything more about his mother.

[59] In the period of time between the incident and Ms Nakamura being dismissed, whenever he worked with her, he would try to avoid her. He said the only interaction he had with her was showing her the picture, but only because he felt obliged.

[60] Mr D agreed that he had not told anybody about meeting with Ms Nakamura and Ms T on this particular night, until after Ms Nakamura's employment had been terminated. He said that he kept it a secret for a long time. He considered that once everything came out, and what was being said about him, they were trying to humiliate him and make him look like a bad person.

[61] Mr D conceded that he had recently informed the Respondent's management of the night where he met with Ms Nakamura and Ms T outside of work.

[62] Relevant to where he was standing when the incident occurred, he denied hitting his head on the fence. He was asked why he didn't hit his head on the fence if he was standing as close to the fence as he claimed? Mr D then demonstrated the action taken and how he stumbled back. He demonstrated that as he tripped backwards, he saved himself. He stated that Ms Nakamura kept on coming for him and he grabbed her hands and said to the effect, "*none of that, none of that at work.*" He then returned to the car wash.

[63] When asked exactly where Ms Nakamura was, he explained that she was on the thin strip of concrete. After she hit him, he explained that they were on the artificial grass, closer to the dog wash. He agreed that while originally they were on the council strip, after the punch backwards they were not.

[64] Mr D stated that Ms Nakamura and Ms T both threatened to commit suicide. He felt it was a threat and it would all be on him if they did. He called the local police station and asked them to listen to him as he had no clue what to do. He reports that they told him that it was a work issue and to discuss it with work.

[65] Mr D stated that Ms Nakamura and Ms T would repeatedly tell him that members of the Japanese gang, Yakuza had raped Ms T in the toilets at her workplace, and this was going on weekly. Mr D said that they said this to him for a few weeks before the incident on 24 June 2020. He said that he could not help them, nor protect them. He said he didn't understand, and it was very confusing.

[66] He considers that Ms Nakamura and Ms T are very close, and he can now see that Ms Nakamura is very controlling of Ms T.

[67] He considered that at the start, Ms Nakamura had good intentions relevant to her friend's alleged predicament, however he told them on the phone to get the police involved and they also needed to tell work. He stated that they were both crying on the phone to him telling him they would kill themselves. He said that he took it very seriously.

[68] Ms D now considers it was harassment, as every second day he'd receive messages. He blocked Ms Nakamura's calls and messages, but she would still send messages through Band or through Ms T. They would ask him to delete the messages, but he didn't.

[69] He stated that he does consider Ms Nakamura's conduct to have been work related, as Ms T alleged that she was sexually assaulted in the toilets at work, and he was punched at work.

[70] Relevant to the Facebook post made by Ms Nakamura, he said that while his name wasn't mentioned, he knew the post was about him, and others who know them will know the post is about him.

[71] In re-examination, Mr D said that he is not sure if people in the café could have seen the incident. He considers it to have been very likely, but he didn't look to see if there were people in the café.

[72] With my permission, after consulting his calendar on his phone during the hearing, Mr D was able to state that the night Ms Nakamura and Ms T visited him to take him in their car was 29 June 2020. He did not inform Ms Steiper and Ms Berg of this information until after the termination.

[73] He described his break-up with Ms T as occurring in around April/May 2020. He said that she was always talking about her ex boyfriend, a former Yakuza gang member. She told him that the ex-boyfriend was stalking her, and also making threats against Mr D simply because he was dating Ms T. He felt that Ms T was threatening him.

[74] He considers that Ms Nakamura had not demonstrated any remorse for punching him. She was always telling Mr D that it was his fault, and that's why she punched him, he stated.

[75] I asked Mr D questions about the statement he made to Ms Berg. He stated that while it was originally drafted for him, he then completed more of it on his phone and electronically signed and returned it to Ms Berg.

[76] Regarding the Facebook post at [10], he said that while he is not friends with Ms Nakamura on Facebook, he saw it on her wall which was not set to private settings. He also had Mr Thompson and a colleague named Gareth inform him that she was sending messages saying that Ms T was raped because of Mr D, and that it was his fault.

[77] Mr D stated that he saw the Band post on 10 July 2020 at [15]. He saw it straight away which caused him to clock off work immediately. He was angry when he saw it and apologised to his supervisor. He reported it to Frank and the Band post was deleted. He also understood that Ms Nakamura was kicked off Band.

[78] He stated that other employees continued to come to him to inquire about the situation, causing him embarrassment. He asked them to mind their own business.

[79] As to how many days he worked with Ms Nakamura following the incident, he nominated five or six occasions.

[80] During the hearing the following messages were admitted into evidence. The messages are from Ms T's phone to Mr D, on account of Mr D having blocked Ms Nakamura. It is clear that Ms Nakamura is the author of most of the messages, sent on Ms T's phone and I have done my best to interpret which of Ms T or Ms Nakamura sent this message on 25 June 2020:

Ms Nakamura: Hello [Mr D], it's Haruka.

She has broken. She say want to go to mothers. She need your help. Not a cop. If you call cops, they will kill her. It's my guess. And also They never contact you.

They don't like your everything of behaviour. They are seeing these messages too, I guess.

I don't want to talk to you actually. I want to leave you alone. But I cannot. I don't want [Ms T] to be fucked again, don't wanna lose her. She doesn't has to kill herself.

Do you forget your beautiful heart? You were very kind and having big heart. [Ms T] loved you who have beautiful heart same as like your mother.

Please remember your kindness and love to her. You cannot laughing. You will get angry to them who hart [Ms T]. And you think to protect her yourself.

Please [Mr D], it's not joking. Why I punched you, just I want? No, I disappointed your behaviour against [Ms T]. You can call me fucking men, bich, whatever. But I don't allow if you don't believe her, don't think to protect her yourself from them. Sorry for long message.

[81] The message below was sent on a date unknown, but prior to 7 July 2020:

Ms T: Did you see Haruka's message yesterday?

Mr D: I blocked her number.
So I did not.

Ms Nakamura: They will keep fucking her unless you believe it. She fucked by 2 guys in the toilet at work. Please stop this nightmare. Only you can stop them, please. I cannot stop them. I cannot help her. Please.

Ms Nakamura: [Picture of torn and bloodied work shirt]

Why don't you believe me?

[82] The message below was sent on a date unknown, but prior to 7 July 2020:

Ms Nakamura: She was about to get fucked by 5 men after work in the car at Southport.
One of them told her if [Mr D] still makes light of them, "YAKUZA", they will rape her.
She was going to tell about it to you by herself but she is crying and cannot talk and doesn't wanna go outside.

Could you imagine how she feels, do you think she can tell it to you on the phone? If you don't come or still not understand I will come to talk to you.

Evidence of Mr Aaron Thompson

[83] Mr Thompson made a witness statement in these proceedings, but was not required for cross-examination by Ms Nakamura. Mr Thompson is employed by Retail Staff as a Handwash Attendant working at Hoppy's Bermuda location.

[84] Mr Thompson stated that on 24 June 2020, he was sitting down in the drive area where the greeter's box is. He could hear from behind the dog washing area that there was an argument going on, and believed, only by the voices, that it was Ms Nakamura and Mr D.

[85] He noted that the argument did not go on for too long, but then he heard what he described as a 'thud' and then within a few seconds of hearing that noise he saw Mr D come around from behind the dog washing area. Mr Thompson said that his face looked a bit red, so he assumed that that the thud noise was him being hit.

[86] In the following days, Mr Thompson submitted that he saw Ms Nakamura at Southport and asked her what they were fighting about. He said that she seemed shocked that he had heard them fighting. Mr Thompson stated that she didn't really outline in detail what they were fighting about, but just that she was very angry at Mr D for something he had done.

[87] Mr Thompson said that when he next saw Mr D, he asked him what had happened that day behind the dog wash area as he had heard Ms Nakamura yelling at him. Mr Thompson noted that Mr D said that Ms Nakamura went off at him and then punched him because of something to do with Ms T.

Evidence of Mr Balhar Singh

[88] Mr Singh made a witness statement in these proceedings and was cross-examined during the hearing. He is employed by Retail Staff as a Site Manager working at Hoppy's Bermuda location.

[89] Mr Singh stated that on 24 June 2020, Mr D came to him whilst he was working in the departure sections at approximately 3:00pm to report that he had been in an incident with a fellow colleague, Ms Nakamura.

[90] Mr Singh was working hands-on at the time and didn't get the details of the incident, but noted that Mr D said he wanted to go home. Mr Singh told him to go home as he could see that Mr D was very upset and angry and he told him he was too embarrassed to stay at work.

[91] Mr Singh stated that he was very busy that day and did not follow up on the complaint. Ms Berg contacted him on 8 July 2020 to tell him that Mr D had lodged a further complaint with Head Office about being punched in the face at work.

[92] Mr Singh said that he confirmed to Ms Berg that Mr D did speak to him about the incident but that he had forgotten to follow up with the Respondent's management to investigate. Mr Singh said that he understood that this was a serious error on his part.

[93] Mr Singh considers Mr D to be a good employee and is an honest person. In Mr Singh's opinion, he would not make up something like this, as he would have no reason to lie about being assaulted by Ms Nakamura.

[94] Mr Singh stated that he has been the On-site Manager for Retail Staff at Hoppy's since 2017. All employees on-site must have a good level of written and verbal English to work at Hoppy's as there are many potential risks and hazards with fast moving parts, vehicles, water and electricity on-site. Mr Singh said that all signs are in English so staff must be able to speak and understand English well.

[95] Mr Singh stated that Ms Nakamura had been working as a casual employee on and off whilst studying since 2017. Ms Nakamura reported directly to him, and he considered that she had very good spoken, written and verbal English. Mr Singh noted that he had never had any issues with communicating with her and she had no issues with communication in English with management, customers and other employees.

[96] In oral evidence Mr Singh stated that at the time Mr D reported the incident, there was a big vacuum running and it was very noisy. He said that he deals daily with hundreds of customers. He acknowledges that he should have reported Mr D's allegation and he considers it to have been a grave error on his part not to have reported it.

[97] He stated that Ms Berg made contact with him once she learned of the incident. He understands the process to be that incidents need to be reported; they need to be emailed to the field manager at first instance.

[98] Relevant to where employees who smoke stand, he stated that customers are typically parked on the road near the dog wash as they are getting their dogs out of their car. He requests those employees who smoke to smoke near the tree.

[99] Mr Singh stated that he has found Ms Nakamura to be aggressive and rude to him.

[100] During the hearing, Mr Singh was shown the following text messages between himself and Ms Nakamura on 9 July 2020:

Ms Nakamura: Hello Balhar, I'm so sorry for couldn't work today. I have to go Brisbane to talk with Karlee tomorrow. So I cannot work tomorrow as well. I don't know yet if I can work at there or not. I'm so sorry about that.

Mr Singh: No problem Haruka. Everything will be fine. You are honest and straightforward person. Everything gonna be alright.
Kind regards
Balhar

Ms Nakamura: Thank you very much

[101] Regarding the above text message, he stated that he was sympathising with her. He considered that he was being neutral and was showing empathy. He said that it means if she was honest and straightforward she wouldn't have anything to worry about.

[102] I inquired if Mr Singh had received a written warning regarding his failure to notify the incident? He stated that he "thinks" he did. He knows that he was sent an email. He stated that he has to maintain a log of any aggressive or rude conversations.

[103] Following the hearing the Respondent forwarded to the Commission a copy of the warning letter issued to Mr Singh. It is dated 15 July 2020 and reads:

"Meeting outcome

Dear Balhar,

I refer to the matters discussed with you during our onsite meeting on the 14.07/2020 with regards to your failure to report an onsite incident on the 24/06/2020 between two staff members under your management.

As you are aware you have a requirement under Workplace Health and Safety to ensure a safe workplace and to also immediately report any workplace incident to Retail Staff for review and investigation.

During our meeting you acknowledged that not asking further questions at the time of the incident being reported to you was a significant lack of judgment and that if you had of (sic) asked further question at the time the worker presented to you in a distressed state you would of (sic) then had a better understanding of the significance of the incident and its need to be reported immediately.

As discussed we require you to again review the Retail Staff incident report form and supporting policies to ensure compliance moving forward.

Since our meeting I have carefully considered the responses you provided and it has been decided as discussed with yourself that you have been issued you (sic) with a Warning for breaches of Workplace Health and Safety and failure to follow procedures.

Please be advised that any further breaches of policies or procedures will result in further disciplinary action which may include possible termination of employment.

If you have any questions regarding this matter, please contact me to discuss further.

Yours sincerely,

Carla Verster"

Evidence of Ms Karlee Berg

[104] Ms Berg made a witness statement in these proceedings and was cross-examined during the hearing. She is employed by the Respondent as an Operations Manager.

[105] Ms Berg stated that on the evening of 7 July 2020, Mr D raised an allegation that he was assaulted by Ms Nakamura, who had punched him in the face. On 8 July 2020, she had a meeting with Mr D to discuss the incident.

[106] When Ms Berg asked Mr D how it happened, he said that he was on his break when Ms Nakamura started a conversation with him about a story she was trying to tell him the night prior through text message about her friend Ms T, Mr D's ex-girlfriend. Mr D told Ms Nakamura that he did not believe the story, which Mr D said resulted in Ms Nakamura getting aggressive towards him and led to her punching him in the face.

[107] Ms Berg's evidence is that Mr D reported that he had grabbed her arms so Ms Nakamura could not assault him further, and he got away as fast as he could.

[108] Ms Berg noted that Mr D stated that he was not really injured but it did hurt, and following the incident he reported it to his manager. The manager did not stop to hear the complaint. Ms Berg stated that Mr D reported that he went straight home and was in shock about how Ms Nakamura thought it was acceptable to punch him.

[109] Ms Berg stated that Mr D informed her that he felt that he needed to avoid Ms Nakamura. Ms Berg apologised to Mr D for the incident not having been followed up, as the incident should have immediately been investigated. She offered Mr D access to the Respondent's employee assistance programme (EAP), and asked him if he needed to see a doctor. She explained that she understood that a bit of time had passed since the incident, but asked if there were any injuries that needed to be seen, to which Mr D replied that there were no physical injuries from the assault.

[110] The following day, 8 July 2020, Ms Berg attempted to call Ms Nakamura a number of times throughout the morning but was unable to reach her. Ms Berg noted that she was aware Ms Nakamura was on duty at the time, so she rang Hoppy's management to ask if Ms Nakamura could be relieved for 15 minutes and to call her back.

[111] Ms Berg's evidence is that she did speak on the phone with Ms Nakamura, informing her that an allegation had been raised that she had punched an employee in the face on 24 June 2020, and a meeting was needed to discuss the allegations. Ms Berg said Ms Nakamura was advised she could bring a support person.

[112] Ms Berg's evidence is that during this phone conversation, Ms Nakamura admitted that she had punched Mr D in the face, and she also acknowledged that she knew it was wrong. When asked why she had punched him, Ms Nakamura replied that she was angry at him because he wouldn't believe the story she was telling him the night before about her friend, who was his ex-girlfriend, and that he was mean to her. Ms Nakamura said she had apologised and that it was over, to which Ms Berg replied that the incident must be investigated due to it being a serious breach of policy. Ms Berg noted that she said to Ms Nakamura that she would send an email confirming what had been discussed and that she would be required to attend another meeting.

[113] Ms Berg noted that Ms Nakamura did not reply to her email, so she sent her a text at 6:45pm on 8 July 2020 asking her to review the email and confirm if she was able to attend the meeting. She received a reply text, "yes."

[114] Ms Berg stated that her observations of Ms Nakamura over the previous two years is that she had very good written and spoken English, which was also a pre-requisite of employment for Hoppy's due to the duty to comply with workplace health and safety. Due to the serious allegations being raised for her to respond to, Ms Berg asked her if she would like the Respondent to supply an interpreter as English was her secondary language, to which Ms Nakamura declined. Ms Berg consulted with Ms Verster and they agreed that Ms Nakamura had a sound level of English.

[115] On the morning of 9 July 2020, Ms Berg met with Ms Nakamura in the presence of Ms Verster in the Hoppy's Bermuda office. Ms Berg's evidence is that she asked Ms Nakamura if she had read the email sent on 8 July 2020 and if she had any further information to add, to which she said that she had nothing further to add.

[116] Ms Berg's evidence is that Ms Nakamura expressly stated that she understood the purpose of the meeting. Ms Berg informed her that if she did not understand, Ms Nakamura should please stop her. When asked if she had anything further to add regarding the incident, Ms Nakamura said she did not.

[117] During the meeting, Ms Berg said to Ms Nakamura that the statement she had given was that she acknowledged that she did punch Mr D in the face because she was angry at him due to him not believing her story about her friend. Ms Berg's evidence is that Ms Nakamura acknowledged that was correct. Ms Berg said she again asked her if she understood this was a breach of policy, WHS and also the law, to which Ms Nakamura again said she knew that.

[118] When asked if she was sure she had nothing else to tell Ms Berg about the incident, Ms Nakamura stated that it was OK now because she had said sorry to Mr D, and she did not understand why it was still an issue. Ms Berg's evidence is that she again asked Ms Nakamura why she punched Mr D and she said because he didn't show honour to her friend and she was angry.

[119] It was Ms Berg's evidence that she asked Ms Nakamura to confirm how she hit him, to which she then put her hand into a fist and used a punching action to show what she had done and said that she pushed him then punched his face. She deliberately asked her, "*You hit him with your fist to his face?*" Ms Nakamura confirmed that she did. Ms Berg said that she advised Ms Nakamura that this was a very serious breach of her employment and that she needed to understand that Ms Berg would need to take the rest of the day to finalise the investigation and consider what she had said as to why she had punched Mr D.

[120] Ms Berg stated that Ms Nakamura asked if she would be fired, to which Ms Berg stated that there would be appropriate disciplinary action which may include termination of her employment, but that she needed to consider her responses before making a final decision. Ms Berg informed her that she would not be able to return to work until an outcome of the investigation had been reached. When given the opportunity to add anything else, Ms Nakamura declined.

[121] Following the meeting, Ms Berg contacted the Respondent's head office to speak with the HR Manager. She advised her of all the steps that had been taken and advised that Ms Nakamura had admitted that she punched her colleague in the face to herself and Ms Verster who also attended the meeting.

[122] Ms Berg was requested to send all relevant material to HR for review. Her evidence is that she was telephoned and asked if Ms Nakamura had shown any remorse at all for her actions. Ms Berg replied that in her opinion, Ms Nakamura had shown no remorse and seemed to think it was OK to punch Mr D. Ms Berg told HR that she didn't even seem concerned at what she had done and said she thought because she had apologised to Mr D that the issue should be dropped now.

[123] HR advised her that based on all the evidence that the appropriate action following this serious breach in her employment was to terminate her casual employment for gross misconduct for behaviour that is dangerous and illegal.

[124] Later that day, Mr Berg contacted Ms Nakamura via telephone and told her that her employment was being terminated due to the seriousness of the incident, which was followed by an emailed termination letter.

[125] Ms Berg stated that on the following day, Ms Nakamura posted on the Band page the message at [15]. Ms Berg said she asked that the Hoppy's manager remove the post as soon as possible and remove her from the group as she was no longer an employee. At least eight other employees all saw the post before management could take it down. It was Ms Berg's evidence that this act caused further damage to the Respondent's relationship with their client, Hoppy's.

[126] In cross-examination, Ms Berg stated that the client, Hoppy's, did not interfere with the decision made by the Respondent.

[127] Ms Berg stated that at no time during the investigation did Ms Nakamura suggest that the incident didn't occur at work or was after work.

Evidence of Ms Cara Verster

[128] Ms Verster made a witness statement in these proceedings and was not required for cross-examination. She is employed by the Respondent as an Account Manager.

[129] On 8 July 2020, she was asked by Ms Berg, her manager to attend a meeting at 8:30am on site at Hoppy's Bermuda with Ms Nakamura on 9 July 2020. The meeting was to investigate the claim that Mr D had made that he had been assaulted by Ms Nakamura in the past week while at work.

[130] Ms Verster said that she presented to the site and once Ms Nakamura arrived, they went into the onsite office and sat down. Ms Verster noted that Ms Berg had asked Ms Nakamura if she had read the email she had sent her and stated that they needed to discuss that with her further. Ms Berg asked her if she had anything else she needed to tell her about the incident. Ms Verster said that Ms Nakamura plainly said "no."

[131] Ms Verster stated that Ms Berg then confirmed with Ms Nakamura that the day earlier, by telephone, Ms Nakamura had said that she punched Mr D and she did this because she was angry at him, to which Ms Nakamura agreed. Ms Berg asked her to confirm how she hit him, and Ms Nakamura said that it was a push that then went into a punch and she made body

movements to show what she meant by closing her fist and pushing it forward in a punching motion.

[132] Ms Verster noted that Ms Berg again asked if she had punched Mr D in the face, because he had said mean words about her friend, to which Ms Nakamura very calmly replied, “yes.” Ms Verster’s evidence is that Ms Berg then asked if Ms Nakamura understood that physical contact, like a punch, is not allowed at the workplace, to which she answered yes, she knew that it was not allowed, but that she had to punch him because her friend’s feelings were hurt.

[133] Ms Verster’s evidence is that Ms Berg said that they would take everything that she had said about the incident onboard and let her know if they had any further questions, and get back to her as soon as possible, but that what she did to Mr D was very serious and would require further follow up. Ms Berg informed her that she was stood down, and not required back at work until the investigation was concluded and a final decision was made. Ms Nakamura did not ask for any further information so Ms Berg again confirmed that she understood that a possible outcome of the investigation would be termination and she said she understood.

[134] Ms Verster said that she had spoken to Ms Nakamura prior to this meeting in person and on the telephone. She said that they had discussed many other matters during the course of her employment, and she considered that she has always had a clear understanding of what she was saying to her and answered in a correct and applicable manner. In fact, when Ms Berg called Ms T on one occasion, Ms T had requested that Ms Verster speak to Ms Nakamura, as her English was much better, and she is very good at interpreting for others.

[135] Ms Verster stated that she had been the Account Manager at Hoppy’s for around three years, and at no time was she ever concerned or worried that Ms Nakamura’s English or understanding of company policy or procedures was questionable as to do her job she needs to communicate with co-workers and customers in English every day.

Submissions of Ms Nakamura

[136] Ms Nakamura submitted that she was unfairly dismissed on 9 July 2020. She submitted that there was no valid reason for the termination relating to her conduct (allegedly punching Mr D), as she had only engaged in a minor and brief argument with Mr D, which included a push and throwing a punch without hitting him. She submitted that the scale of the incident and due consideration to the background of the incident did not justify her dismissal.

[137] It was submitted that she had no prior history of such incidents and there was no risk to the health or safety of Mr D or other employees. Ms Nakamura submitted that she continued working at the Respondent’s workplace for at least two weeks after the incident and met with Mr D and other employees on several occasions without any problems.

[138] Ms Nakamura submitted that the incident was not a workplace incident as it was outside working hours, outside the workplace and related to external matters involving personal intimate relationship matters, which did not relate to work.

[139] Ms Nakamura noted that the Respondent failed to follow a proper procedure and notification process in relation to her dismissal, including but not limited to providing warnings to her that the outcome of the investigation could result in her dismissal.

[140] Relevant to having a reasonable opportunity to respond to the allegations, Ms Nakamura submitted that she was only briefly interviewed (about 5 minutes on 8 July 2020) and dismissed on 9 July 2020, within 24 hours of the brief meeting.

[141] Ms Nakamura submitted that the Respondent did not stress the need for a support person being present at the meeting to assist at any discussions in relation to the dismissal considering Ms Nakamura's language requirements, and that she did not exactly understand the nature of the investigation as to whether it was in relation to her incident or that of her friend's sexual assault incident.

[142] Ms Nakamura stated that the Respondent did not conduct a proper and fair investigation including but not limited to:

- Failing to properly understand the background and nature of the incident;
- Interviewing the complainant only on telephone and not in person;
- Failing to consult with the Site Manager (Mr Singh) in relation to the incident and the investigation process; and
- Failing to consider Mr D's friendship with Ms Nakamura and other external matters including Mr D's intimate relationship with Ms T.

[143] Ms Nakamura submitted that she had consistently maintained that the incident was a brief encounter with Mr D, in which she threw a punch at Mr D without hitting his face.

[144] It was submitted that Mr D had been her friend since 2017, and on the day of the incident she was provoked by Mr D as he did not believe her friend's sexual assault account. Ms Nakamura submitted that this was important for her, as Mr D was Ms T's ex-boyfriend, and because Mr D was the only person who could assist Ms T in her difficult circumstances. Ms Nakamura submitted that she only pushed Mr D away but when he grabbed her arms, she threw a punch at him, which did not hit him.

[145] Ms Nakamura noted that the incident occurred outside her working hours and outside the workplace. Ms Nakamura specifically submitted that she was standing on the street parking lot and that Mr D was standing on the council's grass kerb.

[146] Ms Nakamura submitted that in cross-examination, Mr D admitted that he was standing on the grass kerb, rather than the artificial grass beside the fence as the Respondent had alleged, and that the main point of contention was whether Ms Nakamura's punch had landed on Mr D's face.

[147] Ms Nakamura submitted that all parties had indicated that no one had witnessed the incident, and there was no CCTV footage of the incident. It was put, therefore, that it came down to whose account should be believed, Mr D's or Ms Nakamura's?

[148] Ms Nakamura submitted that Mr D is not a credible witness on the basis that in his written statement to the Respondent on 8 July 2020 he had informed the Respondent that he had “completely avoided” Ms Nakamura, however in cross-examination it was clear that he had met with her outside of work (namely, inside her car on the way to the IGA).

[149] Ms Nakamura submitted that it was evident that Ms Berg was the main person engaged in the investigation resulting in her dismissal. It was submitted that Ms Berg did not follow a substantive and fair procedure to conduct her investigation considering that:

- She concluded her investigation by only calling Ms Nakamura on 7 July 2020, attending a brief meeting with Ms Nakamura on 8 July 2020, sending a follow up email and later sending the dismissal letter on 9 July 2020;
- She did not prompt Ms Nakamura at any time, whether orally or in writing, that the investigation may result in the termination of employment;
- She did not interview Mr D in person, nor did she consult with Mr Singh, the Site Manager, in relation to the incident; and
- She assisted Mr D with writing his complaint.

[150] Ms Nakamura submitted that in cross-examination, Ms Berg admitted that she did not rely on any incident report or conduct any consultation with the front staff members including the Site Manager. Ms Nakamura further submitted that Ms Berg further admitted that she made the decision entirely based on her opinion.

[151] Ms Nakamura noted that given the scale of the business, the gravity of the allegation and the grave consequences of dismissal for an employee’s livelihood, it was unfair for the Respondent to dismiss her simply based on Ms Berg’s mere opinion. Ms Nakamura said that this was particularly concerning considering that Mr Singh admitted in cross-examination that he believed Ms Nakamura’s statement in relation to the incident.

[152] It was submitted by Ms Nakamura that she was kept in the dark and never informed about the possible consequences of the investigation. Ms Nakamura stated that it was evident from Mr Singh’s text message to her hours before the dismissal that the Respondent, through Mr Singh was still representing to her that “everything will be fine”.

[153] It was submitted by Ms Nakamura that it would be difficult to rely upon Ms Berg’s evidence given she had assisted Mr D in his statement. Ms Nakamura put forward that this clearly indicated that Ms Berg may have pursued the investigation with a predetermined decision rather than an understanding of the nature of the incident.

[154] Ms Nakamura further noted that Mr Singh admitted that he was not consulted at all in the investigation, even though he was the Site Manager who managed both her and Mr D. Further Mr Singh also admitted in cross-examination that although Mr D had come to him on 24 June 2020 wanting to go home, he did not totally understand the complaint. Ms Nakamura submitted that this cast doubt as to whether Mr D had even initially made a complaint about the incident.

Submissions as to Remedy

[155] Ms Nakamura seeks the following remedy:

- (a) Reinstatement to her prior position at the Respondent's business, noting that Mr D has been moved to another site; and
- (b) An order of back pay up to the date of reinstatement; or
- (c) Compensation in lieu of reinstatement for the full period allowed pursuant to the Act. Detailed calculations were provided in submissions.

[156] Ms Nakamura noted that in addition to the above loss of earnings' compensation, she also claimed further reasonable monetary compensation for the stress, humiliation and inconvenience caused by the unfair dismissal. It should be noted for the benefit of Ms Nakamura's legal representative that such matters are specifically excluded pursuant to s.392(4) of the Act which states:

“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.”

[157] Further, Ms Nakamura submitted that pursuant to s.611 of the Act she requested the Commission to make orders as to her legal costs.

Submissions of the Respondent

[158] The Respondent submitted the following chronology of events:

Date	Timeline of Events
24 June 2020	<p>Ms Nakamura finished work at 3pm and went over to the dog wash area at Hoppy's where Mr D was on his 15 min break having a cigarette. Ms Nakamura approached [Mr D] very angry.</p> <p>Both employees were in full Hoppy's uniform, and were standing in full view of Hoppy's café at the front of the premises.</p> <p>Ms Nakamura approached Mr D and punched him in the face. Mr D grabbed Ms Nakamura's hands to stop her from punching him again and he went and reported the incident to his supervisor.</p> <p>The Supervisor at work failed to follow up incident.</p>

- 25 June 2020 Ms Nakamura sent Mr D a threatening message on the company communications platform “Band” and told him that if he didn’t believe her story about her friend being sexually assaulted, that the gang would be seeing him and that her friend would kill herself if he didn’t believe her. In the message, Ms Nakamura admitted she punched Mr D because she was disappointed in his behaviour.
- 25 June 2020 – 4 July 2020 Ms Nakamura continued to harass Mr D over the company messaging system, telling him he had to believe the story or the gang would be involved and her friend would be sexually assaulted again.
- 4 July 2020 Ms Nakamura posted on Facebook about Mr D to all her friends. The message said that it was Mr D’s fault for her friend attempting suicide. Mr D felt upset, harassed and humiliated about the message.
- 7 July 2020 Mr D felt so upset, harassed and humiliated about the message that he reported it to his manager at Hoppy’s to find out why her punching him had not been actioned.
- Mr D gave all the harassing messages over to the manager.
- The Manager of Hoppy’s called Karlee Berg, Retail Staff Manager, to advise of the punching incident at work and all harassing messages.
- Retail Staff immediately commenced investigation
- 8 July 2020 Retail Staff interviewed Mr D
- Retail Staff interviewed Supervisor, Balhar Singh, to confirm incident occurred and why he didn’t report it to Retail staff.
- Retail staff interviewed four other staff onsite that day and viewed CCTV footage.
- Retail Staff called Ms Nakamura to advise of the allegations and requested her to attend interview the following day. In the phone meeting Ms Nakamura confessed she punched Mr D at the workplace. Ms Berg asked why she punched him, Ms Nakamura responded “because he deserved it”. Ms Nakamura was advised of serious breach and advised she may bring support person and interpreter to the meeting next day. Ms Nakamura advised she did not require either.
- Following phone meeting Ms Berg sent email to Ms Nakamura

confirming conversation and details of meeting tomorrow. Ms Nakamura does not make any changes and does not advise of any errors in email statement.

Ms Berg and Cara Verster had a meeting with Ms Nakamura. Ms Nakamura chose not to bring a support person.

In this meeting Ms Nakamura was advised again of allegations and her response was the same as the day before. She said to Ms Berg and Ms Verster that she punched him for justice for her friend because he did not believe that she had been sexually assaulted.

Ms Nakamura was advised of the serious breach and that Retail Staff considered that termination may be appropriate action. Ms Nakamura is told to cease work immediately pending decision. Ms Nakamura is advised if she had any further info at all to provide, she should do so.

- | | |
|--------------|--|
| 9 July 2020 | No further information was provided by Ms Nakamura that day. At 4.30pm Retail Staff terminated Ms Nakamura's employment over the phone, and provided confirmation in writing. |
| 10 July 2020 | The day following her termination, Ms Nakamura messaged eight staff on the company chat platform "Band" that she hit Mr D and was fired. She said she hit him because he insulted her friend. She said she knew if she hit him, she would be fired. She said she couldn't forgive his behaviour against her friends. |
| 14 July 2020 | After the investigation was finalised, Ms Verster of Retail Staff had a meeting with Bahlar Singh for meeting to advise of WHS breaches and failure to follow procedure. Corrective actions were put in place. |
| 15 July 2020 | Mr Balhar Singh was issued warning for his actions in not following up and reporting a workplace incident. |

[159] The Respondent submitted that in Ms Nakamura's application she alleged that she did not hit the employee. The Respondent further submitted that this was false, and that the investigation proved thorough evidence that she hit Mr D and continued to harass him for two weeks after she punched him.

[160] It was submitted that Ms Nakamura admitted to punching Mr D in two separate messages on the company communication platform, Band, and confessed to two Retail Staff Managers during her interviews that she punched Mr D.

[161] The Respondent noted that Ms Nakamura punched Mr D because she was angry that he did not believe a story her friend told her about a sexual assault they said happened.

[162] The Respondent noted that Ms Nakamura alleged that the incident didn't happen at work, which it submits is incorrect. Ms Nakamura was asked in her interviews if the location that Mr D had described was correct. Ms Nakamura did not dispute the location of the incident. The incident occurred at the workplace near the dog washing section of Hoppy's venue whilst Mr D was on a 15-minute rest break. It was submitted that the location where the Respondent maintains he was punched is in full view of the Hoppy's outdoor café. The location was described to Ms Nakamura that it was directly behind the dog washing area where all staff regularly smoked in their breaks.

[163] The Respondent submitted that the assault on Mr D was unprovoked. Ms Nakamura was angry when she went over to the employee at work and started yelling at him. Ms Nakamura had told him about a story about her friend the evening before, and he had said he told her that it sounded like fiction. She then reacted by finding him at work and shoving him over and then punched him closed fist in the face.

[164] In Ms Nakamura's interview with two Retail Staff Managers, the Respondent submitted that Ms Nakamura stated that the reason she hit him was because he was rude to her friend and she got very angry because he didn't believe her story and was damaging her heart because he didn't care about her.

[165] The Respondent noted that the Retail Staff Manager asked Ms Nakamura if she understood that there was a serious breach in her employment agreement and Mr D could have been very hurt. Ms Nakamura allegedly replied 'yes', but just said he didn't believe her about her friend, which was a true story in her opinion. Ms Nakamura did not dispute any of the facts when put to her in writing and in person prior to her termination.

[166] The Respondent submitted that Retail Staff were incredibly lucky that the incident didn't turn more sinister, and that thankfully the employee who was assaulted did not retaliate and instead, got himself out of the situation safely and reported the incident to his supervisor and then went home.

[167] The Respondent suggested that the complainant was harassed by Ms Nakamura and humiliated and embarrassed by the situation and just wanted the investigation to be finalised and to move on. He reported it correctly to his supervisor. Unfortunately, the supervisor on site did not follow process and did not initially report the incident. The employee escalated the complaint to the Manager on 7 July 2020 after nothing had been done and he had seen a Facebook post from Ms Nakamura on 4 July 2020 accusing him of being responsible for her friend's attempted suicide.

[168] The Respondent submitted that unfortunately, due to the actions of the supervisor, Retail Staff could only follow up and investigate once it became aware of the incident. Retail Staff determined that the time passed, being two weeks, and the supervisor's lack of responsibility to take action did not excuse Ms Nakamura's behaviour. In the two weeks following the incident Ms Nakamura had time to reflect on her actions but when she was interviewed on 8 July 2020 and 9 July 2020, she did not show any remorse at all for her actions and just considered the case closed. She seemed to think her actions were somehow justified because of a personal issue at work with her colleague and her friend.

[169] The Respondent noted that Retail Staff simply could not allow an employee in the workplace who thought it was acceptable to incite violence on another employee. If the

employee had been injured as a result of the assault, Retail Staff would have had a sizable workers compensation claim to contend with.

Submissions as to whether s.387 provisions have been met

(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)

[170] The Respondent submitted that fighting in the workplace was a valid reason for termination unless extenuating circumstances exist.¹ In this application, Ms Nakamura sought to exclude her behaviour as a valid reason for termination on the basis that:

- It happened in a short proximate to the boundary line of the workplace;
- She had finished her shift; and
- Mr D was on a break at the time of the assault.

[171] The Respondent submitted that in *Rose v Telstra* [1998] AILR 45, the employee, Mr Rose, was involved in a fight with another employee while off-duty on a work trip funded by his employer. It was held that Mr Rose's conduct lacked the requisite connection to his employment because the incident took place outside of working hours, the employee was not wearing his work uniform and was not "on-call" at the relevant time, the incident took place in a hotel room (not a public place) and accordingly there was no evidence that the reputation of the employer had been tarnished by what occurred.

[172] The Respondent submitted that the matter presently before the Commission could be distinguished on account of both employees wearing work uniforms at the time of the incident, they were in a public space immediately outside the workplace, they were in full view of not only other employees but customers of the car wash, and Mr D was still "at work" notwithstanding he was on a break. Had Mr D been injured then the Respondent would have been liable for workers compensation payments.

[173] The Respondent further submitted that Ms Nakamura then went on to use the Respondent's online communication system, Band, to tell other employees that she punched Mr D and she was expecting to be dismissed for it. Given Ms Nakamura's conduct, it could hardly be said that this was a "private matter."

[174] The Respondent submitted that in *Drake v. BHP Coal* [2019] FWC 7444 a dismissal was upheld as fair in circumstances involving a fight outside of work hours and in a public place. Deputy President Asbury held:

"[116] Where an employee physically assaults a work colleague in a public place in the presence of other work colleagues, the assault may be conduct that is likely to cause serious damage to the relationship between the employer and the employee."

[175] The Respondent further made reference to *Hughes v. Momentum Wealth* [2016] FWC 9072, which also involved a fight outside of work and outside of work premises. The dismissal was held to be fair as there was a sufficient connection to employment. Particularly:

“[79] The conduct of Mr Hughes on Friday, 1 July 2016 occurred outside of normal working hours. However, in the circumstances Mr Hughes’ conduct, about which Momentum complains, did have a relevant connection with the employment relationship.”

[176] The Respondent submitted that accordingly, this was a case where there was a sufficient connection of the admitted conduct to the employment relationship. Particularly:

- Ms Nakamura’s conduct was a serious breach of policies and workplace health and safety and created an immediate risk to the health and safety of Mr D;
- There was a risk of reputational harm given the assault happened in a public place in potential view of other employees and customers. Furthermore, Ms Nakamura’s conduct risked harm to the Respondent’s reputation with its clients;
- There was the reputational harm of Ms Nakamura using the Respondent’s online communication system, Band, to communicate the fact that she had punched a co-worker;
- Ms Nakamura’s conduct was directly inconsistent with her obligations of trust and confidence to the Respondent; and
- There was significant financial risk of a worker’s compensation claim if Mr D had been injured due to the incident.

(b) whether the person was notified of that reason

[177] The Respondent submitted that Ms Nakamura was notified prior to dismissal verbally and in writing.

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

[178] The Respondent submitted that Ms Nakamura was provided opportunity in two separate meetings and in writing to respond to the allegations.

(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

[179] The Respondent submitted that Ms Nakamura was offered support person verbally and in writing via email.

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

[180] The Respondent submitted that Ms Nakamura dismissal was related to conduct.

(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

[181] The Respondent submitted the size of Retail Staff had no impact on procedures.

(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

[182] The Respondent submitted that Retail Staff had adequate human resources to investigate the incident. Although the Supervisor initially did not action the investigation, this was a mere blemish in the process and Ms Nakamura was still afforded procedural fairness.

Submissions as to s.392 remedies

[183] The Respondent made submissions regarding remedies in s.392. The Respondent submitted that:

- Ms Nakamura's application should be dismissed as termination was fair;
- Reinstatement would not be appropriate as Ms Nakamura's actions have destroyed the relationship of trust and confidence between the parties;
- If the Commission rules that dismissal was unfair, any compensation should be limited to the knowledge that Ms Nakamura found further work three weeks later;
- Maximum compensation should be three weeks average wages at \$1500 gross (average weekly earnings of \$500 per week);
- Taking into consideration to the extent that Ms Nakamura admitted misconduct directly contributed to her dismissal, any amount awarded should be reduced by 90%.

Submissions of Ms Nakamura in reply

[184] In response to the Respondent's final written submissions, Ms Nakamura submitted that they were a mere repetition of the Respondent's original response in that:

- It completely ignored the testimonies provided by the parties during the hearing on 6 October 2020 and 12 October 2020. The Respondent did not provide any response to the evidence provided by the witnesses and rather continued making various misstatements;
- Painted a picture that Ms Nakamura was continuously harassing Mr D but ignored the fact the she and Mr D were still meeting each other and further that he admitted that he did not think Ms Nakamura had any bad intentions in pursuing him;
- It did not respond to Ms Nakamura's submissions at all. It completely ignored the facts and circumstances referred to therein with respect to the witness testimonies;
- The submissions clearly contained elements of bias against Ms Nakamura; and

- It largely related to the circumstances after the dismissal.

[185] In relation to the time of incident, Ms Nakamura noted both parties gave evidence that no one was around when the incident took place outside the workplace. Further, it was only a minor encounter which ended quickly without anybody noticing it. Therefore, Ms Nakamura submitted that she rejected the statement that this incident had detrimentally affected reputation of the business.

[186] Ms Nakamura submitted that the Respondent appeared to have missed the evidence provided by the complainant that at the time of the incident he was standing on the council's grass kerb which is outside the Respondent's workplace.

[187] Ms Nakamura also submitted that the relevant paragraph 116 quoted from *Drake v. BHP Coal* [2019] FWC 7444 did not apply to her circumstances as the incident took place outside the workplace when no one was around including the work colleagues. Therefore, the incident could not have resulted in any detriment to the Respondent. It was submitted that this further indicated that the Respondent had taken the incident out of context by looking at the mere allegation of 'punching' and not considering the extenuating circumstances as referred to in final written submissions (a requirement Ms Nakamura said is to be followed pursuant to *The AWU-FIME Amalgamated Union v Queensland Alumina Limited*, as the Respondent has also referred to).

[188] Ms Nakamura noted that the circumstances of *Hughes v. Momentum Wealth* [2016] FWC 9072 (*Hughes*) did not apply to her case. In fact, that this was also another authority indicating that she was unfairly dismissed as the Respondent failed to issue any warning to her before the dismissal. Ms Nakamura said that in *Hughes*, the applicant had been given a final verbal warning for his aggressive behaviour in the workplace after he had head-butted a staff member. He was also expressly advised that any further instances of aggression would result in his dismissal. However, the applicant yet again engaged in another incident at a social club function and also showed aggressive behaviour towards his manager. Further, he had failed to leave the premises when his manager had told him to do so. Hence, the circumstances of this case were completely different to that of the current matter.

[189] Ms Nakamura submitted that although she and Mr D were wearing the business uniforms, she was wearing her jumper at the time due to cold weather. Therefore, nobody could have noticed that she was the Respondent's employee. Further, it was submitted that all parties confirmed that nobody had witnessed the incident including the work colleagues and members of the public. Therefore, considering such circumstances, this incident could not have created any detriment to the Respondent's business reputation.

[190] Ms Nakamura further submitted that it was incorrect that she had not been remorseful. Ms Nakamura submitted that she testified at the hearing that she was remorseful and had apologised to Mr D a few times.

[191] Ms Nakamura submitted she was provoked by Mr D, and that it was very clear from the testimonies provided by the parties and the witnesses that she was pursuing Mr D for a good cause, being Ms T's health. Ms Nakamura said that she could not have tried to punch him for no reason and the Respondent had not properly investigated this part of the incident, nor it did in relation to Ms T's alleged sexual assault.

[192] Ms Nakamura noted that the Respondent's lack of proper investigation into Ms T's incident appear to have contributed to the escalation of the incident between herself and Mr D.

Consideration

[193] I will address each of the criteria set out in s.387 of the Act separately.

s.387(a) - Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)

[194] The Respondent must have a valid reason for dismissing Ms Nakamura, although it need not be the reason given to the applicant at the time of the dismissal.² The reasons should be "sound, defensible and well founded" and should not be "capricious, fanciful, spiteful or prejudiced."³

[195] To determine if there was a valid reason for Ms Nakamura's dismissal relating to her conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by Ms Nakamura actually occurred.⁴ It is insufficient for the Respondent to establish that it held a reasonable belief that Ms Nakamura's dismissal was for a valid reason. The Commission must make a finding as to whether Ms Nakamura engaged in the conduct alleged against her on the evidence before it.⁵

[196] Ms Nakamura was dismissed following findings made by Ms Berg that she had punched Mr D in the face while Mr D was in the vicinity of his workplace, and that of Ms Nakamura's, during Mr D's smoke break. Part of the reason for the dismissal included a finding that both Mr D and Ms Nakamura were in work uniforms, and could be seen by the public and potentially by customers in the café.

[197] On the Respondent's submissions, the Respondent had before it all of the messages sent by Ms Nakamura to Mr D between the period of the incident and the dismissal, but did not question Ms Nakamura about the messages. There was no mention of the messages sent by Ms Nakamura to Mr D as forming part of the reason for the dismissal.

Where did the incident occur?

[198] I accept Mr D's evidence that when he commenced his cigarette break, he was standing in the spot he usually stood; on or near the artificial grass and a distance of one or more metres from the tree. From the picture before the Commission admitted into evidence as an exhibit, there is a very thin strip of concrete forming a ledge between the property of the business and what is then a strip of grass known as the nature strip. Essentially, at the top of the picture, moving to the bottom of the picture is:

- (a) the fenced-in dog wash;
- (b) a strip of artificial turf (with the tree to the right of it);
- (c) a very thin strip of concrete which I estimate would only be around 10cm wide, and not a pavement;
- (d) the nature strip of grass, several metres in width;
- (e) the concrete kerb and guttering; and
- (f) the road.

[199] Ms Nakamura's account has her standing on the road, and Mr D on the nature strip. This would, of course, put her at a height disadvantage by the height of the concrete kerb.

[200] Mr D's account has him originally near the artificial grass, but by the time he is having a conversation with Ms Nakamura, he has moved a short distance to the other side of the thin strip of concrete such that he is on the nature strip, but by his account, close to the tree. His markings on the exhibit have Ms Nakamura placed close to him, halfway on the nature strip between the thin strip of concrete and the kerb.

[201] Mr D gave uncontested evidence that when Ms Nakamura punched him in the face he stumbled back and over the roots of the tree; he saved himself from falling. I do not accept that if he was standing where Ms Nakamura alleged he was standing he would have come into contact with the roots of the tree. To do so would have required him to stumble approximately six metres, which I do not accept occurred.

[202] It was put to Mr D in cross-examination that if he was standing where he claimed he was standing he would have come into contact with the fence. He denied that would occur, and I accept his evidence; he was too far from the fence to have come into contact with it.

[203] Where Mr D was on the nature strip when the discussion with Ms Nakamura commenced, he was not on work property. He was only a short distance from work property; I estimate it to be one-to-two metres. After having been struck by Ms Nakamura, I accept that he stumbled back on to work property after leaving the nature strip and stepping backwards towards the tree. I find that Ms Nakamura's actions forced Mr D from the nature strip onto work property. He then held her arms while on work property to restrain her from striking again.

Did Ms Nakamura punch Mr D in the face?

[204] Mr D's evidence is that after he was punched in the face by Ms Nakamura, he grabbed her by the hands and said to her words to the effect, "*Why would you do this, why would you do this at work?*"

[205] He then walked over the grass, returning to the car wash and saw Mr Thompson and reported having been hit by Ms Nakamura. He then informed Mr Singh and requested permission to leave work as he was angry and embarrassed.

[206] I have had regard to the following in determining if Ms Nakamura punched Mr D in the face:

- (a) Mr D's initial reaction and question to her, "*Why would you do this, why would you do this at work?*";
- (b) Mr D's reporting of the incident to Mr Thompson;
- (c) Mr D's reporting of the incident to Mr Singh;
- (d) Ms Nogiwa's evidence that Mr D came back covering his cheek with his hand and stated that Ms Nakamura had punched him, despite her not seeing any injury, swelling or redness;
- (e) Mr D's embarrassment and anger, requiring him to leave work;
- (f) Ms Nakamura's message to him the following day where she wrote:

“Why I punched you, just I want? No, I disappointed your behaviour against [Ms T]. You can call me fucking men, bich, whatever. But I don’t allow if you don’t believe her, don’t think to protect her yourself from them.”;

- (g) The questioning of Ms Nakamura by Ms Berg in the presence of Ms Verster on 9 July 2020 where Ms Nakamura was repeatedly asked if she punched Mr D, and then demonstrated the actions of using a closed fist to punch; and
- (h) The message Ms Nakamura sent her former work colleagues on Band on 10 July 2020, one day following her dismissal where she made the following admissions:

“It was of course my fault that I hit him. I knew if I hit him, I will be fired at work. I was ready for that. For protecting her emotions. The company decided to fire me. I accept this reality, but if I have any chance, please think about why I hit him. I think it was the justice for my friend. I put her feelings in my fist. Why Infinite violence is allowed, not a single punch. I apologised him but he is nothing to say against her.”

[207] I have not given any weight to the conversation Ms Berg had with Ms Nakamura by telephone on 8 July 2020 on account of the potential for some of it to have been misunderstood given that English is Ms Nakamura’s second language. I do not consider she would have had any difficulty in the meeting of 9 July 2020 understanding what was being discussed, and I accept that she freely volunteered her physical actions of striking Mr D in the face on 9 July 2020.

[208] Further, I have not given any weight to the email sent by Ms Berg to Ms Nakamura on 8 July 2020 where Ms Berg confirms the discussion they held that day. I do not doubt that Ms Berg believes it to be an accurate reflection of the telephone discussion, however there is some doubt as to Ms Nakamura’s comprehension of the conversation for me to find that it’s an accurate account.

[209] The first time the Respondent learned that Ms Nakamura denied punching Mr D, and instead stated that she only attempted to punch him was in her Form F2 application to the Commission.

[210] I do not accept Ms Nakamura’s evidence that her post on 10 July 2020 on Band was incorrectly translated by google translate. The venom and clear statements made by her are a cold reality that she did punch Mr D and she wanted her former colleagues to know why.

[211] I have no doubt whatsoever that Ms Nakamura punched Mr D in the face. Her reasons for doing so are clear in her evidence and submissions; they are astonishing and unacceptable. Mr D was not responsible for any sexual assault alleged to have occurred to Ms T. He encouraged Ms T and Ms Nakamura to report it to the police. Within 24 hours of the alleged incident, when he cast some doubt on the matter, having heard for a number of weeks prior that this was allegedly happening each Tuesday in the toilets at work by a gang, Ms Nakamura punched him because she was dissatisfied with his response which she considered to be uncaring.

[212] While Ms Nakamura had finished her shift, and I accept she was standing on the nature strip, and if I am correct she now alleges that she was wearing a jumper over her work

shirt, Mr D was dressed in his work uniform, having a short break before he returned to work. As I have indicated, some of the assault on him occurred on work property when he stumbled back and tripped over the tree roots.

[213] A question arises of whether there was a relevant nexus between Ms Nakamura's conduct outside of her working hours and her employment with the Respondent.

[214] In *Appellant v Respondent*,⁶ a Full Bench of the Australian Industrial Relations Commission (as this Commission was then known) stated, "...it is only in exceptional circumstances that an employer has a right to extend any supervision over the private activities of employees."⁷

[215] In *Rose v Telstra Corporation Limited*⁸ (*Rose*), then Vice President Ross of the Australian Industrial Relations Commission considered previous decisions regarding out of hours conduct and distilled several indicia of when out of hours conduct may be a valid reason for dismissal, as follows:⁹

"It is clear in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited;

- The conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and the employee; or
- The conduct damages the employer's interests; or
- The conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee."

[216] I am satisfied that viewed objectively, Ms Nakamura's action in punching Mr D in the face was likely to cause serious damage to the relationship between the employer and the employee. Faced with an employee who Ms Berg considered readily admitted her conduct constituting assault of a colleague, and Ms Nakamura's dismissal of the matter because she had already apologised to Mr D and worked some shifts with him since the incident, I am satisfied that the Respondent was concerned with the risk of further incidents and the proper protection of its employees.

[217] The Respondent is correct; if Ms Nakamura had injured Mr D, he would very likely have received workers compensation for his injuries.

[218] I am not satisfied that Ms Nakamura's conduct had the potential to or did damage the Respondent's interests, as it seems that nobody else saw the incident, nor was the client, Hoppy's involved in the matter.

[219] I am satisfied that Ms Nakamura's conduct is incompatible with the employee's duty as an employee. Employees cannot simply go around striking their colleagues when they are angry with the position taken by the colleague, whether it is a value-based matter or not. Mr D was entitled to come to work and be safe and protected. Instead, he was punched in the face by a colleague who had just finished her shift because of the offence he seemingly caused. I do not accept Ms Nakamura's submissions that she was provoked by Mr D. Nor do I accept that this was a private, intimate matter between friends. Ms Nakamura was the one

who approached Mr D, while he was still working, albeit on a break. She did not do so after they had both finished work.

[220] I have had regard for the decision in *Tenix Defence Systems Pty Ltd v Fearnley*.¹⁰ In the decision the Full Bench reviewed earlier authorities discussing incidents of fighting and said:

“[25] We think these authorities support the view that in determining whether there is a valid a reason for a termination of employment arising from a fight in the workplace the Commission should have regard to all of the circumstances in which the fight occurred including, but not limited to:

- whether the terminated employee was provoked and whether he or she was acting in self defence;
- the employer's need to establish and retain discipline amongst its employees; and
- the service and work record of the employee concerned.”

[221] I am not satisfied that Ms Nakamura was provoked, nor was she acting in self-defence. I consider it entirely appropriate for the Respondent to establish and retain discipline amongst its employees. I have had regard to Ms Nakamura’s service and good work record.

[222] Having regard to all the above considerations, I am satisfied that there was a valid reason for the dismissal.

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

[223] It is not disputed by either party that Ms Nakamura was informed of the reason for her dismissal in the letter dated 9 July 2020.

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

[224] Ms Nakamura submitted that she was briefly interviewed on 8 July 2020 and then again on 9 July 2020. I am satisfied that the allegation of punching Mr D was put to Ms Nakamura and she afforded all opportunity to respond to the allegation.

[225] I am satisfied that Ms Nakamura’s English skills extend to being able to comprehend what was put to her at the meeting of 9 July 2020 and for her to competently answer.

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

[226] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[227] There is no positive obligation on an employer to offer an employee the opportunity to have a support person. The Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at [1542] states the following:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”

[228] I accept Ms Berg’s evidence that Ms Nakamura was offered the opportunity of a support person at the meeting of 9 July 2020, which she declined. It was also included in the email sent to her on 8 July 2020. Ms Nakamura submitted that the Respondent did not “stress the need for a support person” and she did not exactly understand the nature of the investigation. She was unsure if it was about the incident of 24 June 2020 or about Ms T’s alleged sexual assault. If she had read the email Ms Berg sent to her, she would be under no illusion as to what the meeting was about. Ms Nakamura provided no explanation as to why she did not read the email sent to her.

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[229] Ms Nakamura was dismissed for misconduct and not for performance. I consider that this criterion is not relevant to my decision in this matter.

s.387(f) - Whether the Respondent’s size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[230] The Respondent is not a small business and it is well resourced. There is no absence of dedicated human resource specialists.

s.387(h) - Other matters

[231] I have had regard to the fact that the messages sent by Ms Nakamura to Mr D, quite disturbing in nature were within the Respondent’s knowledge prior to the dismissal, but were not put to Ms Nakamura for her to comment on why she had sent them to Mr D. It is curious that the Respondent did not do so.

[232] As I have said above, the messages are disturbing. I also consider them to be threatening to Mr D. He had already blocked Ms Nakamura from sending him direct messages, but she found a way to do so by using Ms T’s account or phone. The messages are essentially emotional blackmail to force Mr D to intervene in Ms T’s plight, when he had no obligation to do so. Threats of attempts at suicide and the involvement of gangs were, understandably, all too much for Mr D to be involved in. He described it as nothing that he could do, nor anything he wished to be involved in. He contacted the police for advice.

[233] Ms Nakamura pleaded with him, “*Only you can stop them, please.*” If Ms Nakamura considered that her friend was at further risk from gangs who were, according to her, sexually assaulting Ms T regularly while at work and in numbers greater than one, it really was a matter to bring to the attention of the police and her employer, and not Mr D.

[234] Mr D presented to me as a young man who had inadvertently been caught up, for a short while, in Ms Nakamura and Ms T's life, where they would, without regard for Mr D, suggest to him that his late mother was disappointed in him, and Ms T was a conduit to his late mother. During the hearing, Mr D was hurt that they would attempt to bring his late mother into their friendship, alleging that Ms T had special powers to communicate with the dead.

[235] I accept Mr D's evidence that when Ms Nakamura and Ms T presented to his home on 29 June 2020, he was hesitant to have them in his home. He met with them in their car and was surprised when they drove off from his home without telling him where they were going. I accept that he was scared, and only relieved when they stopped at a public space. With all of the messages Ms Nakamura had sent about gangs being disappointed with Mr D, and supposedly blaming him for failing to keep Ms T safe from such gangs, it is understandable that he was concerned.

[236] I do not accept Ms Nakamura's submissions that this event meant that Mr D was comfortable to go out in public with her following the incident. Further, the occasion of him showing her his new-born niece was, I accept, an obligation Mr D felt he owed as he was showing it to everybody in the workplace. It did not indicate any forgiveness of the assault on him.

[237] I note that Mr D and Ms Nakamura worked with each other on five or six occasions following the incident on 24 June 2020. Mr D had, of course, reported the incident to Mr Singh and was not aware that it was not being investigated. I note that Ms Nakamura's behaviour in the workplace was without incident (although she was continuing to send messages during this time).

[238] I have had regard for Ms Nakamura's length of service of two and a half years, which in the industry in which she worked is, I consider, a reasonable period of time. I have also had regard for the fact that she is an international student on a study visa, and finding alternative employment permitting only 20 hours of work per week during study weeks would have been more difficult than for a person with unlimited work rights.

[239] I have had regard to the fact that Ms Berg seemingly assisted Mr D with the preparation of his statement on 8 July 2020. This is evident by the fact that his name was mis-spelt at the top of the statement. Mr D confirmed in evidence that it was prepared by Ms Berg and he supplemented it, read it, and was comfortable to sign that it was true and correct.

[240] As the investigator, Ms Berg should stay well clear of the preparation of a complainant's written complaint. Her job is to collect the information in an independent way and put the allegations to Ms Nakamura.

[241] I am satisfied, however, that Mr D's account is an accurate reflection of the events of 24 June 2020. Where he stated that he has completely avoided Ms Nakamura, I accept that is not correct relevant to the photo of his niece and the occasion where Ms Nakamura attended on his home with Ms T and took him in their car to the IGA. I do not consider it material to the decision the Respondent made to dismiss Ms Nakamura, and I accept that on both occasions where Mr D had contact with Ms Nakamura following the incident, he was

uncomfortable doing so. I do not consider that it affects the evidence he has given in this matter.

Is the Commission satisfied that the dismissal of Ms Nakamura was harsh, unjust or unreasonable?

[242] I have made findings in relation to each matter specified in s.387 as relevant.

[243] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.¹¹

[244] The matters for consideration in s.387(h) which might weigh in favour of a finding that the dismissal was harsh, including but not limited to:

- (a) Ms Berg's involvement in assisting Mr D to write his complaint;
- (b) Mr D's failure to nominate two occasions when he spoke with Ms Nakamura;
- (c) Ms Nakamura's length of service and work eligibility;
- (d) Ms Nakamura's otherwise good employment record; and
- (e) The Respondent's failure to put to Ms Nakamura the disturbing messages she had sent to Mr D

are, however, to be balanced against the seriousness of the reason why Ms Nakamura was dismissed.

[245] Though it is doubtless the case that the matters set out above will have some harsh impact on Ms Nakamura, they do not weigh so heavily when account is taken of the seriousness of the valid reason and the other matters that either weigh against a conclusion that the dismissal was unfair or are neutral, as to militate against a conclusion that the dismissal was not harsh. I am not satisfied that the dismissal was unjust, nor was dismissal disproportionate or otherwise unreasonable considering the misconduct engaged in by Ms Nakamura. The dismissal was not unreasonable.

[246] Having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal of Ms Nakamura was not harsh, unjust or unreasonable.

Conclusion

[247] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that Ms Nakamura was unfairly dismissed within the meaning of s.385 of the Act. Ms Nakamura's application is therefore dismissed.



COMMISSIONER

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¹ *The AWU-FIME Amalgamated Union v Queensland Alumina Limited* [1995] IRCA 346 (17 July 1995), [(1995) 62 IR 385]; cited in *Tenix Defence Systems Pty Ltd v Fearnley* Print S6238 (AIRC FB, Ross VP, Polites SDP, Smith C, 22 May 2000) at para. 22.

² *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

³ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁴ *Rail Corporation New South Wales v Vrettos* (2008) 176 IR 129.

⁵ *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1019 at [24].

⁶ (1999) 89 IR 407.

⁷ *Appellant v Respondent* Print R1221 (AIRC FB, MacBean SDP, Duncan SDP, Deegan C, 1 February 1999), [(1999) 89 IR 407 at p. 416]

⁸ Print Q9292 (AIRC, Ross VP, 4 December 1998).

⁹ *Rose v Telstra Corporation Limited* Print Q9292 (AIRC, Ross VP, 4 December 1998).

¹⁰ Print S6238 (AIRC FB, Ross VP, Polites SDP, Smith C, 22 May 2000).

¹¹ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].