DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Carol Whitfield
v
Primo Foods Pty Ltd
(U2020/10426)

COMMISSIONER BOOTH BRISBANE, 13 MAY 2021

Application for an unfair dismissal remedy – misconduct – reinstatement – continuity of service.

INTRODUCTION

[1] Ms Carol Whitfield worked as a meat process worker for Primo Foods Pty Ltd (Primo or Respondent), a large smallgoods manufacturer, from 15 October 2009 until she was dismissed after a workplace altercation on 15 July 2020.

[2] On 31 July 2020, Ms Whitfield applied to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) alleging that she had been unfairly dismissed.

[3] Ms Whitfield was represented at hearing by Mr Craig Buckley, Industrial Officer, Australasian Meat Industry Employees Union (AMIEU). The Respondent was represented by Mr William Ash, industrial relations adviser, JBS Australia Pty Limited, Primo's parent company.

BACKGROUND

[4] Ms Whitfield was employed on a full-time basis as a meat process worker at the Respondent's meat manufacturing plant in Wacol. The Applicant was classified as a Level 6 Multi-Vac Machine Operator on a wage of $25.76 per hour under the *Primo Foods Pty Ltd – JBS Primo Wacol Enterprise Agreement 2019*.[1]

[5] The dismissal followed an altercation between Ms Whitfield and Ms Rebekah Pearce, another meat process worker, on 9 July 2020. Primo alleges that the Applicant's conduct was threatening in nature.[2] The Applicant denies that she threatened Ms Pearce.[3]

[6] Shortly after the altercation, Ms Whitfield was directed to attend a meeting at the human resources office. She attended, supported by a union representative. Ms Sharon Stephenson, a human resources officer, took a statement from Ms Whitfield about the incident and issued her with a letter asking her to show cause why her employment should not be

terminated. Ms Whitfield's response to the show cause was due by 11.00am the following day.

[7] With assistance from her union, AMIEU, she provided her response the following day on Friday, 10 July 2020. Her response was as follows:

"Response Statement Carol Whitfield 10/07/2020

1. I have been asked to provide a response to allegations of serious misconduct.
2. I work as an operator in the bacon room and have been employed with Primo for almost 11 years.
3. It was alleged that I threatened intent to hurt a team member during my shift on the 9 July 2020.
4. I completely deny that I threatened intent to hurt a team member at any time.
5. I was working in the middle on line 2. The girl in front of me went to plug in her scales. I was collecting bacon.
6. As she was gone I was trying to do both my job and hers. I then suddenly heard screeching and screaming. I turned and saw a girl had returned and was yelling at me to pick up the bacon.
7. I was not aware that she was behind me and was surprised when she started yelling.
8. I then told her to shut up and stop yelling at me as my table was overflowing with bacon and falling on the floor. She could see that I had nowhere to put it.
9. She was angry and kept screaming at me to pick the bacon up.
10. I complained to Brendan and told him she was yelling at me and told him that I felt like knocking her off her perch. I said this as a way of describing how I was feeling at the time. I absolutely had no intention of doing that. There was no malice or intent with what I said.
11. Again, she started yelling at me and again I told her to shut up and stop yelling at me and she had no right to scream at me, I had no idea why she was behind me or why she was there until she started screaming at me.
12. I saw Brendan and Terry speaking to her, so I walked up to them and Terry told me to go back to the line.
13. Terry then called me over, I said to them that she had no right to scream and yell at me like she was.
14. I told him I felt like knocking her off her perch. Brendan laughed as he seemed to understand what I was saying was a joke and I was just upset and venting to my supervisors. But Terry said that I cannot say things like that as that is a threat.
15. I said to Terry how is that a threat. I said to him I did not say that to her I just said it to you as a way of describing how I was feeling.
16. I want the company to understand that I never threatened this girl and I would never threaten any employee.
17. I said what I said as a passing comment to my supervisors with how I was feeling. I did not say that I was "going" to push her off her perch. I said I "felt" like pushing her off her perch. It was a figure of speech. It is an old word saying. A metaphor.
18. I have never threatened anyone at work ever.
19. I did not say directly to this girl that I felt like pushing her off her perch. I said this to my supervisors as a way of venting and describing how I was feeling.

20. I am not the sort of person who would engage in such behaviour. I have never physically hurt anyone at work or outside of work in my life.
21. In my 11 years working for Primo I have never been accused of threatening any person. I love my workplace and my workmates. They are like a 2nd family to me. It upsets me to think that anyone would think that I was capable to "threaten intent to hurt a team member" as that is not the person who I am."

[8] On the following Wednesday, 15 July 2020, the Respondent met with Ms Whitfield and advised her employment was terminated. Later that day, the Respondent wrote in the following terms:

> "Dear Carol,
>
> **Termination of Employment**
>
> On Thursday, 9 July 2020 we wrote to you requiring you to show cause as to why your employment with Primo Foods should not be terminated on the basis of a threat to hurt team member that day (Show Cause Letter).
>
> We received your response to the Show Cause Letter on Friday, 10th July 2020.
>
> JBS will not tolerate any threatening or hostile behaviour in the workplace. As a team member, you must not engage in any assault, hostile physical contact, intimidation, fighting, verbal threats, physical harm or violence, while on Company property, on Company business, at Company functions, in Company vehicles, or in personal vehicles when on Company property or when conducting Company business.
>
> After carefully reviewing and considering your response, and considering relevant disciplinary history, the company has decided to terminate your employment for misconduct. You are not required to work your notice period. You will be paid for your shift today, notice in lieu and accrued leave as you are entitled.
>
> Yours faithfully,
>
> Michael McCarthy
> Senior Production Manager
> Primo Foods"

[9] Ms Whitfield seeks reinstatement to her former role under s.391(1)(a) of the FW Act and orders under ss.391(2) and 391(3) for continuity of service and compensation for remuneration lost because of the dismissal.[4]

WITNESS EVIDENCE

For the Applicant

<u>The Applicant</u>

[10] Ms Whitfield's evidence is as follows.

- Her shift commenced around 6:00 am on 9 July 2020.
- Her role during the shift was to take piles of bacon from the top conveyor belt, transfer it to her workstation, weigh it in to one kilogram lots and then move it to a

lower conveyor belt. Her evidence was that there are usually two employees performing this role.

- At 8:00 am, the scales at Ms Pearce's workstation stopped working. This sometimes happens as the scales stop working when the rechargeable battery runs out.

- Ms Pearce took the scales to a cupboard a few metres from the workstation where the replacements are usually stored.

- Ms Whitfield was left alone to undertake a task usually performed by two employees. As a result, her workstation began to fill up with bacon. She said that in these circumstances, plastic tubs would normally be filled, and the product weighed later. However, on this occasion, no plastic tubs were available. As a result, some of the bacon passed Ms Whitfield and fell from the conveyor belt.

- Her evidence was that Ms Pearce then began to yell at her to pick up the bacon, to which Ms Whitfield replied, 'shut up and stop yelling at me'. She stated that Ms Pearce continued to yell, to which she replied, 'what do you want me to do with it, I've got nowhere to put it?'. Her evidence was that Ms Pearce replied, 'I don't care, just pick up the bacon'.

- Ms Whitfield signalled to Mr Brendan Ash, Leading Hand, who approached her and asked what the problem was. She replied that she would like Mr Ash to tell Ms Pearce to stop yelling at her.

- Mr Ash left and then returned with Mr Terry Roadley, Supervisor. Mr Ash and Mr Roadley called Ms Pearce over. Ms Whitfield approached but was told to return to her workstation, which she did. Mr Ash and Mr Roadley then called Ms Whitfield over and asked her what had happened. She replied, 'She was yelling and screeching at me, she had no right to do that, she was making me really angry, and I felt like knocking her off her perch.'

- Mr Roadley replied that Ms Whitfield had just made a threat. Her evidence is that she 'How is that a threat? I said I <u>felt</u> like knocking her off her perch'. Mr Roadley stated that he would need to report the matter to the production manager.

- Ms Whitfield began her break shortly afterwards. During the break she asked Mr Roadley whether she could be moved to a different part of the production line. Mr Roadley refused this request. However, when she returned from her break, a different employee had replaced Ms Pearce at the workstation nearest Ms Whitfield.

- About 20 minutes after returning from break, she was required to attend the production office and write a statement. She then returned to work.
- Later that day, Ms Whitfield was told by the production manager that she would need to attend the human resources department. She was offered the option of having a support person present, and nominated the union delegate, 'Nu', to attend.

- She met with Ms Stephenson, a human resources officer who typed out Ms Whitfield's statement, which was signed and witnessed by her support person. Ms Stephenson informed Ms Whitfield she would be suspended with pay for one week

pending an investigation. Ms Whitfield was given a letter dated 9 July 2020 that required a response by no later than 11:00 am on 10 July 2020. Ms Whitfield then left the workplace.

- The following day, Ms Whitfield contacted her union organiser, Mr Earle who helped prepare her response.

- At 8:00 am on 15 July 2020, Ms Whitfield received a call from Ms Stephenson asking her to attend the workplace at 10:30 am that day for the outcome of the investigation.

- She attended the meeting with Mr Earle. She says Ms Stephenson commenced the meeting by saying 'We've done the investigation, I'm just the messenger here. Cheryl has decided to terminate your employment.' Ms Whitfield's evidence was that, at the time, she did not know who 'Cheryl' was, but she has since been informed she is the Human Resource Manager.

- Ms Whitfield stated that Mr Earle asked when she would receive her termination letter and that Ms Stephenson responded to the question by laughing. Ms Whitfield's evidence was that Mr Earle then stated, 'I don't think it's very funny when someone has just lost her job'.

- She then left the worksite, after handing in her gate pass to security.

[11] During the Hearing, Ms Whitfield amended her witness statement to include that when she had returned to her workstation after her discussion with Mr Ash and Mr Roadley, she said to Ms Pearce "don't you ever speak to me like that again."[5]

[12] Her evidence during cross examination was consistent with her statement that she denied she said that she would, or wanted to, hit Ms Pearce, and maintained that she said that she felt like knocking Ms Pearce off her perch.

[13] The below extract from the transcript serves to summarise Ms Whitfield's recollection of the events:

> "MR ASH: I put it to you, you said, 'Or I'll hit you'? -I never said, 'I'll hit you.' That's not in my vocabulary. I don't say words like that.
>
> You just made up a lie when you said that what you actually said is, 'I feel like knocking you off your perch'? -No, that's exactly what - - -
>
> You were angry? -But this is in a different - this is after Brendon and her were - Brendon and Terry were talking to her, they came and got her first - okay - and then when I - I walked up to them and Terry told me to go back and, as I went back, I turned to her and I said to her again, 'Don't you ever speak to me like that again', and then I went back to my workstation. When Terry called me over, when it was my turn to be spoken to, Terry said, 'What's going on?' and I said, 'She's getting me angry.' I said, 'I was that angry, I felt like knocking her off her perch.' And he said, 'Do you know that was - do you know that's a threat?' and I said, 'How is that a threat?' And he said, 'That's a threat', and I looked at - then I looked at Brendon and he's leaning

on the computer screen and he said - I said to Brendon, 'How is that a threat?' Brendon just shrugged his shoulders again and just looked down, 'cause Brendon knows me and he knows that I did not say I was going to - I said I felt like knocking her off her perch, and I stood there and argued with Terry for a couple of minutes, saying, 'How the hell is that a threat when I said I felt like knocking her off her perch, she made me that angry.' That's exactly what I said. I said it to - and I repeated it and I repeated it, and I wrote it in my handwritten statement, and that's exactly what I said. I've never said to anyone in that factory or in any of my circles - I'm not the sort of person that would say, 'I'm going to hit you.' There is no way that that would come out, especially in a work environment.

You concede that you were angry because they spoke to Rebekah first? -I was - - -

You were the senior person? -I was angry, I was more - I was disappointed. I thought, 'Well, why - I'm the one that had the problem, why have they gone and spoken to her first?'

So now you say - so you went over, you were angry and you went over and said, 'Don't speak to me like that again' and that's all you said to Rebekah; is that correct? -When Terry said to me to go back to my station, 'We'll talk to you in a minute', I came to her as I was walking - because I had to work past her, and I said to her - I repeated what I'd said earlier to her - 'Don't you ever speak to me like that again.'[6]

[14] Ms Whitfield was asked about the meaning of her statement. The below extract from cross-examination sets out some further context:

"MR ASH: That she made you angry and you felt like knocking her off her perch; is that correct; is that your evidence? -That's exactly what I said.

But you just made that up to downplay what you really said; right? -No, I say it to my son all the time, 'I'll knock you off your perch if you don't pull your head in.' It's - that's the way I speak.

What do you mean by that when you say that? -What do I mean by it? I mean like, 'Pull your head in.'

All right? -That's what I mean by it, like, 'Pull your head in.'

Okay? -Doesn't mean like I'm going to, you know, attack you or - or do anything. You know, it's - it was a matter of speech, it was a matter of speech the way I - it's exactly what I said to Terry. That's why I couldn't work out how he interpreted that as a threat when I said to him I felt - I felt - I got really - and I admitted to him, I told him I was angry. I said, 'I was that angry, I felt like knocking her off her perch.'

That's because - - -? -Not once did I say 'hit'. Not once did I say I was going to hit somebody or I was - it didn't even come into the part of the conversation on what we were talking about. There was no aggressive - Terry's the only one that come up and said that what I said was a threat. He's the only one that said that those words that I

used was a threat and I couldn't work out how saying I felt like knocking someone off their perch - and I - I emphasised, I said, 'I felt like it.'"

A prior warning

[15] Primo relied in part on a prior warning given to Ms Whitfield on 9 July 2019 for a safety related incident to support its termination decision. Her evidence is that the warning was given because she removed a piece of plastic that was hanging loose from a chain that runs down the multi-vac machine. Her evidence was that she did not agree with the warning because the piece of plastic was long, and her hand was not close to the chain while the machine was in operation. She is an experienced machine operator and knows better than to put her hand near the chain when the machine is in operation. Further, it is common practice to remove plastic from the chain.

[16] She was cross-examined about the safety incident and maintained that she had not put her hand near the chain, and it was on that basis she at first refused to sign the warning letter:

"MR ASH: In relation to what you did, you say that it was okay because when you put your hand under the MULTIVAC machine, it wasn't close enough to the chain that it would cut it off, so it's okay? -Yes, it's okay because it was dangling from - the chain goes across here, so the chain goes across here, and there was a big piece of plastic hanging from there, so I just grabbed the plastic, which was nowhere near the chain 'cause it was already hanging loose, so I grabbed it and I snapped it off.

But you know it was a breach of the cardinal rules, don't you? -Yes, but it - and it's also a standard practice that all us MULTIVAC operators do similar, and our supervisors as well.

And you signed the warning letter that you received from 1 July in acknowledgement? -I refused to sign the warning letter from the supervisor, so I ended up having to go to HR, to Sharon, and my production manager, and then I signed, then I signed it because I had a union representative with me then.

The process had been filed and you signed an acknowledgement and you - - -? -Once I had a representative with me, but I refused to sign - I got myself in trouble because I refused to sign it from the supervisor that tried to say that I did the breach in the first place because she - she couldn't even see, she just assumed that's what I had done. She didn't see how long the plastic was and that it was - you know, it was nearly on the ground, and I - I got it from a safe area. You know, I had been a MULTIVAC operator for a lot of years and I do know not to put my fingers near a chain. I do value my fingers."[7]

[17] Ms Whitfield has not been able to find alternative employment since being terminated. She has asked around at local businesses in the area and registered for the JobSeeker scheme. Her capacity to seek alternative employment has been hampered by health issues in her family and her own health issues.

[18] Her evidence at hearing was that she had not found paid employment since 6 October 2020. She had contacted Centrelink which had referred her to a recruitment placement service which assisted her in looking for work. She lacked computer skills, her job at Primo for the

last 11 years not needing such skills. She had also been admitted to hospital for two weeks just before Christmas.

[19] On her evidence, she believes she could have a productive work relationship with Ms Pearce if reinstated, as she holds no animosity towards her.

Warren Earle

[20] Mr Warren Earle is a Branch Organiser with the Queensland Branch of the AMIEU, a position he has held for approximately thirteen years. As an organiser, Mr Earle is responsible for members employed at the Respondent's meat manufacturing establishment at Wacol. Mr Earle provided a witness statement on behalf of Ms Whitfield.

[21] Mr Earle stated that he was contacted by Ms Whitfield on 9 July 2020 to assist with a disciplinary matter. On 10 July 2020, Mr Earle assisted her with her response to the show cause letter which he then emailed to Sharon Stephenson.

[22] On 15 July 2020, Mr Earle attended the Wacol worksite with Ms Whitfield for a meeting. The other attendees at the meeting were Sharon Stephenson and Michael McCarthy. The meeting commenced with Ms Stephenson saying that the company had received Ms Whitfield's statement and that they were here to deliver an outcome. Ms Stephenson said that Ms Whitfield's employment was to be terminated. Mr Earle's evidence was that he attempted to query the decision and was advised by Ms Stephenson that she was 'only here to deliver the message' and that any queries would need to be taken up with Ms Cheryl Wolens.

[23] Mr Earle said that he asked if a termination letter would be provided, to which Ms Stephenson replied that she had not prepared a termination letter and was unsure when she would have it done. Mr Earle said it had been five days since Ms Whitfield provided her response to the show cause letter, which would have been a reasonable time to prepare the letter. Mr Earle's evidence was that Ms Stephenson laughed at this comment and then replied that she had been very busy and would try to prepare the letter that afternoon. Mr Earle's evidence was that he told Ms Stephenson it was inappropriate to laugh during the termination of an employee with over ten years of service. This comment was ignored. Ms Stephenson stated that she would attempt to finalise the termination letter as soon as possible.

[24] The meeting then ended. Mr Earle waited while Ms Whitfield collected some personal belongings and then left the plant with her.

For the Respondent

Rebekah Pearce

[25] Ms Rebekah Pearce commenced employment with the Respondent on 17 March 2020 as a full-time Level 2 process worker. Ms Pearce stated that, prior to the incident on 9 July 2020, she had worked with Ms Whitfield on a few occasions.

[26] Ms Pearce's evidence about the incident on 9 July 2020 is as follows:

- At around 8:10 am, the scales Ms Pearce was using to weigh bacon went flat, which is not uncommon.

- As a result, she went to a nearby cupboard to retrieve a different set of scales, however there were no scales in the cupboard.

- A colleague she knew as Chris offered to search for scales if Ms Pearce could take over her workstation. Ms Pearce then took over that workstation while Chris searched for scales.

- While working at that station, a large amount of sliced bacon came down the line and she found it difficult to keep up. The reason was that Ms Whitfield was not transferring bacon.

- Ms Pearce says she spoke to Ms Whitfield in words to the effect of: 'Carol, can you please pick up some bacon, there is a lot coming through to me?'

- Ms Whitfield ignored this request.

- After 2-3 minutes, Ms Pearce again said words to the effect: 'Please pick it up, a lot is coming through to me'.

- Ms Whitfield then turned to Ms Pearce and aggressively said: 'Shut up. Don't speak to me like that'.

- Ms Whitfield then called out for the leading hand, Mr Brendan Ash, however Ms Pearce did not see or hear any interaction between them.

- Chris returned with a new set of scales and Ms Pearce returned to her workstation and continued working.

- Ms Pearce was then approached by Brendan Ash and the Supervisor, Terry Roadley, who asked to speak with her.

- Mr Roadley said that Ms Whitfield had accused Ms Pearce of yelling at her.

- Ms Whitfield then approached Ms Pearce, Mr Ash and Mr Roadley and said to Ms Pearce words to the effect of: 'If you speak to me like that again, I will hit you'.

- Mr Roadley turned to Mr Ash and remarked that Ms Whitfield had threatened Ms Pearce.

- At around 10:30 am that day, Ms Pearce stated that she attended an interview with Sharon Stephenson, a Human Resource officer and was required to provide a brief statement.

[27] During cross examination, Ms Pearce gave evidence that the work area was noisy[8] and that things may have been stressful[9] but maintained that she did not yell at Ms Whitfield.

[28] Ms Pearce stated that due to the temperament of Ms Whitfield and the threat made on 9 July 2020, she would not feel safe working with Ms Whitfield.

<u>Brendan Ash</u>

[29] Mr Ash commenced employment with Respondent around 5 years ago and by the relevant time was Leading Hand.

[30] His evidence was as follows:

- At around 8:15am, the Ms Whitfield called him over.
- Mr Ash approached, Ms Whitfield who said words to the effect of 'Rebekah's yelling at me to pick up bacon'.
- Mr Ash then called out to Mr Roadley on the 2-way radio, asking him to attend.
- Mr Ash told Mr Roadley there had been an incident involving Ms Whitfield and Ms Pearce.
- Mr Ash and Mr Roadley asked Ms Pearce to step away from the production line and speak with them. Mr Roadley said words to the effect of 'Carol has told us that you're yelling at her'. Ms Pearce responded, 'I wasn't yelling. I just asked her to pick up the bacon'. Mr Ash's evidence was that Ms Whitfield then approached and angrily threatened Ms Pearce with words to the effect of 'If you talk to me like that again, I will hit you'. Mr Roadley replied 'You can't say that' and Ms Whitfield said 'well, I really want to hit her in the head'.
- Mr Roadley told Ms Whitfield to go back to the production line. He told Ms Pearce not to raise her voice and then she returned to the production line.
- Mr Roadley then called Ms Whitfield over and said 'you can't threaten people like that. I will have to report it.'
- About 30 minutes later, Mr Roadley asked Mr Ash to go to the bacon pack office and write out a statement of what occurred.
- At around 12:30 pm that day, Mr Ash attended an interview with Primo Human Resource Officer, Sharon Stephenson.

[31] Mr Ash stated that it would have been easy for Ms Whitfield to collect the bacon that would have gone through to Ms Pearce.

Terry Roadley

[32] Mr Roadley commenced working with the Respondent in about 2012. Since 27 January 2020, he has been a supervisor. His evidence is as follows:

- At around 8:15 am, Mr Brendan Ash called out over the two way radio for Mr Roadley to assist as there had been an incident involving Ms Whitfield and Ms Pearce.
- Mr Roadley and Mr Ash removed Ms Pearce from the workstation and said words to the effect of: 'Carol has said that you have been yelling at her. I want your side of the story'. Ms Pearce responded that she had not been yelling.

- Ms Whitfield then approached and said words to the effect of 'if you talk to me like that again, I will hit you'. Mr Roadley replied that 'you can't say that!' and Carol then replied 'Well, I really want to hit her in the head'.

- Mr Roadley said to Ms Whitfield 'Go away and we will get your side of the story after we finish with Rebekah.'

- Mr Roadley then told Ms Pearce not to raise her voice and sent her back to the production line.

- Mr Roadley and Mr Ash had a conversation with Ms Whitfield. Mr Roadley said to her 'You can't threaten people like that', to which she replied, 'I don't like to be spoken to like that'.

- Mr Roadley then informed Ms Whitfield a report would be made due to the threat she had made against Ms Pearce.

- Mr Roadley sent Ms Whitfield back to the production line.

- Mr Roadley reported the incident to his manager following which Sharon Stephenson was called.

- Mr Roadley made a handwritten account of the incident.

- Mr Roadley was interviewed by Ms Stephenson at around 12:00 pm that day.

Sharon Stephenson

[33] Ms Stephenson is employed by the Respondent as Human Resources Officer, a position she has held for approximately 10 years. She reports to Ms Cheryl Woden, Human Resources Manager. Ms Stephenson's duties include workplace investigations.

[34] Her investigation of the incident involved interviewing Ms Whitfield, Ms Pearce, Mr Roadley and Mr Ash, and recording the statements by typing up what each individual said. Following the interviews, Ms Stephenson formed the view that Ms Whitfield should be asked to show cause as to why she should not face disciplinary action. The show cause letter was provided to Ms Whitfield on 9 July 2020 and a response was received on 10 July 2020.

[35] Ms Stephenson stated that Ms Whitfield's first and final warning for the separate safety-related incident was taken into account for the purposes of determining that her employment should be terminated. Ms Stephenson's evidence was that the safety related incident on 2 July 2019 involved Ms Whitfield breaching a policy not to 'remove or bypass guards, limit switches or safety devices'. She stated that Ms Whitfield put herself at serious risk of injury in placing her hand near a moving chain to collect plastic.

[36] Ms Stephenson further stated that Ms Whitfield was a senior team member within the operations team and as such, expected to model good behaviour, abide by company policy and deal with colleagues respectfully.

[37] During cross examination, Ms Stephenson was asked about the statements of Mr Brendan Ash and Mr Roadley, and specifically who had prepared them and why they were in near-identical terms. Ms Stephenson said she typed the statements as they were given by Mr Ash and Mr Roadley, and that neither was present in the room while the other was interviewed:

> "MR BUCKLEY: Can you explain to me then, Ms Stephenson, why it is that Mr Ash and Mr Roadley's statements are almost word perfect the same? -Because they were both there at the same time when the incident happened, both of them.
>
> You've told me that you wrote down their words. That's right? -Mm.
>
> The words they used? -Yes. Well, yes, that I can recall, yes. So they were both there at the same time.
>
> So if the words that they used in their statements are almost identical for the description of what happened, that's just a coincidence, is it? -Because they were both there at the same time, and that's what they obviously heard or – that's what they told me."[10]

[38] During re-examination, Ms Stephenson maintained that the statements were the same because the same words had been said to her:

> "MR ASH: Ms Stephenson, Mr Buckley asked you - he took you to the records of interview behind - in annexure or appendix SS1 for both Mr Ash and Mr Roadley? -Yes.
>
> And do you recall he said to you that what you had typed up was very similar, if not the same? -Yes.
>
> Do you have - can I read to you paragraph 6, which is identical, for instance, on both of those records of interview? 'As Rebecca was telling us her side of the story, Carol came over and looked angry and said to Rebecca, 'You don't need to talk to me like that, and I want to hit you. I'm going to hit you.' Something along those lines. Carol said it twice.' Now, those words are identical in the records of interview for both Mr Ash and Mr Roadley, and there are also similarities in some of the other paragraphs. Can you explain to the tribunal how you think it could be the case that they're so similar? -Brendan and Terry were both there - - -
>
> And it's okay if you use one as a template? -Yes. So yes, yes. And they were both there at the same time for the same incident. So I would have taken Terry's statement first, and then I would have taken Brendon's statement second. And they were there for the same - so what I'm trying to explain is that Carol went to Brendon and to Terry and told them about Rebecca, the complaint she had, and then they were both there when they had the conversation with Rebecca, and they were both there when Carol came over and spoke to them.
>
> The question that I was asking is more about why the words in these records of interview that you've typed up are identical in some places between both Terry and

> Brendon. Because I'm sure they didn't say the same - exactly the same thing to you? -Probably not exactly the same wording. Probably not, no.
>
> Can you think of why it may be that there are - at least at paragraph 6, why the words are identical? -I was just taking in the statements, and yes. I'm not sure."

Cheryl Wolens

[39] Ms Cheryl Wolens commenced employment with the Respondent on 6 January 2020 as the Human Resources Manager for the Wacol site.

[40] Ms Wolens said that she was involved in the decision to terminate Ms Whitfield's employment with 5 weeks' notice. She stated that she formed the view that the conduct of Ms Whitfield on 9 July 2020 amounted to serious misconduct. Ms Wolens' evidence was that her decision was guided by the following factors:

- on the balance of probabilities (consistent with the versions of events of all witnesses other than Ms Whitfield) Ms Whitfield had threatened to hit another employee;
- she had received a first and final warning for a safety incident in the last 12 months; and
- she did not demonstrate insight into her inappropriate behaviour.

SUBMISSIONS

For the Applicant

[41] Ms Whitfield submitted that there was no valid reason for the termination of her employment. She stated that the basis of the termination was a threat made against Ms Pearce. Ms Whitfield denies that allegation.

[42] Ms Whitfield acknowledged she had used the following words: 'She was yelling and screeching at me, she had no right to do that, she was making me really angry, and I felt like knocking her off her perch'. Ms Whitfield submitted that these words do not convey any threat and did not convey any intent to hit another person.

[43] Ms Whitfield submitted that, prior to commencement these proceedings, the Respondent had never put to her any suggestion that her account of events was inaccurate.

[44] Further, while the termination letter mentions her prior disciplinary record, the show cause letter did not. She therefore had no opportunity to address her prior disciplinary record in the context of the decision to terminate her employment, given that she disputed the facts relevant to the alleged safety breach.

[45] Ms Whitfield submitted that the Commission should take into account:

- her long service with the Respondent;
- termination of employment was a disproportionate in the circumstances;

- she had been denied an opportunity to respond to some of the details that guided the Respondent's decision.

[46] Ms Whitfield submitted that the appropriate remedy is reinstatement. Ms Whitfield stated that any objection to this remedy was based on an unreasonable interpretation of the Ms Whitfield's conduct, relying on *Australia Meat Holdings Pty Ltd v McLauchlan*.[11]

[47] Ms Whitfield submitted that if reinstatement was not ordered, compensation should be granted taking into account the following.

- Ms Whitfield had over ten years' service with the Respondent and it is likely that the employment would have continued for a lengthy period of time had the Ms Whitfield not been dismissed.

- Ms Whitfield's earnings were approximately $959.70 per week.

- Ms Whitfield's efforts to mitigate her loss of income has been hampered by illness of family members, but in any event, the likelihood of securing other employment is the short-term is unlikely given current economic circumstances (including the effects of the COVID-19 pandemic).

- The Respondent is a large business, and any order payment of compensation would not affect the viability of that business.

[48] At hearing, Ms Whitfield maintained the words used were that she felt like knocking Ms Pearce off her perch. It was submitted for Ms Whitfield the words used did not constitute a threat:

> "MR BUCKLEY: Yes, perhaps I'll just say this: the applicant has given her evidence that she said, 'I felt like knocking Rebekah off her perch.' It may be - whether that has been misconstrued, or whether there was a slightly different form of words used but nevertheless, it was Carol just saying, 'This is how' - saying in effect, 'I was that angry I felt like hitting someone,' or whatever. It may be that you're there in a factory environment, it's noisy. You've got supervisors who are under pressure. They're dealing with a lot of employees. It may be that one or more of them jump to a conclusion about what Ms Whitfield intended to do or meant but it wasn't in fact what Ms Whitfield actually meant or intended to do.
>
> Once you jump to that conclusion, it may be that you remember the conversation in a particular way or a way that suits that conclusion. But I mean the applicant's case is essentially though that she said, 'I felt like knocking her off her perch' - 'her,' meaning Rebekah in this case - and it was not intended to be anything other than a statement of how she felt, that she was angry: 'This person has made me angry.'"[12]
>
> …
>
> I suppose in that sense I could refer back to some of the comments I made earlier in my submissions about the context. The fact is that it seems that regardless of what Carol said or what the supervisors heard or thought they heard, no one really thought that Carol was going to hit Rebekah at that point. In fact, Mr Roadley, or in one of the

> versions given by Mr Roadley his response is, 'You can't say that.' It wasn't, 'You can't do that.' It was, 'You're not allowed to say that.' In other words, it implies that the concern was the fact that Carol had articulated something rather than that she was actually about to do something or threatening to carry out an action."[13]

[49] Ms Whitfield further submitted that that she did not threaten Ms Pearce and that there was no valid reason for the termination, or in the alternative, the acts complained of did not warrant dismissal:

> "MR BUCKLEY: … The applicant's primary submission is the applicant didn't threaten another employee and there was no valid reason for the termination. If the Commission were to find otherwise, in the applicant's submission there would still be a further consideration needed to determine whether or not the termination was harsh. Ms Whitfield had a considerable period of service with the employer, which is a significant consideration, albeit perhaps a double-edged one.
>
> But an intemperate remark made when she was angry, that might well call for a serious disciplinary response but not necessarily merit termination of employment…"[14]

[50] On the prior warning, it was submitted that Ms Whitfield did not downplay the seriousness of the warning or the alleged safety breach. She disputed the accuracy of the facts alleged, and submitted that Ms Stephenson's failed to account for Ms Whitfield's divergent views of the relevant facts. It was also submitted the conduct of removing long pieces of including by the supervisor who had issued the Ms Whitfield a warning. Ms Whitfield noted that the Respondent did not challenge her evidence in relation to the conduct of the supervisor or other employees and did not mention the prior warning in the show cause, depriving her of the opportunity to state her case.

For the Respondent

[51] The Respondent submitted that the evidence of the three witness to the incident of 9 July 2020, and their contemporaneous notes, discloses that Ms Whitfield is not telling the truth and did, in fact, threaten to hit Ms Pearce. The Respondent submitted that the evidence supports a finding, on the balance of probabilities, that Ms Whitfield engaged in misconduct by threatening to hit Ms Pearce.

[52] The Respondent submitted that the misconduct of Ms Whitfield was substantial, wilful and constitutes a valid reason for dismissal. The Respondent drew the Commission's attention to *Appeal by B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191.

[53] The Respondent submitted that there were no significant inconsistencies between the witness statements and evidence of Ms Pearce, Mr Ash, and Mr Roadley and the contemporaneous handwritten notes of the incident, which all set out that Ms Whitfield threatened Ms Pearce and said words to the effect of that she would hit her. The Respondent argued that the uncontested evidence of Ms Pearce was that she felt threatened by Ms Whitfield's conduct and felt uncomfortable, and that whatever the precise conduct was, such as angrily saying, 'if you speak to me like that again, I'm going to knock you off your perch,' it reasonably created a fear of workplace violence.

[54] In relation to procedural fairness, the Respondent submitted that Ms Whitfield knew the allegation she was required to respond to and who her accusers were. The Respondent submitted that, in these circumstances it was not necessary for statements or other information to be provided to Ms Whitfield citing *Melouney v ACM Group Ltd* [2012] FWA 9386.

[55] Further, the Respondent submitted that it is reasonable for an employer to rely on a warning issued to an employee when deciding the appropriate disciplinary action, citing *Suzara v St Vincent's Private Hospitals Ltd* [2019] FWC 87.

[56] In relation to the other matters in s.387 of the FW Act, the Respondent said none of these matters seemed to be in contest. The Respondent said Ms Whitfield was notified of the reason for her dismissal and it was that she threatened Ms Pearce; she was given an opportunity to respond to that reason; a show cause process was followed and Ms Whitfield provided a written response. The Respondent submitted that meetings were held and Ms Whitfield responded with full knowledge of what the Respondent's concern was.

[57] There was no unreasonable refusal to allow a support person, and that subsections (e), (f) and (g). In relation to subsection (h), the Respondent submitted that Ms Whitfield had worked for the Respondent for 10 years, which it submitted was not a long period.

[58] The Respondent submitted that the Ms Whitfield's prior warning was thoroughly investigated and procedural fairness was provided to her.

[59] The Respondent submitted that, in the event the application is not dismissed, reinstatement would not be an appropriate remedy as it had lost trust and confidence in Ms Whitfield. The Respondent pointed to Ms Whitfield's lack of remorse regarding the alleged threat and the prior safety incident, as well as Ms Whitfield's concession she understood that as a Level 6 employee she was expected to demonstrate model behaviour. The Respondent said that Ms Whitfield's evidence suggested that she knew better than her supervisor and that because he was new, he took her words to be more serious than they in fact were. The Respondent argued that the Commission cannot be satisfied that Ms Whitfield would not conduct herself in such a way again.

[60] On compensation, the Respondent submitted that Ms Whitfield has not properly explained why she has not taken reasonable steps to mitigate her loss. The Respondent submitted that it appears Ms Whitfield has taken on caring responsibilities or been unfit for work most of the time since her dismissal. In closing submissions, the Respondent submitted that since November, Ms Whitfield had six meetings with her job placement provider and had not yet finished a resume. The Respondent submitted that Ms Whitfield's evidence was that she had some health issues herself but also some caring responsibilities and had exhausted her personal leave and so she would not have been on paid leave during those periods of time she had still been employed.

[61] The Respondent argued that, even if the dismissal is found to be unfair, the Commission should exercise its discretion not to order any compensation, taking into account the factors mentioned above and the payment of five weeks' notice to Ms Whitfield on termination.

CONSIDERATION

[62] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[15] I set out my consideration of each below.

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)

[63] In assessing whether there was a valid reason for the Applicant's dismissal, the reason must be 'sound, defensible or well founded.'[16] A reason which is 'capricious, fanciful, spiteful or prejudiced' cannot be a valid reason.[17] Furthermore, '[T]he reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.'[18]

[64] The onus is on the Respondent to show there was a valid reason for dismissal on the balance of probabilities. It is not the Commission's role to 'stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court.'[19] However, I 'must consider the entire factual matrix in determining whether an employee's termination was for a valid reason.'[20]

[65] In *Allied Express Transport v Anderson*,[21] the Full Court of the Federal Court found that when considering the entire factual matrix, the court would look not only at the employee's conduct but would consider the role of the employer and *its* role in the employee's misconduct or disobedience that lead to the dismissal. In *Allied*, along with other circumstances, the employer's role was considered as part of the as part of the matrix the circumstances and concluded that on the facts of that matter and upheld a finding that there was no valid reason for the dismissal:

> "The entire relevant factual matrix must be considered in determining whether an employee's termination is for a valid reason. It has been held that the expression ''valid reason'' is used in the sense of a reason which is sound, defensible, or well-founded: see *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373 per Northrop J. See also *Murdoch University v Mainsbridge* (unreported, Industrial Relations Court of Australia, Full Court, 12 June 1998). We share the view of his Honour that the so-called disobedience was ''fleeting and understandable'' and largely the making of Allied itself by the manner in which it effected Ms Anderson's removal to Wynyard.

[66] In this matter, I consider that the events that led to the termination are relevant in the factual matrix. These are that the Respondent failed to have a backup scale, extra plastic buckets or battery on hand, notwithstanding the need to replace scales was a not uncommon occurrence,[22] causing the build-up in bacon on the line. Ms Pearce's evidence was a result of the Respondent's failure that 'things may have been stressful' because Ms Whitfield was then not picking up the bacon quickly enough; the Ms Whitfield's evidence was that her workstation was overflowing, and that (in her language) if she had been standing on the ground where the bacon was falling off, she would have been two inches further off the ground. In my view, the busy bacon line and failures on the Respondent's part to have the right equipment on-hand caused significant stress to both Ms Pearce and Ms Whitfield and are relevant to the entire factual matrix as the events unfolding as they did.

[67] The Respondent submits that conduct of Ms Whitfield was serious misconduct in that she threatened to hit another employee. Dismissal was said to be justified by the serious misconduct coupled with the prior safety related warning and her lack of insight.

[68] Ms Whitfield's statement taken on 9 July 2020 is direct and forthright. In it, she said that she was called over by Mr Ash and Mr Roadley and said that '[Ms Pearce] had no right to yell and scream at me and I said I felt like I wanted to knock her off her perch but wasn't going too (sic)'. This version of events, and in particular the phrase 'knock her off her perch', is consistent with the internal investigation report prepared by Ms Stephenson, and is consistent with Ms Whitfield's response to the show cause letter.

[69] Ms Whitfield's oral evidence was also consistent with her statement. Ms Whitfield did not deny she said she felt like she wanted to knock Ms Pearce off her perch.

[70] Ms Pearce's statement says she did not yell at Ms Whitfield, but that it was a noisy environment. However, Mr Ash's evidence is that he told Ms Pearce not to raise her voice. It was Ms Whitfield who called the leading hand over to make a complaint about Ms Pearce's yelling.

[71] The identical wording of Mr Roadley and Mr Ash's statements raises a real concern about the weight the statements should be given.

[72] Further, the fact that handwritten notes of the witnesses did not refer to Ms Whitfield wanting to 'hit her in the head' while both statements did include this more damning formulation casts doubt on the independence and credibility of the material relied on.

[73] Additionally, on the basis of the entire context of the incident, I have concluded that Ms Pearce did yell at Ms Whitfield and I do not accept Ms Pearce's evidence on this point.

[74] In contrast, I found Ms Whitfield's evidence that she was expressing her frustration to her supervisor to be consistent and reliable. It is unlikely that a person would call over their supervisor to make a complaint, and then in the presence of the supervisor directly threaten the person complained of. Ms Whitfield deposed two statements of a different tenor from a threat to hit another person. To knock someone off their perch is a colloquial phrase, referring to causing someone to lose a sense of superiority or authority over others. It usually does not refer to actually hitting, or threatening to hit, someone.

[75] For the reasons stated above, I prefer the evidence of Ms Whitfield to that of the Respondent's witnesses. I am satisfied on the evidence before me that Ms Whitfield said to her supervisor, in front of Ms Pearce, that she felt like she wanted to knock Ms Pearce off her perch intending it to express frustration and possibly anger but not as a threat of violence. It was an inappropriate, an intemperate remark made when angry.[23] I consider the remark as made to be unacceptable. But the question is - was it sufficient, in the entire factual matrix, to be a valid reason for the dismissal?

[76] In answering the question, the following matters have been considered.

[77] The exchange took place between Ms Whitfield and two supervisors in the presence of Ms Pearce. It was Ms Whitfield who called managers over to complain of Ms Pearce's allegedly shouting. Immediately after the exchange, Mr Ash's evidence is that Mr Roadley

instructed Ms Whitfield to go back to the production line and told Ms Pearce not to raise her voice and also to return to the production line. If there was genuine concern for the safety of Ms Pearce, Mr Roadley's instructions for the two to resume work together does not make sense.

[78] Ms Whitfield's sense of frustration was in the context of Ms Pearce having to leave her station for a longer than usual period to attend to get scales; the product building up faster than she could manage; the absence of collection bins to deal with surplus product; and her understanding that Ms Pearce was shouting at her. It is entirely possible that Ms Pearce was also frustrated with the scales not working, there being no replacement, the build-up of product on the conveyor, and the noisy environment, leading her to make intemperate remarks. The evidence does not lend itself to a positive conclusion on that point, however, and Ms Pearce's conduct was not the subject of disciplinary action.

[79] The evidence supports a conclusion that Ms Whitfield engaged in an intemperate exchange and frustrated remarks. These were not however elevated to actual threats. I therefore conclude that the events leading to the termination do not constitute a valid reason for the purposes of the FW Act.

[80] In passing, I note that Ms Wolens formed the view the conduct as she understood it was characterised as 'serious misconduct'. This term is not used in the Act, although it is in the *Fair Work Regulation* about small businesses, and it is in the Agreement at cl. 10.7 with a detailed procedure to be followed. This was not a point raised before the Commission at Hearing, but it seems that Agreement's procedure was not followed. In any case, the conduct established on the evidence and discussed above is not, in my view, 'serious misconduct' as described in the Regulation or the Agreement or as understood in the case law.[24] It may well be one or both of the production line workers in the altercation that day misconducted themselves, but on the evidence, the misconduct of Ms Whitfield was not serious misconduct and did not warrant dismissal.

[81] The Respondent relies on the earlier safety breach as well as the alleged threat. Ms Whitfield's view is that the matters are of a different nature. I do not agree – an employer may on an earlier warning. But it is contextual. In this case, I do note that the prior safety incident occurred almost 12 months earlier and there are no other breaches before or after in a career lasting over a decade.

Conclusion on Valid Reason

[82] The Applicant's exchange with two supervisors and Ms Pearce was an unwelcome, heat of the moment comment, a "single foolish act"[25]. On the evidence I find there was no threat; violence was not intended; and the respondent's decision to return both employees to the bacon line, even if only temporarily, indicates there was no risk to Ms Pearce perceived by the two supervisors. The words may have been misconduct, but not misconduct sufficient to found reasons for dismissal.

[83] In considering all of the factors detailed above, there was no valid reason for dismissal in all the circumstances of this matter.

(b) whether the person was notified of that reason

[84] Notification of 'the reason' relates to the 'valid reason' for dismissal.[26] Notification of the valid reason to terminate must be given to the employee before the decision to terminate is made,[27] in explicit, plain and clear terms.[28]

[85] Ms Whitfield was notified of the allegations against her on 9 July 2020 by way of a show cause letter, and later in the termination letter of 15 July 2020.

[86] The submissions on this point were limited. I note that the Respondent relied on Ms Whitfield's prior disciplinary history as a factor in terminating her employment, but that this was not put to Ms Whitfield for response in the show cause letter. This does not satisfy the requirement that notification of the valid reason should be in explicit terms.

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

[87] In this case, the Applicant does not deny that an incident occurred, but strongly contests the words used, and further contests that she directed the 'threat' at Ms Pearce. In the circumstances, I consider the rather cursory show cause letter did not allow Ms Whitfield to understand the detail of the suggested reason.

[88] Further, Ms Whitfield's prior first and final warning issued on 9 July 2019 was cited by the Respondent as a reason for the dismissal only in the notice of termination and not before. As noted above, Ms Whitfield contests the alleged safety breach and only signed the notice under some pressure.

[89] The Respondent issued the show cause on one day and required a written response by 11 am the next day. An investigation was apparently instigated, and before 8am the next Wednesday it was seemingly completed, and a termination decision communicated to her at the meeting on 15 July 2020. It seems she was not given any investigation report or summary of investigation findings. Ms Whitfield was not given a further opportunity at the meeting to present a case or provide any further response.

[90] As noted above, in cases of 'serious misconduct' the Agreement provides for a different, more detailed process that was not followed here.

[91] I am not satisfied Ms Whitfield was given an opportunity to respond to the allegations as to her conduct in a procedurally appropriate manner.

(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

[92] Ms Whitfield was given appropriate opportunity to have support persons present.

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

[93] The dismissal does not relate to unsatisfactory performance.

(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

[94] The Respondent is a large well-resourced employer with a dedicated human resources team.

(h) any other matters that the FWC considers relevant

[95] Ms Whitfield had worked for the Respondent for nearly 11 years. The Respondent submitted that she was not a long-term employee. I disagree. There is no evidence of any performance or conduct issues prior to Ms Whitfield's first and final warning in July 2019 or after, until the present incident. Ms Whitfield's own health issues were raised in these proceedings, and the impact they had on her alternative employment prospects, although the Respondent may not have been aware of those beforehand.

[96] See also discussion above about 'serious misconduct' reflecting on the gravity of the behaviour.

[97] These are significant factors lend weight to the dismissal being harsh in all the circumstances.

CONCLUSION

[98] On the evidence presented to the Commission, the stated reasons for dismissal were not valid because the events were not as stated by the Respondent. In my view, dismissal was disproportionate to the gravity of the actual conduct shown on the evidence. The procedure used to conclude dismissal was deficient leading to unfairness of the process. Further, given her length of tenure, the absence of other proven misconduct, the contested nature of the prior warning and the Ms Whitfield's personal circumstances, dismissal was a harsh outcome.

[99] The dismissal was therefore unfair within the meaning of the Act.

REMEDY

[100] Having determined that there was no valid reason, and that Ms Whitfield's dismissal was procedurally and substantively unfair, it is necessary to consider the question of remedy. As required by s. 390 of the Act, I am satisfied that Ms Whitfield was protected from unfair dismissal and that she was unfairly dismissed. I am also of the view that Ms Whitfield should receive a remedy for her unfair dismissal.

[101] Reinstatement is the primary remedy for unfair dismissal, and compensation can only be awarded where the Commission is satisfied that reinstatement is inappropriate. In the present case Ms Whitfield is seeking reinstatement as the remedy.

[102] In deciding whether reinstatement is appropriate, a loss of trust and confidence may make reinstatement impractical.[29] A loss of trust and confidence must be soundly and rationally based.

[103] In her statement, Ms Whitfield submitted that she considered she could have a productive working relationship with Ms Pearce and she holds no animosity towards her.

[104] The Respondent submitted that reinstatement was not an appropriate remedy, given Ms Whitfield's behaviour towards Ms Pearce and the fact that she may have to work with Ms Pearce in future, founding a loss of trust and confidence by the Respondent in Ms Whitfield.

[105] Ms Pearce's evidence was that she would not be comfortable working with Ms Whitfield and was fearful she may be subjected to threats or violence from Ms Whitfield in the future. I accept this reflects Ms Pearce genuine concerns. But Ms Pearce's views are not the test; Primo must show that it has lost trust and confidence on a sound and rational basis. As *Perkins* (a case about alleged sale of illicit drugs in the workplace) established,[30] difficulty or embarrassment in re-establishing employment relationships is not necessarily indicative of the requisite loss:

> "We considered whether there was anything in the circumstances of the case that made it inappropriate for us to order reinstatement. We did not think there was. In deciding to order reinstatement, we appreciated that it will be necessary for Mr Pepper and Mr Perkins to display some magnanimity towards each other at the recommencement of their working relationship, but there is nothing in the evidence that suggests either man is incapable of doing this."

[106] On the evidence Ms Whitfield and Ms Pearce had only worked together a few times, indicating that it should be relatively easy to arrange work schedules appropriate to rebuilding interpersonal relationships.

[107] I note in passing that there was at least one statement and some vague, unsubstantiated references made about Ms Whitfield's behaviour including alleged threats towards other people. These comments obviously are not part of my consideration as to the appropriateness of reinstatement as they were not usable as evidence. They nevertheless form part of a wider picture revealed in the Respondent's evidence of a tendency to exaggerate in a way that assists the Respondent's case. The same might be said of characterising the conduct as serious misconduct based on exclusion of Ms Whitfield's contrary evidence.

[108] Ms Whitfield has stated that she could work with Ms Pearce and has no animosity towards her. There is nothing in the evidence that would suggest otherwise.

[109] While I accept the Respondent's right to submit that it lost trust and confidence, I am not persuaded that reinstatement is inappropriate. It may be difficult or even embarrassing for an employer to re-employ an employee who the employer argued was guilty of serious misconduct, but this in itself is not indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.[31]

[110] There is no evidence before me that the Respondent could not afford to reemploy the Applicant, nor is there any evidence that there is no role for her. Accordingly, I am satisfied that an Order should be made requiring the Respondent to reinstate Ms Whitfield by appointing her to the position in which she was employed immediately before the dismissal.

[111] In addition to reinstatement, section 391(2) of the FW Act provides that the Commission may, where appropriate, make an order to maintain continuity of employment in addition to reinstatement.

[112] Such an order is discretionary, and distinct from the decision to reinstate the employee.

[113] In all the circumstances it is appropriate to make an order to maintain continuity of employment in addition to reinstatement.

[114] Section 391(3) of the FW Act provides the Commission may, where appropriate, make an order for lost wages in addition to reinstatement. This order is discretionary and must take into account all the circumstances of the case including the conduct of the employee that led to the dismissal.

[115] In *Tenix Defence,*[32] a Full Bench of the Commission upheld a decision to reinstate an employee who made threats against his former employer but limited the order for lost remuneration on the basis of the threatening behaviour, noting

> "While this is a case in which reinstatement is appropriate, for the reasons we have given something less than the full remedy should be ordered. We therefore propose to make orders reinstating Mr Galea and maintaining the continuity of his service but limiting the order for lost remuneration to a period commencing four weeks after the date of the termination of his employment. Any further occurrence of threatening behaviour on the part of Mr Galea following his return to work would almost certainly justify his dismissal."

[116] I similarly conclude that there should be a limit on the order for lost remuneration on the basis of Ms Whitfield's misconduct which I found to be unacceptable.

[117] I note notwithstanding the summary dismissal, Ms Whitfield was paid five weeks in lieu of notice. I propose to make orders limiting lost remuneration to a period commencing five weeks after the date of Ms Whitfield's employment. The practical outcome is that no further remuneration needs to be paid to Ms Whitfield as a result of this order.

[118] Noting the Full Bench view in *Tenix Defence*, the conduct complained of here might be taken into account should there be any further misconduct by Ms Whitfield following her return to work.

CONCLUSION

[119] An Order [PR729807] requiring the Respondent to reinstate Ms Whitfield to the position that she held immediately prior to her dismissal will issue with this Decision. The reinstatement is to occur in 14 days from the date of the Decision, and to be implemented with continuity of service and employment.

COMMISSIONER

Appearances:

C.Buckley for Ms Carol Whitfield.

W.Ash for Primo Foods Pty Ltd.

Hearing details:

2021.

Brisbane.

February, 2 and 3.

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[1] AE507219; Respondent's Form F3 & Statement of Carol Whitfield dated 6 October 2020, at [3].

[2] Outline of Submissions of Respondent dated 20 October 2020, at [3].

[3] Outline of Submissions of Applicant dated 7 October 2020, at [25]-[26].

[4] Ibid, at [39].

[5] Transcript, PN50-55.

[6] Transcript, PN121-126

[7] Transcript, PN86-89.

[8] Transcript, PN624-625.

[9] Transcript, PN614.

[10] Transcript, PN885-888.

[11] (1998) 84 IR 1.

[12] Transcript, PN1036-1037.

[13] Transcript, PN1040.

[14] Transcript, PN1026-1027.

[15] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; Smith v Moore Paragon Australia Ltd PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[16] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at p. 373].

[17] Ibid.

[18] *Rode v Burwood Mitsubishi* Print R4471 (AIRCFB, Ross VP, Polites SDP, Foggo C, 11 May 1999) at para. 19

[19] *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWCFB 4185, [46] citing *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[20] *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWCFB 4185, [46] citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410.

[21] (1998) 81 IR 410 at 413.

[22] See Evidence of Rebecca Pearce paragraph [27]

[23] Transcript PN1026-1027

[24] For example *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033 [34]; *Dissanayake v Busways Blacktown Pty Ltd* [2011] FWA 3549, appeal dismissed [2011] FWAFB 6487*;* 31*Walsh v Ambulance Victoria* [2013] FWCFB 6867, VP Watson, dissenting; *Symes v Linfox Armaguard Pty Ltd* [2012] FWA 4789, appeal dismissed *Linfox Armaguard Pty Ltd v Symes* [2012] FWAFB 7877; *Carter v Qantas Airways Limited* [2011] FWA 8025, appeal dismissed *Qantas Airways Limited v Carter* [2012] FWAFB 5776; *Ratnayake v Greenwood Manor Pty Ltd* [2012] FMCA 350; *Transport Workers Union v School Bus Contractors Pty Ltd* [2011] FMCA 28; *Williams v Canberra Urology Pty Ltd* [2012] FMCA 945; *Ross v R.C. Mackenzie and Sons Pty Ltd* [2013] FMCA.

[25] *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903

[26] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, February 2000) at para. 41.

[27] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross

VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].

[28] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998); See also *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross

VP, Acton SDP, Cribb C, 11 May 2000) at para. 73, [(2000) 98 IR 137].

[29] *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15 (*Perkins*)

[30] *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15

[31] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 [27]; citing *Perkins*.

[32] *Galea v Tenix Defence Pty Ltd* PR928494 [2003] AIRC 231.