DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Warren Power
v
Lyndons Pty Ltd T/A Lyndons
(U2022/11758)

DEPUTY PRESIDENT DOBSON BRISBANE, 5 MAY 2023

Application for an unfair dismissal remedy

[1] On 12 December 2022, Mr Warren Power (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Lyndons Pty Ltd (Respondent). The Applicant seeks reinstatement and/or financial compensation.

[2] The matter was listed for conciliation with a staff conciliator on 19 January 2023 however was unable to be resolved.

[3] On 20 January 2023, the matter was initially allocated to the chambers of Commissioner Spencer, who issued directions for the filing of material. The Commissioner conducted a conference with the parties on 3 February 2023 and amended directions were issued on 6 February 2023 which listed the matter for hearing on 27 and 28 March 2023. On 22 March 2023 the matter was reallocated to my chambers. Upon reallocation, the directions put in place by Commissioner Spencer remained in place as did the listing for hearing on 27 and 28 March 2023.

When can the Commission order a remedy for unfair dismissal?

[4] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[5] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[6] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;
(ii) an enterprise agreement applies to the person in relation to the employment;
(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

When has a person been unfairly dismissed?

[7] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

Background

[8] The uncontested factual background to the matter is as follows:

- Mr Power commenced employment with the Respondent on 13 September 2021 and was engaged as a Sales Representative at the Respondent's Cairns office prior to his dismissal on 25 November 2023.

- The reason given by the Respondent for the termination of the Applicant's employment was serious misconduct involving his engagement in bullying and sexual harassment.

The hearing

[9] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[10] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, the matter was

listed for a hearing by Commissioner Spencer pursuant to s.399 of the FW Act. Just prior to the listing date, the matter was allocated to me. So as not to cause any undue delay, the listing dates remained.

Permission to appear

[11] Both the Applicant and the Respondent sought to be represented before the Commission by a paid agent and a lawyer, respectively.

[12] Relevantly, section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[13] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

(a) it would enable the matter to be deal with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[14] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.[1] The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.[2]

[15] Commissioner Spencer considered the representations given by the parties during a conference and granted leave on the basis that:

- allowing the Applicant to be represented by a paid agent would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter;
- it would be unfair not to allow the Applicant to be represented because the Applicant is unable to represent himself effectively, particularly given he was a witness in the proceedings; and
- the Applicant had no objection to the Respondent being represented by a lawyer.
- allowing the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter;
- it would be unfair not to allow the Respondent to be represented because the Respondent is unable to represent itself effectively; and
- the Applicant had no objection to the Respondent being represented by a lawyer.

[16] Accordingly, at the hearing on 27 and 28 March 2023, the Applicant was represented by Mr Alan Dircks from Just Relations and the Respondent was represented by Mr Troy Spence of Counsel instructed by Mr Rohan Tate of Optimum Legal.

Witnesses

[17] The Applicant gave evidence on his own behalf.

[18] The following witnesses gave evidence on behalf of the Respondent:

- Mr Ian Chopping
- Mr Stephen Cushion
- Mr Levi Lux
- Mr Troy Mitchell and
- Ms Shanelle Ord.

Submissions

[19] The Applicant filed submissions in the Commission on 10 February 2023. The Respondent filed submissions in the Commission on 7 March 2023, with the Applicant's material in reply filed on 14 March 2023.

[20] Final written submissions were filed by the Applicant on 14 April 2023. Final written submissions were filed by the Respondent on 24 April 2023.

Has the Applicant been dismissed?

[21] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[22] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[23] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[24] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent on 25 November 2023.

[25] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[26] Under section 396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

Was the application made within the period required?

[27] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[28] It is not disputed and I find that the Applicant was dismissed from his employment on 25 November 2022 and made the application on 12 December 2022. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[29] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[30] It was not in dispute and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[31] It was not in dispute and I find that the Applicant was an employee, who commenced their employment with the Respondent on 13 September 2021 and was dismissed on 25 November 2022, a period in excess of 6 months.

[32] It was not in dispute and I find that the Applicant was an employee.

[33] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Award Coverage

[34] It was not in dispute and I find that, at the time of dismissal, the Applicant was covered by an award, being the *General Retail Industry Award 2022*.

[35] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[36] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[37] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis).

[38] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

Was the dismissal a case of genuine redundancy?

[39] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

(a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[40] It was not in dispute and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[41] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[42] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[43] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[44] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[3]

[45] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[46] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[4] and should not be "capricious, fanciful, spiteful or prejudiced."[5] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[6] However, I "must consider the entire factual matrix in determining whether an employee's termination was for a valid reason."[7]

[47] The Respondent submitted that there was a valid reason related to the Applicant's conduct. For there to be a valid reason related to the Applicant's conduct, I must find that the conduct occurred and justified termination.[8] "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."[9]

Submissions

[48] The Applicant submitted that there was no valid reason for the dismissal related to the Applicant's capacity or conduct because he did not engage in the conduct alleged and that the Respondent's response to the alleged conduct was disproportionate. The Applicant submitted that the reason given by the Respondent did not have sound, defensible or well-founded reasons to terminate the Applicant's employment.[10]

[49] The Applicant stated that while the allegations are refuted, that if they were accepted, the termination of the Applicant's employment was disproportionate. The Applicant drew the Commission to the observations of Lord Maugham in that 'in such cases, one must apply the standards of men, and not those of angels'[11]. The Applicant submitted that in the event that the conduct did occur, that any phrase should be considered figurative. The Applicant further submitted that swearing in the workplace was commonplace and tolerated and that the Respondent had a range of options in accordance with their policies to attend to any alleged misconduct prior to resorting to termination.

[50] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's capacity or conduct because the witness evidence garnered during an investigation substantiated the allegation that the Applicant had engaged in the behavior and that the behavior amounted to serious misconduct involving sexual harassment. The Respondent submitted that the words used by the Applicant amounted to sexual harassment. The Respondent made reference to *Hengst v Town and Country Community Options Inc*[12] and drew the similarities between a phrase being said in the workplace being a valid reason for dismissal.

Evidence

[51] The Applicant in his witness statement denied engaging in the alleged conduct – namely that he had said words to the effect of "I'll fuck you in the arse" or "suck my dick" towards any employee of the Respondent on or around the 23rd of August 2022 (The Words).

[52] The Applicant stated that he had tried to make a complaint about his manager Mr Brett Robin and that the Respondent had not properly investigated his allegations.

[53] The Respondent presented witness statements from Mr Levi Lux, Mr Troy Mitchell, and Ms Shanelle Ord stating that they had heard Mr Power using The Words and further provided a copy of an independent investigation conducted by Mr Stephen Cushion that confirmed the witnesses had heard the Applicant use The Words towards Mr Mitchell on or around the 23rd of August 2022.

Warren Power (the Applicant)

[54] The Applicant provided a witness statement on his own behalf. The Applicant denied using the words "I'll fuck you in the arse/suck my dick" and gave evidence that swearing was common in the workplace. The Applicant stated that he had previously been issued a formal warning in relation to templates that he had been required to use in the course of his work and felt that he had been unfairly targeted following an incident between himself and his manager, Mr Brett Robin. The Applicant stated that he told some colleagues about his intention to lodge a formal complaint about Mr Robin and did so on 4 July 2022.

[55] The Applicant stated that the Employer had informed him on 28 July that the investigation regarding his complaint was complete and that 'appropriate action' had been taken. The Applicant was on a period of medical leave from 27 July until 8 August 2022. The Applicant stated that upon his return he was assigned a new task to mentor staff which was contrary to his medical certificate which stated he should not be given new tasks. The Applicant

was then placed on a performance improvement plan on 11 August. The Applicant went on another period of leave returning on 22 August 2022. The Respondent provided The Applicant with a signed declaration indicating the Applicant had read and understood the Bullying and Harassment Policy at Lyndon's. The representative for the Applicant submitted and Mr Power gave evidence that he had simply signed this without actually sighting the policy.

Ian Chopping

[56] Mr Chopping gave evidence that the Applicant had made a complaint against his direct Manager Mr Robin at a conference on 13 June 2022. Mr Chopping gave evidence that there were performance issues with the Applicant and that these were raised with the Applicant on 30 June 2022. Briefly, this included the Applicant refusing to use a new form/template he was directed to use and refused initially to use. This resulted in the Applicant being issued a written warning.

[57] Mr Chopping gave evidence that the Applicant made the complaint about Mr Robin on Monday 4 July after receiving the formal written warning. The complaint was investigated and found to be unsubstantiated. Mr Chopping gave further evidence that there were ongoing multiple problems with the Applicant's performance. The Commission was played copies of two disciplinary meetings with the Applicant (the Recordings).

[58] Under cross examination Mr Chopping's evidence was credible and consistent.

Levi Lux

[59] Mr Lux gave evidence as part of the material submitted by the Respondent. Mr Lux was at the relevant times, employed in Counter Sales at the Lyndon's Cairns Branch and remained in that role at the time of the hearing.

[60] Mr Lux stated that he found the Applicant to be 'very aggressive' and that he would often be asked by the Applicant to perform tasks that the Applicant could have done himself. Mr Lux stated that the Applicant would ask Mr Lux to perform tasks that were not within his position description and that on one occasion when Mr Lux informed the Applicant that he wasn't available to complete a task for him, that the Applicant had used words to the effect of "I will take you outside". Mr Lux stated that he had interpreted this to mean that the Applicant was threatening to assault him. Mr Lux stated that he hadn't made a complaint about Mr Power because he was "used to dealing with bullies like (the Applicant)".

[61] Mr Lux stated that in August 2022 (and was unable to recall the specific date) that he had heard the Applicant in a conversation with Mr Mitchell and that the Applicant had said "I will fuck you up the arse" and "suck my dick".[13] Mr Lux stated that the language was 'memorable' given it was particularly offensive. Mr Lux could not recall specifically what date the conversation occurred but stated that it had happened approximately 2 weeks prior to an altercation between Mr Power and Mr Mitchell on 23 August 2023. Mr Lux also gave evidence that he had witnessed Mr Power giving Mr Mitchell bear hugs although he was unclear as to when this had occurred.[14]

Troy Mitchell

[62] Mr Mitchell gave evidence on behalf of the Respondent that he had been bullied and harassed by the Applicant. Mr Mitchell stated that the Applicant regularly said inappropriate things to him under the guise of humor. Mr Mitchell stated that on one occasion, but he could not specify when, that the Applicant, stated words to the effect of "come on then, get under the table, suck me off" whilst the Applicant gestured to his groin.[15] Mr Mitchell stated that he found comments such as this to be inappropriate but did not report them.

[63] Mr Mitchell stated that in the month of August 2022, the Applicant said to him, words to the effect of: "suck my dick/I will fuck you up the arse" and that Mr Mitchell found the words offensive and inappropriate. Mr Mitchell also stated that on another occasion of which he could not provide the exact time and date, that the Applicant came up behind him and 'bear hugged' him and that he had to struggle to get loose.[16] This evidence was consistent with the evidence of Mr Lux.[17]

[64] Mr Mitchell stated that on 23 August 2022, he and the Applicant had a heated argument and that combined with the previous conduct from the Applicant, he felt he had to resign. Mr Mitchell resigned and two days later on 25 August 2022 he filed a written complaint about Mr Power's conduct towards him.[18] A copy of Mr Mitchell's complaint is at page 178 of the Digital Court Book.

[65] It was the evidence of Mr Mitchell that the conduct of the Applicant in this incident was not the first of the Applicant's conduct of this nature and that he had previous form for similar conduct.[19]

Shanelle Ord

[66] Ms Ord's evidence gave a clear recollection of The Words she heard used by the Applicant to Mr Mitchell. Mr Ord confirmed recounting her evidence to Mr Cushion. She openly admitted telling the Applicant she did not give that evidence because she was scared to do so but she stood firmly by her convictions that The Words were indeed said by Mr Power on or around the 23rd of August 2022.

Stephen Cushion

[67] Mr Cushion gave evidence of the external investigation he conducted in regard to the allegations made by Mr Mitchell. He gave evidence from each of the witnesses and his report was concise, factual and to the point. I found it credible and that the conclusions made were open to Mr Cushion to be drawn, based on the evidence before him. Under cross examination I was satisfied of Mr Cushion's credit and findings, albeit brief.

Findings

[68] Mr Power's evidence was at odds with three witnesses who I found to be credible, considered and who were in my view, mostly all distressed and affected by the gravity of the alleged conduct of Mr Power. Overall, I found Mr Power's evidence to be self-serving and I am not satisfied of his credit.

[69] Further, I am not satisfied that there was any link between Mr Power's complaint about Mr Robin and his own conduct towards Mr Mitchell. The Applicant did not present any credible nexus between the two issues. There were no allegations of collusion between the parties and therefore there can be no basis to blame Mr Power's unacceptable conduct towards Mr Mitchell as having any connection to any prior disputes he may have had with Mr Robin. Furthermore, the timeline in respect of the Applicant's allegations, disciplinary action taken by the Respondent, the timing of the Applicant's complaint and its eventual findings also do no support a nexus between them.

[70] Mr Lux, whilst being somewhat confused about the order in which certain events had taken place, was clear that he had witnessed unwelcome bear hugging from Mr Power directed at Mr Mitchell and that he had heard Mr Power say The Words to Mr Mitchell and in this respect I disagree with the submissions of the Respondent at P36.[20] I accept that Mr Lux's evidence was his recollection of what he had heard Mr Power say to Mr Mitchell and that this was consistent with the interview statement he also gave to Mr Cushion.[21]

[71] Mr Mitchell's evidence was sincere, contained sufficient particulars and had caused him a great deal of discomfort. Further, his evidence was that he had heard Mr Power say The Words to him, that they were unwelcome, and it was my view that his allegations were not made lightly. I accept Mr Mitchells evidence of what had occurred.

[72] I am satisfied that Mr Power attempted to apply pressure to Ms Ord not to provide evidence of what she had heard, however, despite this, Ms Ord's evidence was clear that she had heard Mr Power say The Words to Mr Mitchell. In this respect I disagree with the Respondents submissions at P36.[22] It was Ms Ord's evidence, which I accept, that she had to instruct solicitors to ask Mr Power to cease and desist contacting her to interfere with her evidence. This in and of itself, is a serious matter. Not only was it a failure to follow a reasonable and lawful directive of the Respondent to keep the matter confidential but it may also be a breach of other laws such as the victimization provisions of sexual harassment legislation and criminal laws in respect of interfering with witnesses.[23] Whilst I accept that the principles of *Briginshaw v Briginshaw*[24] are relevant to these latter issues (specifically the potential victimization and criminal code breaches), in respect of the allegations that the Applicant used The Words towards Mr Mitchell, whilst the witnesses were confused about when they occurred, partly as a result of confusion caused in cross examination, which is evidenced in the submissions of the Respondent, the witnesses were all very clear that The Words were used, that they were used by the Applicant and that they were directed specifically at Mr Mitchell. The Applicant completely denies using The Words at all even in the face of this evidence. The Words used fall clearly within the definition of sexual harassment as defined in the Fair Work Regulations[25] and the standard of proof in this respect has in my view been met.

[73] I have considered the Applicant's failure to call Mr Brown as a witness in light of its allegations that the Applicant's position was advertised prior to him being terminated and I do not find a negative inference in this decision. I accept the evidence of Mr Chopping that the Respondent was at one point looking for two sales staff. Circumstances surrounding staffing shortages are well known at this present time and there was no credible nexus drawn by the Applicant between the additional advertisement and his own termination. Further I don't accept that the employer requiring the tools of trade to be returned during the suspension and investigation process had any bearing on the outcome of that process. An Independent

investigation was conducted by Mr Cushion and that investigation was confined to the very serious issues of conduct alleged including the use of The Words and the physical "bear hugging". The Conduct of the Applicant, once substantiated, was so egregious that it could not be ignored.

[74] Whilst there does appear to be some confusion amongst come of the witnesses about when things were said there was no doubt that they were said and that they were said on or around the 23rd of August 2022. Further, there is no doubt that the Applicant denies they were said at all, or at any time whatsoever. I don't find this complete denial credible in light of the evidence from the multiple witnesses.

[75] It is my view that The Recordings from earlier disciplinary action with the Applicant, demonstrated a dysfunctional, aggressive, disrespectful and untenable relationship from the Applicant towards his managers.

[76] The witness evidence of the witnesses in these present allegations from Mr Lux and Mr Mitchell were believable and measured. These witnesses both made appropriate concessions where it was relevant to do so.

[77] The evidence of the Applicant was argumentative, contradictory, demonstrated a lack of insight into his own conduct and in all the circumstances lacked credibility.

[78] The evidence of Ms Ord was that she told the Applicant what he wanted to hear about her evidence because she didn't want to engage in any disagreement with him. For that reason, her evidence to the Applicant that she didn't make the admissions she made in her statements was only said to appease the Applicant and is not an accurate reflection of what she witnessed. Ms Ord confirmed that she did witness the Applicant speak to Mr Mitchell in the manner Mr Mitchell alleged and that she heard the Applicant use The Words to Mr Mitchell. On this basis it was reasonable for the Respondent to conclude in my view that the Applicant had engaged in sexual harassment conduct towards Mr Mitchell.

[79] Having regard to the matters I have referred to above, I find that there was a valid reason for the dismissal related to the Applicant's conduct and that was his use of The Words to Mr Mitchell on or around the 23rd of August 2022.

Was the Applicant notified of the valid reason?

[80] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[26]

[81] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[27] and in explicit[28] and plain and clear terms.[29]

Submissions

[82] The Applicant submitted that he was notified of the valid reason on the basis of correspondence to him on 22 November 2022 in which he was advised of the allegations, that an independent investigation had been conducted and that those allegations were substantiated. The Applicant was suspended on full pay, advised that he had a final warning on file and he was provided an opportunity to show cause why further disciplinary action including termination should not be taken against him. The Applicant responded that he refuted the allegations and alleged that Ms Ord had denied giving evidence in support of the allegations and that Mr Lux was not in the office at the time. The Applicant further went on to discredit Mr Lux and Mr Mitchell.

[83] The Respondent submitted that the Applicant was notified of the valid reason on the basis that he was given the findings of the investigation on 22 November, reminded of the previous final warning and provided an opportunity to show cause why he should not be further disciplined or even terminated.

Evidence

[84] The letters that were the subject of the submissions were tended as evidence in respect of annexures to the various statements of the party. Audio recordings (The Recordings) of the Applicant's previous discussions with his managers were played in evidence and witnesses were cross examined.

Findings

[85] Having regard to the matters referred to above, I find that the Applicant was notified of the reason for his dismissal prior to the decision to dismiss being made, in explicit, plain and clear terms. This is evidenced in the letter to Mr Power of 25 November 2022.[30]

[86] In all the circumstances, I find that the Applicant was notified of the reason for his dismissal.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[87] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[31]

[88] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.[32] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[33]

Submissions

[89] The Applicant submitted that he was given an opportunity to respond to any valid reason because the allegations were put to him for his response in writing on 22 November 2022[34] to

which he responded. He was given a further opportunity on 25 November 2022 to show cause as to why further disciplinary action including termination should not be taken and the breach of the Company's policies of Bullying and Harassment, Lyndon's Code of Conduct and Sexual Harassment taken by the Applicant.

[90] The Respondent submitted that the Applicant did have an opportunity to respond to any valid reason related to the Applicant's capacity or conduct because of the documented evidence supporting the same in the DCB at pages 65-67.

Findings

[91] I find that the Applicant was given adequate opportunities to respond to the valid reason and that this was uncontested.

[92] In all the circumstances, I find that the Applicant was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[93] 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.

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

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer 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."[35]

Submissions

[95] The Applicant submitted that the Respondent did not offer the Applicant to have a support person present, however as I have already said, there is no positive obligation on the Respondent in this respect and therefore I consider this to be a neutral issue.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[96] Whilst the Respondent submitted that the Applicant had previously been provided a final warning for performance related issues and I note that the Applicant disputes that previous warning, this dismissal was not related to unsatisfactory performance, but rather, serious misconduct, therefore this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

Submissions

[97] The Respondent made no further submissions on this point other than it provided a fair go, investigated the allegations and followed an appropriate process for the Applicant to show cause in respect of that process.

[98] The Applicant submitted that the manner in which the Respondent effected the dismissal was harsh and that the Applicant was not provided a fair go however the Applicant failed to provide any evidence of this.

[99] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

Findings

[100] I find that having regard to the matters above, I find that the size of the Respondent's enterprise was not likely to impact on the procedures followed in effecting the dismissal.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

Submissions

[101] Both parties made similar submissions without any further evidence on this issue as they did to the previous issue (s387(f)).

Findings

[102] I find that whilst the Respondent lacked dedicated human resource specialists and expertise they were able to avail themselves of adequate assistance and I find it had no unfair or unreasonable impact on the procedures followed in effecting the dismissal.

What other matters are relevant?

[103] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

Submissions

[104] The Applicant submitted that the following other matters are relevant to the Commission's consideration of whether the dismissal was harsh, unjust or unreasonable was that he had never received a copy of the Employee Handbook which contained the Respondent's code of conduct and Anti-Bullying policy.

[105] The Respondent submitted that these documents were available to the Applicant and that the Applicant had signed a declaration that he had read, understood and accepted them on 13 September 2021.[36]

[106] The representative for the Applicant submitted and Mr Power gave evidence that he had simply signed the Employee Handbook without actually sighting it. I don't accept this. Mr Power is an adult and there was no evidence put to me that he lacked capacity to understand what he was signing. It is his responsibility to ensure he has read and understood a declaration before he signs it. I don't accept that a failure on his part to follow that up before signing it gives him a free pass to say he isn't bound by the policy he has declared an understanding and acceptance of.

[107] Further, whilst swearing in the workplace may or may not be commonplace The Words used by Mr Power went far beyond simply swearing in the workplace and fall squarely within the definition of Serious Misconduct as prescribed by the Fair Work Regulations. Such conduct in the workplace is simply intolerable, the evidence was clear that it was unwelcome and such conduct opens the Respondent to a failure of its duty to provide a safe place of work for its employees.

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

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

[109] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[37]

[110] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable because the conduct of the Applicant was of such serious gravity and in the face of credible evidence to the contrary, that the Applicant's failure to admit his own actions left the Respondent with no confidence that such conduct would not reoccur. This created an untenable situation inconsistent with the continuation of the employment relationship or contract.

Conclusion

[111] I am therefore satisfied that the Applicant was not unfairly dismissed within the meaning of section 385 of the FW Act.

[112] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act. The Applicant's application is therefore dismissed and I order as such.

DEPUTY PRESIDENT

Appearances:

Mr A Dircks for the Applicant.
Mr T.A Spence of Counsel instructed by Optimum Legal for the Respondent.

Hearing details:

Brisbane, 27 – 28 March 2023.

Final written submissions:

Applicant 14 April 2023.
Respondent 24 April 2023.

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[1] *Warrell v Fair Work Australia* [2013] FCA 291.

[2] Ibid.

[3] *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].

[4] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[5] Ibid.

[6] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[7] *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, 413.

[8] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[9] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[10] *Selvachandran v Petron Plastics Pty Ltd* [1995] 62 IR 371 at [373]

[11] *Jupiter General Insurance Co Ltd v Shroff* [1937] 3 at [73] and [74]

[12] *Hengst v Town and Country Community Options Inc* (1995) 185 CLR 411

[13] Transcript Tuesday 28 March 2023, PN1287.

[14] Transcript Tuesday 28 March 2023, PN1223 and PN1280.

[15] Transcript Tuesday 28 March 2023, PN1592.

[16] Ibid PN1561.

[17] Transcript Tuesday 28 March 2023, PN1223 and PN1280.

[18] P25, Digital Court Book.

[19] Transcript Tuesday 28 March 2023, PN1592.

[20] PN1275 see also p193-194 of the DCB.

[21] DCB SC5 p193-194.

[22]Statement of Mr Ord Paragraph 29, DCB p 309, PN1700, PN1716-1718.

[23] *Criminal Code* (Qld) S119B(b).

[24] (1938) 60 CLR 336; cited in Barber v Commonwealth (2011) 212 IR 1, 33 [93].

[25] *Fair Work Regulations 2009* (Cth) Reg 1.07(3)(a)(iv).

[26] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[27] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[28] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[29] Ibid.

[30] DCB P68

[31] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[32] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[33] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[34] DCB p 63-64.

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

[36] DCB P208.

[37] *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 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].