



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kashish Chhabra

v

Catholic Homes Incorporated
(U2022/6640)

COMMISSIONER SCHNEIDER

PERTH, 19 JULY 2023

Application for an unfair dismissal remedy

[1] On 26 June 2022, Mr Kashish Chhabra (the Applicant) made an application to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Catholic Homes Incorporated (the Respondent).

[2] The Applicant seeks compensation.

[3] The matter was subject to a Hearing before the Commission.

[4] The Applicant filed submissions in the Commission on 2 September 2022.

[5] The Respondent filed submissions in the Commission on 16 September 2022.

[6] Final written submissions were filed by the Applicant on 28 September 2022.

[7] At the Hearing, the Applicant gave evidence on his own behalf.

[8] The following witnesses gave evidence on behalf of the Respondent at the Hearing:

- Ms Jackie Hadida (Ms Hadida) – Executive Manager, Human Resources with the Respondent.
- Ms Susan Nottle (Ms Nottle) – Clinical Care Coordinator with the Respondent.
- Ms Louisa Chadwick (Ms Chadwick)– Facility Manager of Servite Village with the Respondent.
- Ms Nikita Pereira (Ms Pereira) – Former Human Resources Officer with the Respondent.

- Ms Mitchell - Student Nurse on placement with the Respondent at the time of the incidents.
- Ms Brown - Student Nurse on placement with the Respondent at the time of the incidents.

Background

[9] The Applicant commenced employment with the Respondent on 11 January 2021.

[10] The Applicant's employment was subject to an enterprise agreement, being the *Catholic Homes Enterprise Agreement 2017*.

[11] The Applicant was engaged as a Multi Skilled Care Worker (Level 1).

[12] On 7 June 2022, the Respondent became aware of allegations regarding the Applicant's conduct that occurred on 1 and 2 June 2022.

[13] The Respondent then commenced an investigation into the allegations.

[14] The allegations put to the Applicant related to elder abuse.

[15] The Applicant's employment with the Respondent was terminated on 16 June 2022.

[16] I have made a decision to not publish the names of the residents who the Applicant is alleged to have mistreated and neglected in care. In this decision, the residents will be referred to as Resident H and Resident J. The first names of the complainant student nurses will also not be used in the Decision, for their privacy.

[17] For context, and before traversing the submission and evidence of the parties, it is helpful to note the primary allegations against the Applicant that were the catalyst for the dismissal.

[18] On 7 June 2022, Ms Chadwick of the Respondent was approached by two trainee enrolled nurse students, Ms Brown and Ms Mitchell, who reported the following:

- On 1 June 2022, Ms Mitchell observed the Applicant using unreasonable force to move Resident J whilst he was in bed during an incontinence aid change. Ms Mitchell also reported that, during the change, the Applicant had not attended to Resident J's personal care by not cleaning him.
- On 2 June 2022, whilst Ms Brown was on rounds with the Applicant, she observed that he did not clean Resident H appropriately or apply the required barrier cream whilst conducting an incontinence aid change.
- Later that shift, both Ms Mitchell and Ms Brown observed the Applicant forcibly giving Resident H a milk drink. During this time, Ms Brown and Ms Mitchell reported

that the Applicant was yelling at Resident H and used physical force to grab her forearm.

Legislation

Preliminary matters

[19] The Act requires that I determine several initial matters before considering the merits of the Applicant's application. There is no dispute between the parties concerning these initial matters, and I am satisfied that none of the usual preliminary issues require attention.¹

When can the Commission order a remedy for unfair dismissal?

[20] Section 390 of the 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.

[21] Both limbs must be satisfied.

[22] 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.

[23] As has been established, I am satisfied that the Applicant is protected and therefore I must now consider the second limb.

[24] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account several criteria.

[25] Section 387 of the Act reads:

“387 Criteria for considering harshness etc.

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

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

[26] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.²

Witness Evidence

The Applicant

[27] The Applicant, at all times, has denied the allegations put to him by the Respondent.

[28] The Applicant highlighted that, following the allegations and his eventual termination of employment, the completion of his nursing degree was delayed. This delay occurred as his clinical placement was cancelled due to the Serious Injury Response Scheme (SIRS) notification made by the Respondent to the Aged Care Quality and Safety Commission.

[29] The Applicant provided communication to Ms Chadwick in relation to an earlier incident, in February 2022, involving another staff member. The Applicant could not demonstrate the relevance of this communication.

[30] The Applicant, in his written statement to the Respondent, outlined his concerns about the two nursing students, Ms Brown and Ms Mitchell.

[31] The Applicant raised concerns about his belief that the students had mental health issues and/or neurodevelopmental disorders. It appears, on assessment of this evidence, that the Applicant sought to infer that the students’ alleged conditions had bearing on the allegations mounted against him or on their credibility.

[32] The Applicant asserts that he was not rough with Resident J. Rather, that he used the bedsheet to reposition Resident J to ensure he would not fall off the bed.

[33] The Applicant, in his written statement, states the following:

“so I used the bed sheets to reposition him so that he can be in the middle and he moaned a bit”.

[34] The Applicant submits that Resident J was never in pain and never complained about the interaction.

[35] The Applicant submitted that he correctly changed the incontinence aid on Resident H. The Applicant submits that the aid was “*damp and it wasn’t soaking wet*”.

[36] The Applicant stated that he cleaned Resident J and applied the barrier cream as is standard.

[37] The Applicant stated that Resident H was waving her hand which caused her to spill the drink he was trying to give her. The Applicant stated that he held “*her hand gently to calm her down*”. The Applicant stated that he was holding her hand for two purposes “*to calm her down and secondly she was waving her hand and throwing away lactulose drink*”.

[38] The Applicant confirmed in evidence that he worked with Ms Brown and Ms Mitchell on 1 June 2022 and 2 June 2022.

[39] The Applicant’s evidence was that he performed his duties as normal during these rostered shifts, with the exception of being partnered with a student nurse on each shift, rather than a staff member of the Respondent.

[40] The Applicant filed a significant volume of material which related to his studies and the impact the termination of his employment and the SIRS report had on his studies and visa status. I note that these are important issues to the Applicant and have been factored into my consideration.

[41] However, the Commission does not have the authority to assess the SIRS report made to the relevant authority or the decision of the university to delay the Applicant’s clinical placement.

Ms Hadida – Executive Manager, Human Resources

[42] Ms Hadida gave evidence on behalf of the Respondent.

[43] Ms Hadida confirmed that Ms Periera, during her employment with the Respondent, reported directly to Ms Hadida.

[44] Ms Hadida gave extensive evidence on the Respondent’s policies relating to the management of incidents which are required to be reported to the Aged Care Quality and Safety Commission.

[45] Ms Hadida was not present for the investigation meeting between the Applicant and the Respondent’s representatives. However, Ms Hadida had discussions with Ms Periera following the investigation meeting.

[46] Ms Hadida's evidence was that the information provided by the Applicant, during the investigation, was inconsistent and that his conduct amounted to a serious breach of the Respondent's workplace policies and procedures.

[47] Ms Hadida decided that consistent with the Respondent's disciplinary procedure and disciplinary policy, the termination of the Applicant's employment was the appropriate outcome.

Ms Brown – Student Nurse

[48] Ms Brown provided evidence on behalf of the Respondent.

[49] At the time of the dismissal, Ms Brown was studying a Diploma of Nursing at South Metropolitan TAFE and was completing a practical placement at the Respondent at the time of the incident.

[50] Ms Brown gave evidence that, prior to commencing at the Respondent, she did not know any of the residents or staff.

[51] After starting at the Respondent, Ms Brown met Ms Mitchell who was also completing a practical placement for her TAFE course.

[52] Ms Brown confirmed that, prior to commencing her placement at the Respondent, she did not know the Applicant.

1 June 2022

[53] Ms Brown confirmed that she did not work directly with the Applicant on 1 June 2022.

[54] However, Ms Brown did speak with Ms Mitchell who was buddied with the Applicant on 1 June 2022.

[55] Ms Brown also gave evidence that in the evening, on 1 June 2022 at approximately 5:00PM, whilst on break, she had a conversation with Ms Mitchell.

[56] Ms Brown gave evidence about her conversation, noting that Ms Mitchell appeared upset regarding the standard of care the Applicant was providing residents.

[57] In particular, Ms Brown recalled the concern being in relation to the cleaning of residents when changing incontinence aids.

[58] Ms Brown gave evidence that, following this discussion with Ms Mitchell, she checked on a number of residents attended to by the Applicant and noted the following regarding the residents' condition:

- No presence of barrier cream.

- The presence of dry skin, which further indicated that no barrier cream, or similar, had been used.
- Reddened skin.
- Faint smell of urine from some residents.

[59] Ms Brown gave evidence that whenever she interacted with Ms Mitchell that evening, following the discussion regarding her concerns, she appeared upset and distressed.

2 June 2022

[60] Ms Brown confirmed that she worked with the Applicant on 2 June 2022.

[61] The Applicant was her “*buddy*” for the shift on 2 June 2022.

[62] Ms Brown gave evidence that the Applicant did not appear interested in assisting her training and ignored her requests for information, at times, during the shift.

[63] Ms Brown gave evidence that, between 3:00PM and 4:00PM, she was changing incontinence aids with the Applicant.

[64] In relation to Resident H, Ms Brown stated she observed the following conduct from the Applicant, and reactions from Resident H, whilst completing an incontinence aid change:

- The Applicant failed to gain consent from, or properly engage with, Resident H over what was about to occur prior to undressing the resident.
- Resident H appeared to uncomfortable and resisted the Applicant’s contact.
- The Applicant then told Resident H “*we are going to change your pad*”, but only after he had begun undressing her.
- The Applicant was “*physically rough*” Resident H and “*yanked*” the incontinence pad off.
- The Applicant failed to clean Resident H or apply barrier cream.
- The Applicant did not seek assistance from Ms Brown during the procedure, despite Resident H being classified as a “*two-assist*” resident.

[65] Ms Brown stated that, as she was working under the direction and guidance of the Applicant, she felt powerless to interject at the time of the incident.

[66] Ms Brown stated she observed the following regarding the alleged incident involving the Applicant and further rough handling of Resident H, on 2 June 2022:

- At around 4:00PM, Ms Brown assisted the Applicant in preparing the dinner service. The dinner service commenced at 5:00PM and lasted for around an hour.
- After the dinner service, Ms Brown stated that she was walking around the premises with Ms Mitchell when they heard yelling coming from the room of Resident H.
- Ms Brown stated that she observed the following when approaching the room.
- Resident H was in her bed and the Applicant was next to her with a cup of liquid trying to get her to drink it.
- The cup had a closed lid and was two handled, similar to a child's "sippy cup".
- The Applicant was very loud, aggressive, and angry towards Resident H.
- Ms Brown stated she heard the Applicant say "you need to take it, just drink it" to Resident H.
- The Applicant was very insistent and forceful with Resident H.
- Ms Brown stated that Resident H said "No, I don't want it" on several occasions and was pushing her head away and waving her left arm in the air.
- Ms Brown stated that she witnessed the Applicant grab the resident on her right arm, near or on the wrist, which he held on to for around 5 seconds.
- Ms Brown stated that, after witnessing this, she spoke up and said "maybe you should just leave it" to the Applicant.
- The Applicant then left the room.
- Ms Brown said that Resident H appeared agitated and distressed following the incident.
- Ms Brown stated that Resident H told her "I don't like that man, he needs to go away".
- Ms Brown sat with Resident H for around 10 to 15 minutes, until she had calmed down.

[67] Ms Brown explained that, in the following days, she had discussions with Ms Mitchell about what they had witnessed in relation to the Applicant's conduct.

[68] Ms Brown stated that, after the subsequent long weekend had finished, they reported the conduct of the Applicant to Ms Chadwick, the Facility Manager.

Ms Chadwick - Facility Manager

[69] Ms Chadwick was the Facility Manager of Servite Village at the time of the incidents.

[70] Ms Chadwick gave evidence that she had commenced work for the Respondent on 25 October 2021, in her position, and that she has 15 years' experience as a facility manager in the Aged Care industry.

[71] Ms Chadwick did not witness the conduct of the Applicant.

[72] Ms Chadwick was notified of the Applicant's conduct on 7 June 2022.

[73] Ms Chadwick was involved in the decision to terminate the Applicant's employment.

[74] Ms Chadwick gave evidence that, on 7 June 2022, she received complaints from two student nurses, Ms Brown and Ms Mitchell, in relation to the conduct of the Applicant.

[75] The conduct of the Applicant in question primarily focused on two residents: Resident J and Resident H.

[76] In summary, the complaints were as listed below:

- The student nurses had witnessed the Applicant mistreating Resident J and Resident H.
- On 1 June 2022, Ms Mitchell witnessed the Applicant move Resident J "*like a sack of potatoes*" whilst moving Resident J on his bed.
- Ms Mitchell complained that the Applicant failed to clean Resident J when changing an incontinence aid.
- On 2 June 2022, Ms Brown had witnessed the Applicant fail to clean Resident H properly when changing the incontinence aid.
- On 2 June 2022, both Ms Mitchell and Ms Brown witnessed the Applicant raising his voice and forcibly grabbing Resident H by the arm when she was refusing a drink, despite Resident H indicating they did not want the drink.

[77] Ms Chadwick gave evidence that, after consulting with Ms Pereira from the Respondent's Human Resources team on 7 June 2022, she contacted the Applicant, on 8 June 2022, informing him that he was stood down and directing him to not attend work.

[78] Ms Chadwick then provided the Applicant with a letter outlining the allegations and requested a written response prior to meeting the Applicant in person on 10 June 2022.

[79] Ms Chadwick outlined that she met with the Applicant, on 10 June 2022, alongside Ms Pereira.

[80] Below is a summary of the key points outlined by Ms Chadwick in relation to the meeting on 10 June 2022:

- The Applicant denied all allegations.
- The Applicant denied not cleaning Resident J and Resident H correctly but confirmed that Ms Brown had questioned the Applicant over the process he used.
- The Applicant confirmed that Resident J had been on the edge of the bed and was shocked and surprised when he woke up.
- The Applicant stated he was gentle when dealing with Resident H but did concede that Resident H had indicated over an extended period that she did not want the drink.
- The Applicant raised historical issues not related to the workplace in relation to Ms Brown and Ms Mitchell.

[81] Ms Chadwick said that the Applicant's written response to the allegations and his responses in the meeting, were not satisfactory and were inconsistent with the statements of Ms Brown and Ms Mitchell.

[82] Ms Chadwick outlined that, for the below reasons, she advised Ms Periera that she supported a decision to terminate the Applicant's employment:

- Both Ms Brown and Ms Mitchell had observed the Applicant failing to clean residents in accordance with standard procedure on different days.
- The Applicant, whilst denying the allegations, admitted that Ms Brown had raised this issue directly with the Applicant.
- The Applicant's version of events in relation to Resident J differed between his written statement and his verbal explanation. Namely, the Applicant, in writing, confirmed that Resident J had moaned when the Applicant was moving the resident. However, the Applicant denied this when being interviewed.
- The Applicant admitted that Resident J had woken up "*shocked and surprised*".
- The Applicant provided an inconsistent explanation in relation to his interaction with Resident J.
- The Applicant stated he could not wake the resident but also said he had a conversation with the resident and confirmed he was okay.
- The Applicant admitted that Resident H had refused to drink on multiple occasions, and, despite this, he persisted in his attempts to make the resident drink.
- The Applicant admitted he had moved Resident H's hand. However, he claimed that this was done gently.

[83] Ms Chadwick confirmed that she met with the Applicant, on 16 June 2022, and informed him of the decision to terminate his employment.

Ms Pereira – Former Human Resources Officer

[84] Ms Pereira was employed with the Respondent in the position of Human Resources Officer, from September 2020 until she left the employment of the Respondent, on 21 August 2022.

[85] Prior to September 2020, Ms Pereira was employed by the Respondent in another position in the Human Resources team.

[86] Ms Pereira did not witness the conduct of the Applicant directly. However, Ms Pereira was involved in the investigation into the allegations.

[87] Ms Pereira's involvement began upon her receiving an email from Ms Chadwick, which outlined the allegations in relation to the Applicant's conduct.

[88] After receiving the email, Ms Pereira and Ms Chadwick had a conversation. In this conversation, Ms Pereira sought further background information in relation to the allegations including specific details around who had witnessed the conduct, the timing of the conduct, and other information.

[89] Following this conversation, Ms Pereira provided a letter to Ms Chadwick to give to the Applicant. The letter provided him with an opportunity to respond to the complaints.

[90] Ms Pereira discussed the complaints with her direct manager, Ms Hadida, and it was agreed that the best course of action was to stand down the Applicant.

Investigation Meeting – 10 June 2022

[91] Ms Pereira confirmed that she received an initial email response from the Applicant, on 8 June 2022.

[92] Ms Pereira considered the email response from the Applicant prior to the meeting on 10 June 2022.

[93] Ms Pereira noted the below points raised by the Applicant in his written response:

- The Applicant claimed that both Ms Brown and Ms Mitchell suffered mental health issues.
- The Applicant, in relation to his interaction with Resident J on 1 June, stated that the resident would have fallen off the bed if he did not intervene.
- The Applicant conceded that Resident J did moan a bit.
- The Applicant stated that Resident H was waving her hand in the air when he attempted to give her a drink.

- The Applicant also stated that he gently held Resident H's hand in an attempt to give her the drink.

[94] Ms Pereira confirmed that the Applicant was provided with the opportunity to have a supported person present, however, he declined to do so.

[95] Ms Pereira confirmed she explained to the Applicant that the allegations were of a serious nature and were in relation to the mistreatment and neglect of residents.

[96] Ms Pereria stated that, before he had even started to respond to the allegations, the Applicant was talking very quickly and made claims about the student nurses having mental health issues.

[97] Ms Pereira noted the below points raised by the Applicant in his verbal response:

- Resident J is deaf and that is why the Applicant called out to him.
- The Applicant stated that Resident J did not moan at all.
- The Applicant confirmed that Resident J did wake up shocked and surprised.
- The Applicant confirmed that he used the bed sheet to assist in repositioning Resident J.
- The Applicant denied that he had not properly cleaned Resident H when changing her incontinence aid on 2 June 2022.
- The Applicant confirmed that Ms Brown had questioned him about how he had cleaned Resident H and that the Applicant invited Ms Brown to clean Resident H if she was concerned.
- The Applicant advised that he had applied barrier cream to Resident H.
- The Applicant admitted that Resident H had held her hand over her mouth and was saying “*not going to have it*” and “*don't like it anymore*” in relation to the drink.
- The Applicant also admitted he had held Resident H's arm in an attempt to coax her into consuming the drink.

[98] Ms Periera stated that, following the meeting, she had serious concerns about the responses provided by the Applicant. These concerns are listed below:

- In the Applicant's written statement, of 8 June 2022, he stated that Resident J had moaned when he had moved the resident. However, during the meeting, the Applicant denied that the resident had moaned.
- The Applicant admitted that Resident J had awoken, shocked and surprised.

- The Applicant could have returned later to change Resident J or attempted to wake him in a gentler manner.
- The Applicant confirmed that Ms Brown had voiced concerns over the manner in which he had attended to Resident H.
- The Applicant confirmed that Resident H displayed significant resistance to having a drink on 2 June 2022. However, the Applicant stated he was only “*gently*” holding Resident H’s hand.
- The Applicant persisted for 15 minutes in his attempts to coax Resident H to drink.
- The Applicant showed no remorse for his actions and there was no willingness to admit any fault or that he would do things differently in the future.

[99] Ms Periera confirmed that, in light of the above, she recommended the Applicant be terminated from his employment with the Respondent.

Ms Mitchell – Student Nurse

[100] Ms Mitchell provided evidence on behalf of the Respondent.

[101] Ms Mitchell was studying a Diploma of Nursing at TAFE and was completing a practical placement with the Respondent at the time of the incident.

[102] Ms Mitchell gave evidence that, prior to commencing at the Respondent, she did not know any of the residents or staff.

[103] Ms Mitchell confirmed that, prior to commencing her placement, she did not know the Applicant.

[104] Ms Mitchell confirmed that she worked with the Applicant during two afternoon shifts on 1 June and 2 June 2022.

[105] Ms Mitchell stated that she saw the Applicant mistreat two elderly residents, Resident H and Resident J, during this period.

1 June 2022

[106] Ms Mitchell gave evidence that, when working with the Applicant, she found him to be very talkative and that it was hard for her to get a word in or to ask questions.

[107] Ms Mitchell also stated that the Applicant asked her numerous personal questions that were not related to the work being conducted.

[108] Ms Mitchell gave evidence that she witnessed the Applicant conducting the task of changing incontinence aid changes.

[109] Ms Mitchell's evidence was that the Applicant seemed determined to complete these as quickly as possible and did not seem to care if they were completed correctly.

[110] Ms Mitchell gave evidence that she saw the Applicant fail to change four or five residents correctly.

[111] Ms Mitchell stated that the Applicant failed to show care towards residents by failing to talk kindly to them or advise them that he was about to change their incontinence aid.

[112] Ms Mitchell said that the Applicant failed to clean residents who had urinated or defecated in their incontinence aids prior to placing a new aid on the resident.

[113] Ms Mitchell stated that the Applicant also failed to apply barrier cream to the residents.

[114] Ms Mitchell gave evidence that when she asked the Applicant "*shouldn't we wipe the residents down and apply some cream?*" he responded with "*it's fine*".

[115] Ms Mitchell gave evidence that she felt bad that the residents had not been correctly changed and cleaned.

[116] Ms Mitchell confirmed that as she was required to be always supervised and she could not go back to the residents to clean and change them herself.

[117] Ms Mitchell stated that, in relation to the incident involving Resident J, she observed the following:

- As Ms Mitchell was entering Resident J's room and was putting on her gloves, she heard the Applicant yell at Resident J "*[first name of Resident J], you need to wake up*".
- Ms Mitchell stated that, when the Resident did not wake up, the Applicant again yelled at Resident J "*[first name of Resident J], wake up, we are here to change you*".
- Ms Mitchell gave evidence that she was shocked the Applicant had yelled at Resident J.
- Ms Mitchell gave evidence that, through her nursing training and observing other carers in their work, she learned yelling was not the right way to wake up a resident who is sleeping.
- Ms Mitchell outlined that the accepted practice, which she had observed and learnt, was to gently tap a resident on the arm or shoulder to wake them up was the accepted nursing practice.
- Ms Mitchell stated that she was on the left-hand side of Resident J and the Applicant was on the right-hand side.

- Ms Mitchell gave evidence that Resident J was closer to her side of the bed than the Applicant's.
- Ms Mitchell stated that there was no risk of Resident J falling off the bed.
- Ms Mitchell gave evidence that, after the Applicant yelled at Resident J to wake up, Resident J awoke and was startled by the noise and jumped up a bit in bed.
- Ms Mitchell stated that Resident J then went back to sleep and remained in and out of sleep whilst she and the Applicant worked.
- Ms Mitchell gave evidence that the Applicant instructed her to "*push*" Resident J to the middle of the bed. Ms Mitchell refused this instruction.
- Ms Mitchell assisted the Applicant in changing the incontinence aid on Resident J.
- Ms Mitchell gave evidence that she observed the Applicant "*grab J roughly by the forearm and push him on his shoulder*" and that Resident J "*moaned and told me that his shoulder hurt*".
- Ms Mitchell gave evidence that the Applicant did not clean Resident J when changing the incontinence aid. Ms Mitchell stated that when she questioned the Applicant on this, the Applicant stated, "*he'll be fine*".

[118] Ms Mitchell gave evidence that, during her break at around 6:30PM, she advised Ms Brown of her concern over the Applicant's interaction with Resident J.

2 June 2022

[119] Ms Mitchell outlined that she was not partnered with the Applicant on 2 June 2022.

[120] Ms Mitchell explained that she had a discussion with Ms Brown during her meal break.

[121] In this discussion, Ms Mitchell remembers Ms Brown stating that the Applicant "*had no time for her*".

[122] Ms Mitchell gave evidence that she was walking with Ms Brown after dinner, and they were near Resident H's room. Ms Mitchell explained that she was in the doorway and Ms Brown entered Resident H's room.

[123] Ms Mitchell confirmed that she witnessed the following, whilst being in the doorway of Resident H's room:

- Resident H stated, at least four times, "*no, I don't want it*" in relation to the drink the Applicant was giving to her.
- Resident H waved her left arm and moved her head side to side. Ms Mitchell took this as another indication that Resident H did not want the drink.

- The Applicant then grabbed the right wrist of Resident H for 5-6 seconds and yelled at the resident to “*drink it, drink it*”.
- Ms Brown intervened and told the Applicant to “*leave it*”. At this point, the Applicant let go of Resident H’s arm and left the room.
- Ms Brown then turned to Ms Mitchell and stated, “*what the fuck?*”.
- Ms Brown then checked on the resident, who stated “*I don’t like that man*”.

7 June 2022

[124] Ms Mitchell confirmed that Ms Chadwick was away from the facility on 3 June 2022.

[125] Ms Mitchell noted that it was a long weekend from 4 to 6 June 2022. Ms Mitchell said that, in this period, she and Ms Brown discussed the incident, and made a decision to report it to Ms Chadwick when she returned to work on 7 June 2022.

Ms Nottle – Clinical Care Coordinator

[126] Ms Nottle advised that the Applicant was known to her as a previous employee of the Respondent. However, due to her hours of work and her position, Ms Nottle had very little direct interaction with the Applicant.

[127] Ms Nottle was involved in reporting the mistreatment of Resident H to the Aged Care Quality and Safety Commission, along with Ms Chadwick, on 7 June 2022.

[128] Ms Nottle gave evidence that, on 7 June 2022, Ms Chadwick advised her that two student nurses, Ms Brown and Ms Mitchell, had made allegations against the Applicant. The allegations were that the Applicant had mistreated two residents.

[129] The allegations involved the Applicant failing to correctly clean the residents when changing their incontinence aids, yelling at the residents, and rough handling.

[130] Ms Nottle advised that, following receipt of the allegations, a Serious Incident Response Scheme (SIRS) report was made to the Aged Care Quality and Safety Commission (Aged Care Commission).

[131] Following further internal consultation, the SIRS was reported as a “*Priority 2 – unreasonable force*”. The use of force was in relation to the allegation that the Applicant had grabbed the arm of Resident H, whilst attempting to get the resident to drink a nutritional supplement on 2 June 2022.

[132] Ms Nottle conducted a physical assessment of Resident H, at 3:00PM on 7 June 2022. Ms Nottle confirms that there were no signs of physical bruising or injury to Resident H’s skin.

[133] Ms Nottle gave evidence that, when finishing her assessment, Resident H stated, “*oh, don’t let that man with the black hair come near me*”.

[134] Ms Nottle, following the assessment, signed a statement and reported Resident H’s comments to management.

Consideration of witness evidence and credibility

[135] Having considered the evidence of the witnesses, I have made the following findings in relation to the witness evidence and credibility of each witness.

[136] I have assessed each of the witnesses noting their consistency, credibility and apparent logic of their evidence, relevance, whether their evidence related to events or discussions they experienced, and their ability to make concessions over advancing a particular position.

[137] I have reviewed the evidence of the Applicant; I have formed that view that the Applicant is not a reliable or credible witness.

[138] The Applicant, during the initial investigation and show cause process carried out by the Respondent, has made significant changes to his version of events and his interactions with Resident J and Resident H.

[139] The Applicant, whilst under cross examination, was inconsistent with his recollection and previous statements provided to the Respondent or in materials provided to the Commission.

[140] The Applicant frequently contradicts himself, or provides evidence that departs from previous statements, in pursuit of providing evidence that is merely favourable to his position.

[141] On assessment of the all the evidence, it appears that the Applicant frequently embellished and exaggerated his testimony, likely motivated out of his emotional response to the allegations, which is understandable, and, less excusably, when it was favourable to him to do so.

[142] I have also noted that, during the course of the Hearing, the Applicant adopted an almost *scorched earth approach* in the court room.

[143] The Applicant was overly hostile, and often antagonistic, when making statements or putting questions to the Respondent’s witnesses.

[144] The Applicant made some irrelevant and personally targeted comments towards the Respondent’s witnesses, seemingly to intimidate, undermine, or retaliate against an individual. In one particular moment, the Respondent’s representative, Ms Ivanovski, and I were compelled to interject and reprimand the Applicant for a distasteful comment uttered to a witness.

[145] I find that the Applicant’s conduct during the hearing, and his behaviour towards the Respondent’s witnesses, weighs against his credibility.

[146] I note that several of the Respondent's witnesses were either not employed or are no longer employed by the Respondent.³ On assessment of their demeanour and willingness to make concessions, it appears these witnesses were more likely to give impartial, logical, and consistent evidence that was not motivated by bias or in attempt to advance a particular position.

[147] I found Ms Brown and Ms Mitchell to be highly credible witnesses, their evidence was consistent, measured, and balanced.

[148] The Applicant's apparent inference that the students' alleged mental health issues and/or neurodevelopmental disorders has bearing on their evidence is rejected.

[149] I also note that Ms Brown and Ms Mitchell confirmed that, prior to the work placement with the Respondent, they had only had minimal interaction with each other whilst studying at TAFE. It is clear that the students' bond, developed while at the Respondent, had bearing on the evidence given, but only so far as they had shared their experiences with each other contemporaneously out of mutual concern for residents.

[150] From the evidence available, I find there is no corroborating evidence that suggests that Ms Brown or Ms Mitchell conspired against the Applicant or fabricated the conduct they observed.

[151] The evidence given by both students reflects that their primary concern, above all and at all times, was for the welfare of residents.

[152] I note that Ms Periera kept excellent contemporaneous notes of the meeting held with the Applicant on 10 June 2022. These records support the assertion that the Applicant's evidence was inconsistent and changed significantly during the investigation process.

[153] I find that the evidence of Ms Chadwick and Ms Hadida was consistent with that of Ms Periera and gave further support to the Respondent's position that the Applicant's version of the events frequently changed and was inconsistent.

[154] For the reasons outlined above, I have decided that in the circumstances where there is conflict between the evidence of the Applicant and the evidence of the Respondent, I prefer the evidence given by the Respondent's witnesses.

Criteria – Submissions - Consideration

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

[155] 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

[156] 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

[157] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁷

“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.”⁸

[158] The Applicant submitted that there was no valid reason for the dismissal related to his conduct.

[159] The Applicant maintained that the conduct had not occurred, or, in the alternative, the Applicant provided an explanation for the conduct which he believed was reasonable.

[160] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant’s conduct as the Applicant engaged in elder abuse during his interaction with both Resident J and Resident H on 1 June and 2 June 2022.

[161] I am satisfied, based on the evidence and submissions of the parties, and on the balance of probabilities, that the conduct occurred and that this conduct resulted in a valid reason for the termination of the Applicant’s employment.

[162] The Applicant makes several claims in response to the allegations all of which are unsubstantiated, irrelevant, or do not hold so much weight as to refute the seriousness of the allegations.

[163] The Applicant, in his materials, attempts to shift blame onto others in the Respondent’s facility.

[164] The least fanciful of the Applicant’s response to the reason is that he was performing his duties under pressure, due to understaffing and training issues. This claim was not supported by evidence and appeared inconsistent with evidence provided by the Respondent’s witnesses.

[165] Even if I was inclined to accept this submission, which I am not, I find the suggestion that a stressful workplace justifies elder abuse abhorrent. The healthcare industry is not for the faint of heart, and those who, out of stress, deliberately act in such a way that causes harm to patients are clearly in the wrong line of work.

[166] The witness evidence presented by the Respondent confirmed that the Applicant engaged in a course of conduct which included unreasonable use of physical force on two residents under his care.

[167] The unreasonable use of physical force included rough handling of Resident J, on 1 June 2022 at around 4:30PM. This included the manner in which the Applicant woke Resident J and then handled Resident J when repositioning him on the bed.

[168] The unreasonable use of physical force included physically grabbing the arm of Resident H whilst trying to force Resident H to drink something that she was indicating she did not wish to drink.

[169] I also find that the Applicant failed to correctly change the incontinence aid and clean Resident H, on 2 June 2022, as was required by her care plan.

[170] I find that, on the balance of probabilities, the Applicant's conduct was willful and deliberate.

[171] I do not accept the Applicant's submission that there were issues in the workplace that forced this conduct to occur. The evidence does not support such submissions.

[172] However, if I have erred and the Applicant's submissions about pressures within the workplace are accurate, I would not then be satisfied that such factors even remotely excuse nor justify the conduct.

[173] The Applicant's conduct went to the heart of the employment contract, clearly amounting to breaches of several workplace policies the Applicant was subject to.

[174] The evidence presented by the Respondent also reflects that the Applicant's conduct is not consistent with accepted practices within the industry.

[175] I am satisfied that the Applicant's conduct caused serious and imminent risk to the health and safety of residents.

[176] The evidence shows that, on the balance of probabilities, the Applicant's conduct, through his use of unreasonable force, caused physical and mental pain to the residents in question.

[177] Accordingly, I am satisfied that the Applicant's conduct amounts to serious misconduct and justifies a valid reason for dismissal.

[178] 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.

Was the Applicant notified of the valid reason?

[179] Proper consideration of section 387(b) of the Act 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 section 387(a) of the Act.⁹

[180] 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,¹⁰ and in explicit¹¹ and plain and clear terms.¹²

[181] The Respondent sent the Applicant written communication, on 7 June 2022, which directed the Applicant to attend a workplace investigation meeting on 10 June 2022.

[182] The written communication outlined to the Applicant the nature of the allegations and the seriousness of the allegations. The Applicant provided a written response to the letter of 7 June 2022, in writing, on 8 June 2022.

[183] The Applicant attended the workplace investigation meeting, on 10 June 2022, and engaged in the workplace investigation meeting. The Applicant was told in this meeting that his ongoing employment was at risk.

[184] 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, and in explicit and plain and clear terms.

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

[185] 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.

[186] An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.¹³

[187] 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.¹⁴

[188] 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.¹⁵

[189] The Respondent, on becoming aware of the issues with the Applicant's conduct, took all reasonable steps to ensure the Applicant was provided with a procedurally fair process.

[190] The Applicant was made aware of the allegations and was provided with the opportunity to meet with the Respondent to provide an explanation or a response to the allegations.

[191] The Applicant was also afforded the opportunity to provide a written response to the allegations, which he did, prior to the meeting.

[192] The evidence given by the Respondent's witnesses makes clear that the Applicant's responses, in his written response and in the meeting, were considered prior to coming to the conclusion that his employment should be terminated.

[193] The Respondent's communication to the Applicant was clear, concise, and easy to understand. There is no evidence to suggest that the Applicant did not understand the allegations or the serious impact that the allegations could have on his employment with the Respondent.

[194] 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?

[195] 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.

[196] 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.”¹⁶

[197] The Respondent submitted that it did not unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal on the basis that the Respondent, in writing to the Applicant, confirmed that he could have a support person in attendance at the meeting on 10 June 2022.

[198] The Respondent provided a copy of a letter from Ms Chadwick to the Applicant, dated 7 June 2022; this letter directed the Applicant to attend a meeting on 10 June 2022.

[199] The letter from Ms Chadwick to the Applicant states:

“At the meeting I will be in attendance along with Human Resources. You are welcome to bring a support person with you to the meeting.”

[200] In the termination letter, the Respondent confirms the below in writing to the Applicant:

“Thank you for attending the meeting on 10 June 2022 with Human Resources and myself. It is noted you chose not to bring a support person with you to the meeting”.

[201] The Applicant has not made any submissions that he was unreasonably refused a support person.

[202] Noting there is no positive obligation on the Respondent, the Respondent did, in writing, remind the Applicant that he had the ability to have a support person present. From the evidence provided, it is a reasonable conclusion that the Applicant decided to not have a support person present at the meeting. This was the Applicant’s choice to make.

[203] In all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[204] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

[205] Although, it is noted as a relevant factor by the Respondent, in response to the Applicant's evidence to the contrary. This is discussed later in the decision.

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

[206] 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.

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?

[207] Having regard to the investigation and materials outlined previously in this decision, I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise.

What other matters are relevant?

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

[209] The Applicant submitted that several other matters are relevant to the Commission's consideration of whether the dismissal was harsh, unjust, or unreasonable:

[210] The Applicant submitted a mountain of allegations against the Respondent and its employees. The large majority of these allegations are not relevant to the determination of this unfair dismissal matter.

[211] I have distilled the Applicant's submissions to those that bear the most relevance to these proceedings:

- The applicant raised concerns regarding staffing numbers.
- Specifically, the Applicant raises concerns about the, allegedly insufficient, number of appropriately qualified and experienced staff.
- The Applicant submitted that the lack of permanent staff and other medication qualified practitioners on shift placed undue burden on him in completing his duties.
- The Applicant has also noted his status as an international student, reliant on continuing his studies, which includes mandatory placements, to maintain his presence in the country.

[212] The Respondent submitted that the following other matters are relevant to the Commission's consideration of whether the dismissal was harsh, unjust, or unreasonable:

- This was not the first instance of the Applicant failing to follow procedures or act within the policies of the Respondent.

[213] The Applicant did not provide any significant evidence in support of his claims that the staffing arrangements on the days in question contributed to or were a reasonable excuse for the conduct in question.

[214] The Applicant took objection to the presence of the student nurses. However, he did not provide any significant evidence which could reasonably explain how their presence contributed to the conduct in question.

[215] The Applicant provided a document titled "*Letter Regarding Response to Unfair Dismissal*". In this document, the Applicant stated, "*I was dismissed unfairly from my workplace without any previous warnings from my employer*".

[216] The Respondent submitted that the Applicant had been counselled previously on the below occasions:

- 22 February 2021 – the Applicant failed to attend mandatory fire safety training.
- 11 August 2021 – the Applicant was counselled for using the Respondent's computer to log onto his university website.
- 4 September 2021 – the Applicant was involved in another incident with Resident H, the matter concerned Resident H sustaining bruising whilst being showered. This incident was reported by a SIRS as well. Following a review of the injury on Resident H, by a General Practitioner, it was determined that it could not be determined how Resident H suffered the bruising.
- 10 October 2021 – the Applicant failed to comply with face mask requirements.
- 24 October 2021 – the Applicant was involved in a performance management meeting with the Respondent over concerns that the Applicant had admitted that he would ignore a resident who repeatedly contacted him for assistance during his shift.
- 25 October 2021 – the Respondent outlined the above areas of concern with the Applicant during a performance review conducted with the Applicant.
- 21 April 2022 – the Applicant was involved in a verbal altercation with a fellow staff member in view of a resident.

[217] It is clear that Respondent had previously raised concerns with the Applicant over various incidents or situations which the Applicant was involved in whilst performing his duties for the Respondent.

[218] Whilst the Applicant may not have received a formal warning, the Applicant had been verbally counselled over his conduct previously.

[219] I find the Applicant's submissions, that he had been an employee with no previous performance concerns, to be disingenuous. This raises further concerns over the credibility of the Applicant as a witness.

[220] The evidence before the Commission reflects a pattern of behaviour.

[221] This evidence and the pattern that emerges supports the position that the Applicant acted in a manner inconsistent with workplace policies, ongoing employment, and the general expectations of such a professional.

[222] I have considered the Applicant's status as an international student and the implications the dismissal had on his visa in coming to my conclusion.

[223] The Applicant has made assertions about the staffing levels and working with the student nurses having an impact on his abilities to perform his duties in accordance with the Respondent's policies and procedures.

[224] The Applicant has not provided any notable evidence which supported this position.

[225] As I have stated at several points throughout this decision, even if these submissions and evidence were accepted, understaffing and a high-stress workplace does not excuse the wilful and deliberate, or even negligent and careless, conduct that would cause harm to patients.

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

[226] I have made findings in relation to each matter specified in section 387 of the Act as relevant.

[227] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.¹⁷

[228] Having considered each of the matters specified in section 387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust, or unreasonable because the Applicant engaged in conduct which warranted the termination of his employment.

[229] The Respondent, after receiving the allegations from Ms Brown and Ms Mitchell, commenced a workplace investigation in relation to the conduct of the Applicant.

[230] The evidence provided supports that the investigation was conducted in procedurally fair and logical manner.

[231] The Respondent's witnesses have provided a consistent and coherent outline of the Applicant's conduct over the period of 1 June and 2 June 2022. This conduct included the below actions:

- The Applicant failed to follow correct procedures in relation to the changing and cleaning of residents using incontinence aids on both 1 June and 2 June 2022.

- The Applicant, on at least two occasions, yelled and raised his voice at residents, the first of which resulted in Resident J waking up startled and shocked due to the Applicant's yelling.
- The Applicant continued to try and force Resident H to drink a drink when she indicated both verbally and physically that she did not want the drink on 2 June 2022.
- The Applicant used unreasonable physical force when he was repositioning Resident J on 1 June 2022.
- The Applicant used unreasonable physical force when he grabbed the wrist of Resident H on 2 June 2022.

[232] Given the seriousness of the misconduct in question, and the weight of the evidence supporting the finding that the misconduct occurred, the Commission cannot be satisfied that the Applicant's termination of employment was harsh, unfair, or unreasonable.

Conclusion

[233] Briefly, although of no relevance to the conclusion and considerations at hand, I wish to address the conduct of the student nurses in this matter.

- Ms Brown and Ms Mitchell, as student nurses completing a practical placement, were in a position where they are expected to follow the direction and example of more experienced staff members, like the Applicant.
- It would clearly be an uncomfortable position to be in, to see a more senior staff member acting in such a way.
- People of less character and courage or confidence and knowledge than Ms Brown and Ms Mitchell may have opted to turn a blind eye to the conduct of the Applicant, rather than make a report.
- There was no incentive, on the contrary it appears there were likely counterincentives, for Ms Brown or Ms Mitchell to report the Applicant's conduct to the Respondent, other than it being the right thing to do.
- The actions of Ms Mitchell and Ms Brown show that their paramount concern is the wellbeing of patients, and I am confident both will be wonderful additions to the healthcare field.

[234] 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 Act. The Applicant's application is therefore dismissed, an Order to that effect is issued.¹⁸



COMMISSIONER

Appearances:

K Chhabra, Applicant.

M Ivanovski of CCIWA for the Respondent.

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<PR764402>

¹ The application was made within the relevant time period (s.394(2)). There is no dispute that the Applicant has been dismissed (s.386). The Applicant is a person protected from unfair dismissal as; the Applicant did not earn over the high-income threshold, the Applicant's employment was subject to an Enterprise Agreement, and it is not disputed that the Applicant has served the minimum employment period (s.382). The Applicant's dismissal was not a case of genuine redundancy (s.389). The *Small Business Fair Dismissal Code* is not applicable (ss.385; 388(1)). Additionally, the Hearing was held in compliance with section 397. The Applicant was self-represented, and the Respondent was represented by an employer body which did not require permission to appear.

² [\[2011\] FWAFB 7498](#), [14]; [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

³ Ms Mitchell, Ms Brown, and Ms Periera.

⁴ (1995) 62 IR 371, 373.

⁵ Ibid.

⁶ (1996) 142 ALR 681, 685.

⁷ [1999] FCA 1836, [7].

⁸ Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

⁹ [\[2020\] FWCFB 6429](#), [19]; [\[2020\] FWCFB 533](#), [55].

¹⁰ (2000) 98 IR 137, 151.

¹¹ Print Q3730 (AIRC, Holmes C, 6 October 1998).

¹² Ibid.

¹³ Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

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

¹⁵ (1995) 60 IR 1, 7.

¹⁶ Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

¹⁷ (2002) 117 IR 357, [51]. See also [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; [1999] FCA 1836, [6]-[7].

¹⁸ [\[PR764403\]](#).