



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Lindsay Swift**

v

**Highland Pine Products Pty Ltd**  
(U2023/600)

COMMISSIONER MCKINNON

SYDNEY, 10 AUGUST 2023

*Application for an unfair dismissal remedy – whether dismissal harsh, unjust or unreasonable – application dismissed*

[1] From 25 September 2019 until 3 January 2023, Mr Lindsay Swift was employed by Highland Pine Products Pty Ltd (Highland Pines) as a Maintenance Electrician in the country town of Oberon, New South Wales.

[2] On 3 January 2023, Mr Swift was dismissed by Highland Pines for serious misconduct. The nature of the alleged misconduct was sexual harassment and a failure to communicate respectfully and appropriately with work colleagues.

[3] On 24 January 2023, Mr Swift applied for an unfair dismissal remedy under section 394 of the *Fair Work Act 2009* (the Act). The application is made in time. I am satisfied that Mr Swift is protected from unfair dismissal because he had completed the minimum employment period of at least 6 months with Highland Pines; the *Highland Pine Products Enterprise Agreement 2020* applied to his employment; and his annual rate of earnings was below the high income threshold.

[4] Highland Pines has more than 200 employees. As a result, the dismissal could not have been consistent with the Small Business Fair Dismissal Code. The dismissal was also not a case of redundancy – genuine or otherwise.

[5] The only question is whether Mr Swift has been unfairly dismissed. I have decided that Mr Swift has not been unfairly dismissed. These are my reasons.

## **The facts**

[6] Mr Swift is 50 years old. He moved to Oberon in New South Wales to work at Highland Pines, after previous roles working as an Electrician in businesses in nearby Bathurst. Highland Pines operates a large timber mill in Oberon, including a Dry Mill, Green Mill and Kilns. It has over 200 employees.

[7] On 27 April 2022, Mr Swift was placed on a 6-month performance development plan in connection with concerns about his punctuality, use of car parks, adherence to meal breaks, private use of company property (including the alleged removal of materials from site without authorisation) and concerns that some of his comments to colleagues had gone “too far”.

[8] The performance development plan directed Mr Swift to “ensure you adhere to the Highland Pine Workplace of Respect Policy”, a copy of which was provided to Mr Swift at the time. The consequences of failing to make reasonable efforts to achieve the objectives of the plan were described as “to reconsider the ongoing employment relationship between the parties” and a final review date was set for 26 October 2022.

[9] During the period of the performance development plan, weekly monitoring meetings were held between Mr Swift and his Maintenance Supervisors, Mr Cameron Smith and Mr Wayne Boyd. No additional concerns were raised with his managers over the period and on 27 October 2022, the plan was “signed off” by Maintenance Manager, Mr John Coyle.

[10] Shortly after Mr Swift’s performance plan was signed off on 27 October 2022, Mr Coyle received an email from Mr David Grady, the Acting Dry Mill Manager. The email reported concerns about Mr Swift that had been raised with him the day before, on the basis that people were “finding working with him difficult and at times off putting”. In summary, the concerns raised in the email were these:

1. Telling a new starter that he would not need his brain out on the Dry Mill floor.
2. Discussing his sex life with other employees, despite their attempts to shut the conversation off, including showing them photos of people he had “rooted” on the weekend.
3. Introducing himself to a supervisor by saying “Hi, I’m Lindsay the electrician, I like to root”.
4. Approaching several female employees for a date, and
5. Responding to calls in a way that was “over the top” including by yelling and swearing.

[11] Mr Coyle spoke to Mr Grady that afternoon and then brought the contents of the email to the attention of the Operations Manager, Mr Geoff Oxley, and Human Resources Manager, Simon Quintner. He was asked to put the reported allegations to Mr Swift and seek a response.

[12] At approximately 12.00pm on 1 November 2022, Mr Swift was called into a meeting with Mr Smith and Mr Coyle. They were not yet aware that 2 hours earlier, at approximately 10.00am on 1 November 2022, there had been an incident involving Mr Swift and another employee, who I will refer to as “Ms B”. While in the lunchroom talking about Halloween the night before, the topic of ‘trick or treating’ had come up. Mr Swift commented to the effect that children were asking for “candy” and using “Americanisms”. In response, Ms B said to Mr Swift, in words to the effect, “I am surprised you didn’t give them lollies and invite them in”. Mr Swift was offended by the comment because it insinuated that he was a paedophile. He replied, “Why the fuck would I do that?”. After a short exchange, Ms B told Mr Swift to “grow a sense of humour” and left. Mr Swift asked the other employee in the lunchroom, Mr Brendan Sergeant, for his support in any complaint he might make about Ms B’s comment and Mr Sergeant agreed.

[13] At the beginning of the meeting with Mr Smith and Mr Coyle, Mr Swift asked if he needed to contact his union. He was told there was no need. Mr Coyle had on previous occasions offered Mr Swift the option of a support person for the meeting, but I find on this occasion that he did not do so. This was most likely because Mr Swift had always refused such offers in the past.

[14] Mr Coyle then read from a written list of allegations derived from Mr Grady's email and invited Mr Swift to respond. He did not give Mr Swift a written copy of the allegations because he wanted to protect the identities of the people who had made complaints.

[15] Mr Swift responded to each of the allegations, agreeing with some and denying others:

1. He admitted to telling the new starter to leave his brain in the lunchroom, and agreed this was not an acceptable comment.
2. He admitted discussing sexual exploits with one (unnamed) female colleague and said she also discussed her sex life with him. He denied discussing his sexual exploits with others and denied showing a photo to another employee and/or saying "Look what I rooted on the weekend".
3. He alleged that an (unnamed) colleague had that morning implied he was a paedophile during a discussion about Halloween. He said he was upset and did not appreciate the comment, that there was a bystander present, and that he did not want to give names or make a complaint.
4. He denied introducing himself to the new Dry Mill supervisor by saying "My name is Lindsay and I love to root". He recalled the encounter but denied the context in which it occurred. Mr Swift's version of events was that he said to the person, in words to the effect: "Are you doing any rooting over the weekend?"
5. He agreed that he sometimes "blew up" when asked to respond to machinery breakdowns. He explained that supervisors did not provide him with enough information about the nature of breakdowns.

[16] Mr Swift asked Mr Coyle why these matters had not been raised with him at the time of the alleged incidents. Mr Coyle explained that he had only become aware of the allegations on 27 October 2022. Mr Coyle said he would speak to the other employees, see if anyone wished to make a formal complaint, and let him know the outcome.

[17] Mr Coyle then spoke to Mr Quintner and Mr Grady. Mr Grady was asked to contact the relevant employees and see if they wanted to make a formal complaint against Mr Swift.

[18] On 2 November 2022, Mr Swift handed a written letter of complaint to Mr Coyle about the 'Halloween' comment of the day before. The complaint did not name the people involved and Mr Swift said he did not want to make a formal complaint. Mr Coyle provided the letter to Mr Quintner.

[19] On 10 November 2022, Mr Coyle spoke to Mr Quintner who told him that no formal complaints had been made about Mr Swift. Mr Coyle tried to find Mr Swift to tell him of the outcome but could not find him.

[20] On 15 November 2022, Mr Swift came to see Mr Coyle in his office. Mr Coyle told him that as no formal complaints had been received about the issues discussed with Mr Swift in the meeting on 1 November 2022, the matter would not proceed. Mr Swift reacted unhappily, saying, in words to the effect, “This is bullshit... that they can say this stuff and not stand behind their comments.” Mr Coyle responded by saying, in words to the effect, “If people are not prepared to make statements, there is not much I can do.” Later that day, Mr Swift commenced a period of personal leave.

[21] On 16 November 2022, Mr Swift contacted Mr Coyle. He said he was stressed about the allegations that had been made against him, and the fact that witnesses were not willing to make statements or lodge a formal complaint. He said he was willing to make a formal complaint about the Halloween comment of 1 November 2022. Mr Coyle arranged to meet with Mr Swift the following day.

[22] On 17 November 2022, Mr Swift met with Mr Coyle and Mr Quintner. Mr Swift named Ms B as the person who had made the offensive comments, and Mr Sergeant as the witness. He described the incident and said he was concerned that Ms B had not spoken with him since that time. They discussed the options to resolve his concerns including a conversation with Ms B about breaching the Workplace of Respect Policy and an apology. Mr Swift said he did not want to make a formal complaint but that he wanted someone to have a conversation with Ms B. If she was apologetic, he would accept that as the outcome. Mr Quintner noted that he could not make someone apologise. After further discussion, it was agreed that the Workplace of Respect Policy would also be discussed at Toolbox Talks and that Mr Coyle would speak to Mr Smith about some supervisory issues Mr Swift had raised.

[23] On 18 November 2022, Mr Swift contacted Mr Coyle to say that he would deliver a medical certificate of capacity to the site gatehouse. Mr Coyle collected the certificate and noticed its reference to alleged bullying and harassment of Mr Swift. Mr Coyle gave the certificate to the General Manager of Highland Pines, Mr Michael Bitzer and its contents were brought to the attention of Mr Quintner.

[24] On 21 November 2022, Mr Coyle contacted Mr Swift for a welfare check. He reminded him of his access to the Employee Assistance Program and Mr Swift said he did not need it. Mr Coyle asked Mr Swift about the reference to alleged bullying and harassment in the certificate of capacity. Mr Swift explained that it was the making of allegations against him that were not backed up – “false allegations”, and the incident with Ms B. Mr Coyle told Mr Swift the matter would be formally investigated.

[25] Mr Quintner then commenced an investigation into the alleged bullying and harassment of Mr Swift. Ms B was interviewed and acknowledged that her conduct on 1 November 2022 was in breach of the Workplace of Respect Policy. She also described Mr Swift’s conduct towards her. 17 other employees, including both men and women who interacted with Mr Swift at work, were interviewed as part of the investigation. Many were hesitant to become involved or to provide information because they did not want to be confronted by Mr Swift.

[26] Putting aside the incident with Ms B on 1 November 2022, Mr Quintner formed the view that he could not substantiate any bullying or harassment of Mr Swift and that what he

was dealing with was instead a pattern of repeated and inappropriate behaviour by Mr Swift towards other employees, including of a sexual nature.

[27] On 30 November 2022, Mr Coyle contacted Mr Swift for an update in relation to his ongoing absence from work, noting that his certificate of capacity had expired. Mr Swift said he was going to see his doctor again. Mr Coyle told him that the investigation into alleged bullying and harassment was ongoing.

[28] On 15 December 2022, Mr Swift called Mr Coyle. He said he had a review of his workers compensation claim at the Oberon medical centre that day, and that he was only prepared to return to work if the matters he had raised had been resolved. Mr Coyle told him that the investigation of alleged bullying and harassment had been completed. Mr Swift misinterpreted this as confirmation that the matters had been resolved. Later that day, he obtained medical clearance to return to work.

[29] On 16 December 2022, Mr Swift was advised by Mr Coyle that he was not required to work what would have been his usual Friday overtime shift. Instead, he was asked to meet with Mr Coyle on the following Monday, 19 December 2022.

[30] On 19 December 2022, Mr Coyle met with Mr Swift and his support person, Mr Chris Williams. A list of written allegations was handed to Mr Swift. His response to the allegations was requested by the following day.

[31] On 20 December 2022, Mr Swift met again with Highland Pines, this time with his union representative. The allegations were discussed. Mr Swift was then given a detailed letter of allegations and asked to provide his response in writing by the following day. The response date was subsequently extended by agreement to 12.00pm on 23 December 2022. Over this period, there was a series of correspondence between Highland Pines and Mr Swift's union representative, the unregistered Independent Worker's Union of Australia, including responses provided to the allegations on Mr Swift's behalf. An "outcome meeting" was scheduled for 3 January 2023 upon Mr Swift's return from pre-approved annual leave.

[32] The outcome meeting went ahead as scheduled on 3 January 2023. Mr Swift's employment was terminated on the grounds of serious misconduct. Despite having been dismissed on this basis, Mr Swift was paid five week's wages in lieu of notice of termination. On 24 January 2023, Mr Swift made this application to the Commission.

### **Was the dismissal harsh, unjust or unreasonable?**

[33] Whether a dismissal was harsh, unjust or unreasonable depends on an assessment of all the relevant facts and circumstances, including those set out in section 387 of the Act. Those are considered in turn.

Was there a valid reason for the dismissal related to capacity or conduct, and was it notified to Mr Swift?

*Alleged sexual harassment*

[34] Highland Pines submits that it had a valid reason for dismissal on the basis that Mr Swift engaged in sexual harassment of other employees, including by:

Allegation 1

- a. Making statements while present in the control room near the grading deck such as “did you do any rooting on the weekend”.
- b. Referring to “fucking this fat bitch” in the presence of female employees.
- c. Using words to describe his alleged sexual activities including “I fucked this girl”.
- d. Describing employees to other employees as a “fat bitch” or “slut”.
- e. Showing female employees photos of women on his mobile phone, including women who were partially or totally bare breasted.
- f. Describing various sexual positions including “pegging” and “dry anal sex” in detail to female employees.
- g. Telling a female employee that he had “sex with chicks” and asking if she would do this.
- h. Showing an employee a photo of a female on his phone and stating words to the effect, “Yeah I fucked this chick”.
- i. Regularly describing his alleged sexual encounters including sexual positions and referring to himself using words to the effect of “heavy into domination” and liking women to “be submissive”.
- j. Within a few weeks of commencing work, approaching an employee and saying “Do you like to fuck?”.
- k. Regularly asking female employees, “Did you get fucked on the weekend?” or “Did you take it up the arse?”.
- l. Showing his iPhone to other employees and talking about threesomes.
- m. Showing another employee his iPhone and saying words to the effect, “Look at this bird” while showing a picture of his penis.
- n. In the changing room, saying to another employee “Look at these balls” while displaying his testicles.
- o. Bragging to other employees about the women he has “had” during a previous weekend describing them in ways including that “she had a big arse” and “a really fit body”.
- p. Displaying photos of women taken in shopping complexes without their knowledge or consent.

[35] One witness, Mr Michael Hunter, gave evidence in support of Mr Swift. In addition to Mr Quintner and Mr Coyle, three witnesses gave evidence against Mr Swift in relation to the allegations, who I will refer to as “Ms A”, “Ms B” and “Mr D”.

*Allegation 1a.: Asking other employees “Did you do any rooting on the weekend?”*

[36] Mr Swift does not deny saying “Did you do any rooting on the weekend?” to other employees. According to Mr Swift, this was a common greeting in the workplace at Highland Pines, and that colourful language and sexual innuendo were rife. I do not accept this contention, except to the extent that it was a phrase commonly used by Mr Swift. There is no evidence to support the assertion that other than Mr Swift, employees of Highland Pines commonly greeted their colleagues in this way. This proposition was expressly denied by the other witnesses including Mr Hunter, who gave evidence in support of Mr Swift and whose evidence I accept without hesitation.

[37] I find that Mr Swift had a practice of asking other employees, including Ms B, if they did “any rooting on the weekend”.

*Allegation 1b.: Referring to “fucking this fat bitch” in the presence of female employees.  
Allegation 1d.: Describing employees to other employees as a “fat bitch” or “slut”.*

[38] The evidence in support of these allegations is found in Mr Quintner’s interview notes made during his investigation into the bullying and harassment of Mr Swift. The employees who described these exchanges did not give evidence in the case, and the notes of Mr Quinter are hearsay. While consistent with the tenor of evidence given by other witnesses about the content of their discussions with Mr Swift at work, I cannot find the allegations established based only on the notes provided.

*Allegation 1c.: Using words to describe his alleged sexual activities including “I fucked this girl”.*

*Allegation 1e.: Showing female employees photos of women on his mobile phone, including women who were partially or totally bare breasted.*

*Allegation 1f.: Describing various sexual positions including “pegging” and “dry anal sex” in detail to female employees.*

*Allegation 1g.: Telling a female employee that he had “sex with chicks” and asking if she would do this.*

*Allegation 1h.: Showing an employee a photo of a female on his phone and stating words to the effect, “Yeah I fucked this chick”.*

*Allegation 1i.: Regularly describing his alleged sexual encounters including sexual positions and referring to himself using words to the effect of “heavy into domination” and liking women to “be submissive”.*

*Allegation 1k.: Regularly asking female employees, “Did you get fucked on the weekend?” or “Did you take it up the arse?”*

*Allegation 1l.: Showing his iPhone to other employees and talking about threesomes.*

[39] Allegation 1f. is not established on the basis that discussion about “pegging” formed part of Ms A’s strategy to discourage sex-based conversations with Mr Swift, and so I do not find it to have been a matter initiated by Mr Swift. There is a lack of evidence in relation to whether Mr Swift described “dry anal sex” to female employees. The remaining allegations are established by the oral evidence of Ms A, and in relation to allegations 1e, 1k, and 1l, by Ms B. Both Ms A and Ms B affirmed that the notes of their interviews with Mr Quintner were accurate and true.

[40] I accept the evidence of Ms A as brave, honest and credible. I prefer her evidence over that of Mr Swift where it is in conflict. Mr Swift's evidence was not always consistent, and it was inconsistent with the evidence of other witnesses in important respects. I also accept the evidence of Ms B, who was a truthful witness including when making admissions about her own conduct towards Mr Swift. Supporting their evidence, Mr D confirmed that he had heard others talk about Mr Swift showing them things on his phone. While this evidence is hearsay and of limited weight, it tends to support the evidence of Ms B and Ms A.

[41] On balance, the facts that underpin each of these allegations (except for allegation 1f.) are established.

*Allegation 1j.: Within a few weeks of commencing work, approaching an employee and saying "Do you like to fuck?"*

[42] This allegation is supported by the clear and unambiguous evidence of Mr D. He described walking into the lunchroom to make a coffee and having Mr Swift ask him, out of the blue, "Do you like to fuck?" This caused him to feel offence and embarrassment. He left the lunchroom and went straight into the office of a colleague, Mr Ian Piggott. After the encounter, he tried to stay away from Mr Swift.

[43] Mr Swift has a different version of the exchange, which is affected by inconsistency. He says he asked Mr D what he was doing on the weekend, and if he had "any rooting planned". He says Mr D laughed it off on the basis that he was a married man, changed the subject and their banter continued, including a joke about Mr D sneaking off from his daughter's wedding to go "surf fishing". Implicit in this version of events is that it was not apparent to Mr Swift at the time that his comment about "rooting" to Mr D was unwelcome.

[44] The first difficulty with Mr Swift's account is that the wedding of Mr D's daughter was in country New South Wales, which is a long way away from any surf. The second is the contention I have already rejected, which is that greeting someone about their plans for "rooting" on the weekend was a commonplace greeting at Highland Pines. There is also the issue of whether Mr Swift understood the inappropriateness of his comment at the time. Mr Swift says that he sensed Mr D was embarrassed when he made the comment and regretted it immediately afterward, but also that the exchange was characterised by laughter and jokes. Mr Swift says he would have apologised to Mr D if given any indication that the comment was unwelcome, but also says he had sensed embarrassment on the part of Mr D at the time. If so, that can only have been in response to some indication from Mr D that his question was inappropriate. Either way, Mr Swift did not apologise to Mr D, either at the time, or after the event.

[45] I accept Mr D's recollection of the exchange and the truthfulness of his evidence. It was apparent at the hearing that having to relive this encounter with Mr Swift caused further discomfort to Mr D. I prefer his evidence to that of Mr Swift in relation to the matter.

[46] I find that Mr Swift approached Mr D, out of the blue, and asked him "Do you like to fuck?".



*Allegation 1m.: Showing another employee his iPhone and saying words to the effect, “Look at this bird” while showing a picture of his penis.*

*Allegation 1n.: In the changing room, saying to another employee “Look at these balls” while displaying his testicles.*

[47] Mr Swift denies these allegations. The evidence in support of the allegations is found in Mr Quintner’s interview notes made during his investigation into the bullying and harassment of Mr Swift. The employees who described these exchanges did not give evidence in the case, and the notes of Mr Quinter are hearsay. While consistent with the tenor of evidence given by other witnesses about the content of their discussions with Mr Swift at work, I cannot find the allegations established based only on the notes provided.

[48] In relation to allegation 1n, Mr Swift asserts that it is false on the basis that there is no change room in the Dry Mill. That submission wrongly assumes that the location of the alleged conduct was in the Dry Mill. The allegation makes no such connection. I accept that there is no dedicated change room in the Dry Mill, but there is a change room in the Green Mill. It is possible that the alleged conduct occurred there. If so, it was reprehensible. While the allegation is not established for the reasons above, I do not find the allegation to be false on the basis asserted.

*Allegation 1o.: Bragging to other employees about the women he has “had” during a previous weekend describing them in ways including that “she had a big arse” and “a really fit body”.*

[49] Mr Swift does not strictly deny allegation 1o, on the basis that he admits to what he describes as “reciprocated, conventional conversations in the workplace on numerous occasions”. Mr Swift does not admit the allegation either. The contents of allegation 1o. are consistent with the general tenor of other sex-related conversations and sharing of photographs that Mr Swift has engaged in with Ms A and Ms B.

[50] On the balance of probabilities, I find that Mr Swift bragged to other employees, including Ms A and Ms B, about the women he had “had” on the weekend, including with descriptions of their physique.

*Allegation 1p.: Displaying photos of women taken in shopping complexes without their knowledge or consent.*

[51] This allegation is not established due to a lack of evidence.

*Alleged inappropriate communication style with colleagues*

[52] Highland Pines also submits that it had a valid reason for dismissal on the basis that Mr Swift failed to maintain a respectful and appropriate communication style with respect to his work colleagues, including by:

Allegation 2

- a. Leaving handwritten notes in the communication book like “...working with muppets”.
- b. Regularly raising his voice, described by some as yelling, and being aggressive and intimidating in his manner towards employees.
- c. Losing his temper and becoming verbally aggressive, referring to other employees as “idiots” or “fucking idiots”.
- d. Making farting noises over the radio, and saying things like “fucking bastards” and “fucking radio”, which he had been seen to throw.
- e. Referring to another employee, who I will refer to as “Ms C”, as being “dumb as dog shit”, and
- f. Swearing in the presence of other employees, saying, “fuck”; “cunt” and “bitch”.

*Allegation 2a. Leaving handwritten notes in the communication book like “...working with muppets”.*

[53] The facts that underpin this allegation are established by the documentary evidence in the form of Mr Swift’s handwritten notes. I reject the assertion of Mr Swift that these notes were acceptable to Highland Pines and that they were not disrespectful or inappropriate. The reference to other employees as “muppets” was plainly disparaging to those employees.

*Allegation 2b. Regularly raising his voice, described by some as yelling, and being aggressive and intimidating in his manner towards employees.*

[54] Mr Swift admits that he sometimes got angry and “blew up” when he was frustrated at work. I accept the evidence of Ms A that Mr Swift was intimidating in his manner towards other employees, including Ms A, who stated that she felt like she was being spoken down to because she was not as knowledgeable as Mr Swift, and that he made her feel like she was dumb. While I accept that the work environment was noisy, I do not accept Mr Swift’s assertion that this was the only reason he was yelling. Other witnesses confirmed that it was usually possible to talk and be heard without yelling.

[55] I find that Mr Swift regularly raised his voice, and was intimidating in his manner towards employees including Ms A. The evidence does not establish that he was aggressive towards employees while in their presence.

*Allegation 2c. Losing his temper and becoming verbally aggressive, referring to other employees as “idiots” or “fucking idiots”.*

[56] The facts that underpin this allegation are established on the basis of Mr Swift’s admissions and the evidence of Ms A and Mr D, who each confirmed that Mr Swift sometimes called other employees “idiots” or “fucking idiots” in conversations with others. The evidence does not establish that he called anyone an “idiot” or a “fucking idiot” while talking directly to them.

*Allegation 2d. Making farting noises over the radio and saying things like “fucking bastards” and “fucking radio”, which he had been seen to throw.*

[57] Mr Swift concedes that farting over the radio occurred but denies that it was him. The evidence in support of the allegation is found in Mr Quintner’s interview notes made during his investigation into the bullying and harassment of Mr Swift. Mr D gave evidence that every day he heard Mr Swift display a lack of respect over the radio - a type of negativity, or arrogance that was hard to explain. The employee whose evidence underpins this allegation did not give evidence in the case, and the notes of Mr Quinter are hearsay. Mr D’s evidence tends to confirm the allegations but is not specific in relation to what was said and does not address the farting allegation. I accept the evidence of Mr Hunter that one hears some “pretty interesting things” over the radio at Highland Pines, but this does not go so far as to pin responsibility for those things on Mr Swift. The facts that underpin this allegation are not established.

*Allegation 2e. Referring to another employee, Ms C, as being “dumb as dog shit”.*

[58] Mr Swift admitted to this allegation in his response, through his union representative, on 21 December 2022. It is plain that Mr Swift did not think that Ms C was competent in her role and he made this lack of respect for Ms C clear to others with whom he worked. I do not accept Mr Swift’s denial and contrary explanation at the hearing, to the effect that he only called Ms C’s “actions” dumb as dog shit. It is unlikely that Mr Swift was as careful with his language at the time he made the comment as when he was seeking to defend the allegation in the witness box.

[59] I find that Mr Swift called Ms C “dumb as dog shit”, although he did not make the comment directly to Ms C.

*Allegation 2f. Swearing in the presence of other employees, saying, “fuck”; “cunt” and “bitch”.*

[60] Mr Swift does not deny swearing at work and does not deny using the words in allegation 2f. Mr Swift gave evidence that swearing was common in the workplace. I accept this, but I do not accept that it was common to use swearing in a way that was disrespectful to others. Witnesses other than Mr Swift gave consistent evidence to the effect that while swearing did occur, it was not usually in a way that was disrespectful or directed at anyone in particular. The facts that underpin this allegation are established.

*Conclusion on valid reason*

[61] The first matter to be determined in relation to whether Highland Pines had a valid reason for the dismissal of Mr Swift is whether Mr Swift sexually harassed other employees.

[62] For the purposes of this case, the legal meaning of “sexually harass” is found in section 28A of the *Sex Discrimination Act 1984*. This section provides as follows:

“(1) For the purposes of this Act, a person sexually harasses another person (the person harassed) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstance.

(2) In this section:

“conduct of a sexual nature” includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.”

**[63]** In *Hughes trading as Beesley and Hughes Lawyers v Hill*<sup>1</sup>, the Full Court of the Federal Court of Australia observed that there are essentially three elements of unlawful sexual harassment for the purposes of section 28A. These are summarised below:

1. The first task is to decide whether there has been any sexual advance, request for sexual favours, or other conduct of a sexual nature (as defined in section 28A(2) of the *Sex Discrimination Act 1984*). This is a question of fact for the Court to decide for itself.
2. If there has been relevant conduct of a sexual nature, the Court must then decide if the conduct was unwelcome to the person allegedly harassed. This is a question of subjective fact, which turns only on the attitude of the person to the conduct at the time; their actual state of mind. Conduct will not be sexual harassment if it was not actually unwelcome in this sense. Ordinarily this will be proved by the recipient of the conduct giving evidence that the conduct was unwelcome, although this evidence may be available by a variety of means and in some cases the unwelcome quality of the conduct may be painfully obvious.

3. Once it is established that there was unwelcome conduct of a sexual nature towards another, an objective limit is applied to the scope of section 28A. This objective standard does not relate to the first two issues (whether conduct of a sexual nature occurred, or whether it was unwelcome). The ‘circumstances’, which are defined broadly but not exhaustively in s.28A(1A), must be such that a reasonable person would have anticipated the possibility that the person allegedly harassed would be offended, humiliated or intimidated by the conduct. The reasonable person is assumed to have some knowledge of the personal qualities of the person harassed, and the extent of their knowledge is a function of the circumstances in s.28A(1A) that must be taken into account.

**[64]** It is clear on the facts that Mr Swift engaged in conduct of a sexual nature in relation to Mr D, Ms B and Ms A. Importantly for the purposes of this case, conduct may be sexual in nature even if the person engaging in the conduct has no sexual interest in the person towards whom it is directed.<sup>2</sup> The relevant conduct of Mr Swift included initiating conversations about sexual activity, making statements of a sexual nature to or in the presence of others, sharing images of a sexual nature, and making enquiries about the private lives of others. Specifically, Mr Swift:

1. Adopted a practice of asking other employees, including Ms B, if they did “any rooting on the weekend”, and in the case of Ms B, asked her “Did you take it up the arse?”.
2. Described his alleged sexual activities to Ms A, including by bragging; saying “I fucked this girl”; and using words to the effect that he was “heavy into domination” and liked “women to be submissive”.
3. Showed Ms B and Ms A photos of women on his mobile phone including those who were partially or totally bare breasted, and talked to Ms B about threesomes.
4. Approached Mr D, out of the blue, and asked him “Do you like to fuck?”.

**[65]** I am satisfied that the conduct of Mr Swift towards Mr D, Ms B and Ms A was unwelcome. Each of these witnesses confirmed that they felt uncomfortable watching the way he interacted with other female employees, including the way he looked at them.

1. Mr D gave direct evidence that when Mr Swift asked him what he described as a “personal question”, he took offence, and felt dirty, embarrassed and uncomfortable. He left the room almost immediately and after that, stayed away from Mr Swift.
2. Ms B gave evidence of the “creepy vibes” Mr Swift gave her, and of the way he spoke to women. She said that when he spoke to her in the manner that he did, she would usually just tell him to “fuck off” or say, in words to the effect, “I don’t want to talk to you about that.”
3. Ms A gave evidence that Mr Swift made her feel uncomfortable, and that she spoke to Ms B about it after one of her interactions with him at work. She explained that when Mr Swift brought up the topic of other women and what they would do on the weekend or show her pictures of women with exposed body parts, she would try to turn the conversation to another topic or walk away. She hoped he would notice that she did not want the conversation to continue, but it did not work. Eventually she

adopted the strategy of raising a particular type of sexual activity that Mr Swift was not “into”, to try and bring an end to the discussions.

**[66]** The circumstances of Mr Swift’s conduct towards Mr D, Ms B and Ms A were such that a reasonable person would have anticipated the possibility that each of these employees would be offended, humiliated, or intimidated.

1. Mr D is a married man with adult children, who was employed in a supervisory role, including in relation to Mr Swift. Despite never having met Mr Swift in person before, Mr Swift approached him in the lunchroom while he was making a cup of tea and, out of the blue, asked him in the presence of others if he “liked to fuck”. A reasonable person would consider such an encounter to be likely to cause offence to Mr D or to be humiliating to him.
2. Ms B is a mature woman who had worked at the Mill for nearly 20 years. Over time, she assumed a protective role towards new starters and other (usually younger) women and men at the Mill in relation to Mr Swift. In this role, she bore the brunt of his sexual discussions, including greetings about her own sexual activity and whether she had “taken it up the arse”, and had to contend with him regularly discussing his own alleged sexual exploits, including being shown images of women said to have been involved in those exploits. She may have chosen to endure these exchanges to protect others, but this made them no less offensive. A reasonable person would think it at least possible for Ms B to be offended by these exchanges, particularly in the context in which they occurred, while Ms B was at work and likely in the presence of others.
3. As for Ms A, she is a younger single woman who was asked out to the pub by Mr Swift when she started working shift work in June 2021. She turned him down and “that was it... of that situation”. Ms A wanted to do a good job for Highland Pines. She went wherever she was needed each day and did what was required to be done. She did not want confrontation with Mr Swift, and so for almost 18 months, tried to cope with his repeated conduct of lingering in the area that she worked, engaging her in sexual conversation and showing her images of a sexual nature, all of which distracted from her work. She did this by trying to walk away, and when this failed, by contriving her own alleged sexual activity of “pegging” to deflect his attention or interest in these conversations away from her. That Ms A felt compelled to describe the very private matter of her participation in sexual activities to Mr Swift as an avoidance mechanism is telling. In the circumstances, a reasonable person would anticipate the possibility that Mr Swift’s conduct would cause Ms A to be offended, humiliated and intimidated.

**[67]** I find that Mr Swift sexually harassed Mr D, Ms B and Ms A.

**[68]** Sexual harassment is conduct of the kind that will ordinarily justify dismissal. Not only is it unlawful under section 28B of the *Sex Discrimination Act 1984* and inconsistent with the duties of employers and employees under workplace health and safety legislation,<sup>3</sup> it is destructive of the necessary confidence between an employer and an employee<sup>4</sup>. In many cases, it is also likely to be inconsistent with an express direction from the employer to treat other employees with respect and to not engage in sexual harassment, for example in a contract of employment or workplace policy. Further, employers have a positive duty to take reasonable

and proportionate measures to eliminate, as far as possible, unlawful sexual harassment by their employees. This duty applied to Highland Pines at the time of Mr Swift's dismissal.

[69] It is no answer to the allegation of sexual harassment that Mr Swift's conduct was consensual and/or that he intended no harm, or that he himself was sexually harassed by Ms B when she insinuated that he was a paedophile in connection with Halloween. The latter question was dealt with separately by Highland Pines and is a matter to which I will return. Putting that aside, Mr Swift's conduct occurred on an ongoing basis over a period of years. As the initiator of much of this conduct, Mr Swift could not have known, at least initially, how it was going to be received by the recipients. To suggest that it was consensual in those circumstances both misses the point and lacks insight about how conduct of a sexual nature can affect those to whom it is directed, particularly in a workplace environment where employees have a reasonable expectation that they will be kept safe.

[70] The intention of a person who engages in sexual harassment is irrelevant to the question of whether their conduct was unwelcome, or objectively offensive, humiliating or intimidating.<sup>5</sup> Just as irrelevant is the response that one's conduct was not unwelcome to others, or has been an accepted feature of the workplace in the past. Even if those propositions can be established, they do not go to the question of whether certain conduct of a sexual nature was unwelcome to the persons to whom it was directed. Those are matters of subjective fact, personal to the individuals in question. One cannot know how a person will respond to conduct of a sexual nature, and there is no common or ordinary response to conduct that for many is an intensely private and personal matter. Nor can one assume that when a person responds to conduct of a sexual nature, they are consenting to their participation. Equally possible is what happened in this case, where the response of the employees concerned was to find ways to avoid or limit their involvement in a way that did not put them at further risk.

[71] The second matter for determination is whether Highland Pines had a valid reason for dismissal in connection with Mr Swift's failure to maintain a respectful and appropriate communication style with respect to his work colleagues. In this regard, I have found that Mr Swift:

1. Made handwritten notes in the communication book like "...working with muppets", in a way that was disparaging about other employees of Highland Pines.
2. Regularly raised his voice, and was intimidating in his manner towards employees including Ms A.
3. Sometimes called employees "idiots" or "fucking idiots" in conversations with others (but not directly to the person about whom the comment was made).
4. Called a fellow employee "dumb as dog shit" (but not directly to her).
5. Regularly swore in the presence of other employees, saying, "fuck"; "cunt" and "bitch".

[72] The disparaging comments left by Mr Swift in the communication book appear to have been tolerated to a degree by Highland Pines, as they were made some years ago and never actioned by relevant managers except generally in connection with the performance development plan in April 2022. The same can be said of calling other employees "idiots" or "fucking idiots", which Mr Swift admits occurred in the presence of managers, and swearing in the workplace which I find was common. However, the intimidating nature of Mr Swift's behaviour, including the use of derogatory swear words directed at others and his lack of respect

in particular for female employees such as Ms C, is in a different category. This conduct only became apparent to Highland Pines on and after 27 October 2022, when Mr Grady raised concerns about Mr Swift with his manager, and through the subsequent investigation of Mr Swift's conduct by Mr Quintner.

[73] This repeated pattern of disparaging and/or offensive conduct directed particularly towards female employees demonstrated a lack of respect and was inconsistent with Highland Pines' Workplace of Respect Policy. Mr Swift had earlier been warned about the importance of complying with that policy. His failure to do so, in addition to the sexual harassment of others, gave Highland Pines a valid reason for dismissal.

[74] I find that there was a valid reason for the dismissal of Mr Swift.

[75] The reasons for his dismissal was notified to Mr Swift orally during the meeting on 20 December 2022 and later that same day in the form of a letter of allegations. The reasons for dismissal were again notified to Mr Swift in the letter of termination on 3 January 2023 after the parties met to discuss the outcome of the investigation into his conduct.

Was there an opportunity to respond to any capacity or conduct related reason?

[76] Mr Swift was given a meaningful opportunity to respond to the valid reasons for his dismissal, both of which related to his conduct. While it is the case that the initial timeframes for response were short, these timeframes were subsequently extended by agreement and Mr Swift had the benefit of union representation in the preparation of his response, and in meetings to discuss the matter. Mr Swift took advantage of these opportunities, providing both written responses to the allegations through his representative, and attending relevant meetings.

Was there any unreasonable refusal to allow a support person to be present to assist at any discussions relating to dismissal?

[77] There was no unreasonable refusal to allow Mr Swift to have a support person to assist in discussions about the dismissal. There was no request of this kind that was denied. I have found that Mr Swift was not asked if he wanted a support person on the first occasion that allegations of sexual harassment were raised in person with him, but nor was any request made for a support person, or any such request refused. The process that followed that initial meeting with Mr Swift faltered when no employee was willing to make a formal complaint against him. Ironically, that would have been the end of the matter but for Mr Swift's insistence that the employees "false" complaints against him be investigated. From the time that a formal investigation into his own allegations of bullying and harassment began, Mr Swift had the benefit of representation. Highland Pines recognised Mr Swift's representative and responded accordingly.



Was Mr Swift warned about relevant unsatisfactory performance?

[78] Mr Swift was warned, in connection with the Workplace of Respect Policy, that his behaviour sometimes bordered on ‘going too far’ and was reminded of the need to comply with the policy. However, ultimately Mr Swift was not dismissed for unsatisfactory performance. He was dismissed for misconduct.

Degree to which the size of the employer’s business and any absence of dedicated human resources management specialists or expertise in the business would be likely to impact on procedures followed in effecting the dismissal

[79] Highland Pines is not a small business. It has embedded human resources expertise in Mr Quintner and the means to obtain legal advice as required.

Other relevant matters

[80] Mr Swift was employed for approximately 3 years and 3 months. Although he was terminated on the grounds of serious misconduct, he was paid an amount in lieu of notice of termination. However, he missed out on a Christmas ham voucher given to other employees in late December 2022. A payslip for his final pay was not provided to Mr Swift immediately upon termination, although this was subsequently remedied on his request.

[81] I described above the conduct of Ms B towards Mr Swift in connection with the insinuation that he was a paedophile. The question of whether this amounted to sexual harassment does not fall for determination in this case, but even so, the comment was plainly offensive to Mr Swift and unsurprisingly so. Highland Pines took the matter seriously and addressed it directly with Ms B, who acknowledged her conduct and expressed remorse to Highland Pines, although she did not apologise to Mr Swift. It is apparent that disciplinary action was taken in relation to the matter, although the fact of her continuing employment with Highland Pines indicates that this did not result in dismissal.

[82] Despite the requirement that employees report misconduct under the Workplace of Respect Policy, this case has uncovered a workplace culture that does not encourage reporting. Employees “don’t usually report” matters, and instead try to manage them on their own. As can be seen, this has allowed inappropriate behaviour to go unchecked for lengthy periods, increasing the risk of exposure to harm among employees. Highland Pines will need to do more to meet its duty to prevent workplace sexual harassment in the future having regard to its legal obligations under both the Act and the *Sex Discrimination Act 1984*. This includes a program of training for managers and employees and letting go of the notion that an employer can only act on alleged misconduct if there is a “formal complaint”.

[83] It should be apparent from my findings above that I do not agree with Mr Swift that he was the victim of a ‘witch hunt’ by a select group of employees which had the objective of seeing him dismissed, or that their complaints were false or artificial in nature. Nor do I agree that Mr Quintner was biased in the conduct of his investigation, or that a predetermined decision had been made to dismiss Mr Swift before the conclusion of the investigation or before Mr Swift was given an opportunity to respond. It is true that the allegations that led to dismissal were not raised with Mr Swift during the period of his performance development plan, but that

is a product only of the timing of the allegations made against him. To the extent that it is said that Mr Swift was not given a copy of the Workplace of Respect Policy, this ignores that he had only just completed a performance development plan, which relied at least in part on his compliance with the policy, a copy of which had been given to him at the time it commenced.

**[84]** The consequences of the investigation into his conduct and then his dismissal were not insignificant for Mr Swift. In its initial stages, it led him to seek medical treatment and to take a period of leave. His return to work after this period was ultimately short lived. Mr Swift is the father of three children and was out of work for some months, in a country town where alternative work opportunities are likely to be limited, and where he had moved to take up the opportunity of work for Highland Pines. These circumstances affected Mr Swift's search for another job and the time it took to find one.

**[85]** Mr Swift alleges that Highland Pines did not comply with section 17.2 of the *Highland Pine Products Enterprise Agreement 2020* because it did not give him written details of the allegations against him on 1 November 2022. For the reasons above, Mr Swift was not "accused of disciplinary misconduct" at that time. That accusation came later, in connection with the formal investigation into his conduct after 18 November 2022.

**[86]** I reject the submission that when dealing with allegations of sexual harassment, the balance of probabilities sits in favour of a person with no past history of such conduct. Each case turns on its own facts and circumstances and is to be dealt with accordingly.

**[87]** I accept that Mr Swift had a manner of dealing with others that was direct, but he was not always clear (as evidenced by the way he spoke down to others, and used "big words") and his propensity for saying what he really thought (by calling people "idiots", or "dumb as dog shit", or "muppets") was not honesty, it was disrespect.

**[88]** In his evidence, Mr Swift described encounters with other employees about his COVID-19 vaccination status, an incident involving the removal of stickers from his locker. In my view, those matters are not relevant to the question of whether Mr Swift was unfairly dismissed. They have no bearing or relationship to the allegations made against him that ultimately led to his dismissal.

**[89]** Finally, Mr Swift appears to contend that Highland Pines relied on the definition of 'serious misconduct' in regulation 1.07 of the *Fair Work Regulations 2009* (as recently amended to include 'sexual harassment') in connection with his dismissal. However, regulation 1.07 is limited to dealing with provisions in the Act about notice of termination, redundancy, and in certain cases, a requirement to consult about redundancies. Regulation 1.07 does not define or limit the circumstances in which an employer can dismiss an employee for serious misconduct, although it may be relevant to whether there has been compliance with the Small Business Fair Dismissal Code.<sup>6</sup> Ordinarily, whether an employee has engaged in serious misconduct is a matter to be dealt with under the general law, having regard to whether their conduct is consistent with their duties as an employee to their employer.<sup>7</sup>

## Mr Swift was not unfairly dismissed

[90] When all of these matters are taken into account, I am not satisfied that Mr Swift has been unfairly dismissed. Mr Swift sexually harassed at least three employees at work. In relation to two of those employees, this conduct continued over a lengthy period. It was serious misconduct and a valid reason for dismissal, as was his separate and disparaging conduct towards employees that was not of a sexual nature.

[91] The process undertaken by Highland Pines to deal with this conduct in relation to Mr Swift was imperfect, but it was not unfair. Mr Swift had access to support and representation in connection with the dismissal and a meaningful opportunity to respond to the allegations against him. It was not necessary for Highland Pines to disclose the individual names of each of the individuals who made the allegations against him, because the detail of their allegations was provided in a way that allowed Mr Swift to understand what was put against him and so that he could respond.

[92] None of the other mandatory considerations support a conclusion that the dismissal of Mr Swift was harsh, or unjust, or unreasonable. That includes the personal characteristics and circumstances of Mr Swift. I accept that the dismissal had serious consequences for Mr Swift, including financially and because of his geographic location. However, those were all foreseeable consequences of the manner in which Mr Swift conducted himself while at work.

[93] For these reasons, I find that Mr Swift has not been unfairly dismissed.

[94] Application U2023/600 is dismissed.



*Appearances:*

*L Swift* on his own behalf.

*S Zeitz* of Zeitz Workplace Lawyers for the respondent.

*Hearing details:*

2023.

Oberon:

June 13, 14, 15.

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<sup>1</sup> [2020] FCAFC 126.

<sup>2</sup> *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 at [708].

<sup>3</sup> *Work Health and Safety Act 2011*, s19 and s28.

<sup>4</sup> *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

<sup>5</sup> *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 at paragraphs [30]-[32]; *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 at [713].

<sup>6</sup> *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [\[2015\] FWCFB 5264](#).

<sup>7</sup> *Lucisano v Fictiv Pty Ltd* [\[2020\] FWC 6045](#).