



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Andrew Drake

v

Melba Support Services Australia Limited

(U2022/11835)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 21 MARCH 2023

Application for an unfair dismissal remedy – disability support worker – co-worker’s allegation of inappropriate touching – findings of fact – allegation substantiated on balance of probabilities to the Briginshaw standard – valid reason for dismissal – application dismissed.

[1] Mr Andrew Drake has made an application for an unfair dismissal remedy under s 394 of the *Fair Work Act 2009* (Act). From 16 December 2019 until 29 November 2022, Mr Drake was employed by Melba Support Services Australia Ltd (Melba) as a disability support worker at a supported independent living home, Palmerston House, in Buninyong in Victoria. Melba summarily dismissed Mr Drake for serious misconduct after it found substantiated an allegation that Mr Drake had placed his lips on a resident’s stomach while she stood naked after a shower and ‘blew a raspberry’. Mr Drake denies the allegation. He maintains that he blew a raspberry on his arm, not on the resident’s stomach, and that he did so to distract the resident who was banging on the wall. Mr Drake contends that there was no valid reason for his dismissal, because he did not do the thing of which he was accused. He seeks reinstatement.

[2] I am satisfied that the Commission has power to determine the merits of this application. Mr Drake was a person protected from unfair dismissal within the meaning of s 382. His application was lodged within the time required by s 394. The Small Business Fair Dismissal Code is not relevant, nor is the question of genuine redundancy.

[3] The resolution of this matter depends in large measure on factual findings that the Commission must make about what occurred in the bathroom at Palmerston house in the early evening of 4 October 2022.

[4] Mr Drake gave evidence that he has been a disability support worker for five years and had worked at Palmerston House for over two years. There were four residents at the house, all of whom had disabilities with high needs and required assistance with showering and going to the toilet. One of the residents was ‘M’, a woman in her late twenties. Mr Drake said that M would often seek the attention of staff and bang her fist on the walls. On the evening of 4 October 2022, Mr Drake was rostered to work with two other disability support workers, Lisa Miller-Caris and Terry Johnson. After dinner, Mr Drake helped M to take a shower. He said that while they were in the bathroom, M hit the wall, and he distracted her by blowing a

raspberry on his arm. He then put on M's dressing gown and took her to her bedroom. I will return below to the details of Mr Drake's account of what occurred.

[5] Mr Drake said that on 5 October 2022, he received a telephone call from the company's general manager, Jacqui McGowan, who told him that concerns had been raised about his conduct towards a resident the previous day, and that he was suspended on pay pending an investigation of the matter.

[6] On 14 October 2022, Mr Drake received an email from Rupert Evans, Melba's employee relations manager, attaching a letter headed 'Allegation of Misconduct/Serious Misconduct' (letter), and a document headed 'FIMS – Supported Person Incident Report' (incident report). The letter stated that it was alleged that on 4 October 2022, at about 6.10pm, Mr Drake had placed his mouth on M's bare stomach, and that this conduct had breached the *Melba Support Services Code of Conduct*. The letter asked Mr Drake to respond to the allegation at a meeting with Mr Evans and stated that he could also respond in writing.

[7] The incident report contained a heading '*Description of the Incident*', under which the following text appeared, evidently written by the complainant, whose name was redacted:

'I knocked on the bathroom door and stated are you guys right in there, to no reply, upon opening the door, I observed staff member AD to be assisting supported person M in dressing after her shower. AD was crouched down next to supported person M. I could see via the reflection of the mirror AD's face pressed against the bare skin of the lower left side of M's stomach area and in what appeared to be the action of blowing a raspberry.

AD had not appeared to have seen me open the door. I was in shock of what I had observed and immediately shut the bathroom door. AD and supported person M exited the bathroom 2 minutes later.'

[8] Much of the rest of the incident report was redacted, including sections headed '*Immediate follow up actions*' and '*Incident assessment*'.

[9] On 24 October 2022, Mr Drake attended an online meeting with Mr Evans, who had been appointed by Melba to investigate the allegation. By this time, Mr Drake had learned that the complainant was Ms Miller-Caris. After the meeting, Mr Evans sent Mr Drake a draft document entitled '*Melba Summary Record of Interview*' and asked him to make any changes. On 25 October 2022, an organiser of the Health and Community Services Union (HACSU), Jane Kim, replied to Mr Evans on Mr Drake's behalf, stating that, subject to certain tracked changes, Mr Drake agreed with the summary of interview. The document records the following:

- Mr Evans asked Mr Drake to respond to the allegation. Mr Drake said: 'I didn't do it. I went through the shower process as I usually do, and I dried her. At some point she hit her fist on the bathroom wall.'
- Mr Drake told Mr Evans that there were several responses he had used in the past to distract M, such as calling her mother's name, but he decided this time to blow a raspberry on his arm. He had not done this before. It was '*just reflex action*'. He held

his arm in front of his face and blew on his arm. M stopped hitting the wall and laughed in response.

- Mr Drake said that after putting on M's continence aid, he put on her dressing gown and took her to her bedroom.
- Mr Evans asked Mr Drake if he had been aware of anyone opening the bathroom door and observing him. Mr Drake said no.
- Mr Evans asked Mr Drake how he responded to the claim that his face was pressed against the bare skin of M's stomach in what appeared to be the action of blowing a raspberry. Mr Drake said: '*I didn't do it.*' He said that he was trained in human rights and understood respecting boundaries.
- Mr Evans then sought to summarise his understanding of Mr Drake's account of the '*raspberry*': he was in close physical proximity to M; he was in a crouching position; and he blew a raspberry on his arm. Mr Drake said 'yes'. However, Mr Drake's marked-up amendment to the incident report stated that he was '*standing up*'. Mr Drake told Mr Evans that he did not think that his arm had been touching M's skins.
- Mr Evans asked Mr Drake why someone would report that his face was on M's skin. Mr Drake said that his theory was that Ms Miller-Caris had not opened the door and had instead heard the raspberry from outside. He said that he and Ms Miller-Caris had recently applied for permanent positions, that he had been successful, but that Ms Miller-Caris had not. He said that she had been emotional on 3 October 2022, and had wanted to have the interviews for the positions redone.

[10] HACSU's reply to Mr Evans on 25 October 2022 attached Mr Drake's written response to the allegation, in which he restated various answers to Mr Evans' questions. He referred to the raspberry as a '*pretend fart*'. He said that he blew the raspberry after M had hit the wall and before he helped her put on the continence aid. He said that he had been standing in front of M, who had her back to the door. He said that he did not believe that the door to the bathroom was opened during the time he was supporting M. He said that no one from outside could have seen what occurred unless they had fully opened the door. Mr Drake said that Ms Miller-Caris had been agitated and emotional about not getting the permanent position and that she had believed that there had been foul play. Mr Drake said that when he received the allegation, he was shocked, as it went against the grain of who he was as a person.

[11] On 7 November 2022, Mr Drake received a copy of the investigation report from Mr Evans. On 21 November 2022, he received a letter from Melba's chief people officer, stating that the company had determined that the allegation against him was substantiated, that Melba proposed to dismiss him, and that he should provide any response to this proposal within five days. On 25 November 2022, Sue Van der Wiel of HACSU replied on Mr Drake's behalf, stating that dismissal would be harsh, unjust or unreasonable because Mr Drake did not touch M's stomach with his mouth. She said that Ms Miller-Caris's complaint was vexatious, and that she stood to benefit from the allegation because she might be appointed to Mr Drake's permanent position. On 29 November 2022, Mr Drake's employment with Melba was terminated with immediate effect.

[12] Mr Drake's evidence to the Commission was that at around 6.10pm on 4 October 2022, he followed M into the bathroom and closed the bathroom door. He supported M with showering the lower half of her body. After the shower, he was standing in front of M, who had her back to the bathroom door. M hit the wall next to the mirror and he then did a '*pretend fart*' or raspberry in the crook of his left arm to attract M's attention. He said that he did this before pulling up M's continence pants. He said that when he blew the raspberry, he was standing. M laughed and then looked at him. Mr Drake then walked around M to check that he had dried her properly. He helped M to put on her dressing gown and walk to her bedroom. M then went to the lounge room.

[13] Mr Drake said that the door to the bathroom is a heavy wooden sliding door that makes a noise on its rollers when opened, and that while he was helping M, the door was closed. He said that it would be impossible for a person to see the inside of the bathroom if the door was only slightly open, as the walls are very thick next to the door. He said that even if Ms Miller-Caris had opened the door, M would have blocked her view of him, and of M's stomach. Mr Drake said that the door was closed, and that it was not possible that it could have been opened, because he would have seen this in his peripheral vision.

[14] Mr Johnson gave evidence that at around 6.00pm on 4 October 2022, he, Mr Drake and Ms Miller-Caris were in the dining and lounge room area adjacent to the kitchen. M got up and walked to the passage. Mr Drake said that he would support M with her showering and followed her out of the room. Sometime afterwards, Ms Miller-Caris said that she could hear some banging. She walked out of the dining and lounge room area and proceeded to the hall. Mr Johnson said that, from where he stood in the dining and lounge area, he had a line of sight to Ms Miller-Caris in the hall. She first stopped outside the bedroom of another resident, 'B'. She then said words to the effect that it was M banging in the bathroom. Mr Johnson said that he could see that the bathroom door was closed. He said that Ms Miller-Caris seemed to be satisfied and then walked back to the dining and lounge area, and the two of them did paperwork together. Not long afterwards, M returned to the lounge area, and Mr Drake followed.

[15] Mr Johnson said that '*the whole time Lisa was investigating I saw what she was doing*'. He said that Ms Miller-Caris was gone for about five minutes. He said that the bathroom door was '*never opened by Ms Miller-Caris.*'

[16] Ms Miller-Caris gave evidence that she has been a disability support worker for 13 years and has worked for Melba for one year. Ms Miller-Caris said that after dinner on the evening of 4 October 2022 she was in the kitchen and saw M walk off down the corridor that leads to the bathroom. Mr Drake accompanied her. She assumed that he would assist her with showering. A short time later, she heard a banging noise. Ms Miller-Caris asked Mr Johnson whether he thought that it was M making the noise. She then left the kitchen and walked down the corridor. As she approached M's room, the noise became louder. The door was closed and she could hear music inside. She then knocked on the door and called out words to the effect of '*you guys right in there*'? There was no response. She assumed that Mr Drake and M were in the bathroom but had not heard her question because of the music that was playing.

[17] Ms Miller-Caris gave evidence that she then pulled the bathroom door to open it slightly, so that she could check if M or Mr Drake needed any help. The opening was around a foot wide,

leaving a space of some inches either side of her head. When she opened the door, she saw in front of her M's back, angled slightly to the right. There was a mirror on the wall to her right. Ms Miller-Caris said that she could see in the mirror a reflection of M's face and most of her body. She saw Mr Drake crouching down in front of M, who had disposable elastic continence pants part way up her legs. Mr Drake's hands were either side of the pants and he was pulling them up. Ms Miller-Caris said that she then saw Mr Drake's face move towards M's stomach and his lips make contact with her. She said that it appeared to her that he was *'blowing a raspberry'* on M's stomach. She did not hear a *'raspberry'* sound because of the music.

[18] Ms Miller-Caris said that she was shocked by what she had seen and quickly closed the door. She said that her heart was racing, and she felt sick. She walked out of the house to gather her thoughts. Some minutes later she saw M and Mr Drake walk out of the bathroom. Ms Miller-Caris said that she did not want to leave M alone with Mr Drake, so she waited for Mr Johnson to return to the living area from assisting another resident. She then went to her car and called Laura Murphy, Melba's operations manager, to report the incident. Ms Miller-Caris's evidence was that she regretted not doing more at the time to protect M, but she was in shock about what she had seen and wanted guidance about what to do. Ms Murphy told her to complete an incident report. She did so. Later in the evening, Mr Drake approached her and gave her a hug. Ms Miller-Caris thought that he must have seen that she was upset about something.

[19] Ms Miller-Caris acknowledged that she had been disappointed not to get the permanent position for which she had applied, but she denied lying about what she saw in the bathroom, for this or any other reason. She said that she had in fact helped Mr Drake with his own application for a permanent role. Ms Miller-Caris denied that she had wanted to be reinterviewed for the position and said that after the incident on 4 October 2022 she did not want to return to work at Palmerston house, because the incident had shocked her, and she did not want to work with Mr Drake again. She now works at a different house. Ms Miller-Caris said that she strongly rejected the suggestion of Mr Drake that she had made a false report about what she saw on 4 October 2022.

[20] Ms Murphy submitted a witness statement that was tendered in evidence. She was not required for cross-examination. Ms Murphy said that on the evening of 4 October 2022 she was rostered to be on-call. Around 7.00pm she received a telephone call from Ms Miller-Caris, who said that she was *'not travelling well'* because she had seen Mr Drake *'blow a raspberry'* on M's stomach. Ms Murphy replied that she would escalate the matter and get back to her. After conferring with a more senior manager, Ms Murphy rang Ms Miller-Caris and said that she should complete an incident report that evening. She also told her to keep Mr Drake in sight until the end of the shift. Ms Murphy said in her statement that, from her tone of voice and her responses, Ms Miller-Caris appeared to be very upset. Later that evening, Ms Murphy received an incident report from Ms Miller-Caris. At 9.30pm, she reported the incident by telephone to the Ballarat police. She also informed M's mother that an incident had been reported. Ms Murphy said that Ms Miller-Caris later told her that she had found the incident very stressful and was concerned about what other staff would think of her involvement in it.

Findings

[21] I make the following factual findings.

[22] First, I find that Ms Miller-Caris opened the door to the bathroom and looked inside. It is clear that she did so. If she had not opened the door, she could not have known that Mr Drake had '*blown a raspberry*.' I reject Mr Drake's suggestion that she heard the raspberry through the door. It was a heavy wooden door. Ms Miller-Caris said that music was playing. I find it unlikely that a raspberry would have been audible from the hall. Further, the sound that is produced by a '*raspberry*' is not so distinctive as to be easily recognisable. Further, while Ms Miller-Caris could perhaps have guessed that Mr Drake was alone with M in the bathroom, that she might be naked after her shower, and that Mr Drake would be helping her to dress, she would not have known the positions in which Mr Drake and M were standing in the room. Her evidence about this accords with Mr Drake's own evidence. I accept that Mr Drake did not see anyone open the door. But he was attending to M. His view of the door was partly blocked by M. And for a time he was crouching, putting on the continence aid. He simply did not notice that the door had been opened. He neither saw nor heard the door slide open.

[23] Secondly, I reject Mr Johnson's evidence that he watched Ms Miller-Caris for the entire time – some five minutes in his estimation – that she was out of the dining and lounge area after going to investigate the banging. It is improbable that he would have kept his eyes fixed on Ms Miller-Caris. There was no reason for him to monitor her actions so carefully. I accept that he watched her walk into the hall, but I do not accept that he did not avert his gaze at all, particularly given that there were two other residents in the dining room at the time, for whom Mr Johnson was supposed to be caring. Mr Johnson acknowledged in cross-examination that Ms Miller-Caris left the dining and living room area on other occasions that evening, and that he did not have his eyes on Ms Miller-Caris for the entirety of the shift. I accept that Mr Johnson did not see Ms Miller-Caris open the door of the bathroom. But as Ms Miller-Caris said, she was in the doorway only for a short time. There was ample scope for Mr Johnson not to have noticed Ms Miller-Caris open the door. Further, I treat Mr Johnson's evidence with some caution. In my view, he had a tendency to express conclusions, rather than confine his evidence to what he saw and heard. For example, he said that the events in the bathroom described by Ms Miller-Caris in her witness statement '*did not occur*' because '*the bathroom door was never opened by Lisa Miller-Caris*.' Mr Johnson is not qualified to say what occurred or did not occur in the bathroom. Nor can he say that the door was *never* opened. Rather, he did not see Ms Miller-Caris open the door. To the extent that Mr Johnson says that he does not believe that Ms Miller-Caris had an opportunity to open the door without his seeing this, I find that this was not the case. Ms Miller-Caris did not mention in her evidence that she went to the door of B's room. Perhaps she did. But this is not important. What is important is what she saw when she opened the door to the bathroom.

[24] Thirdly, I accept Ms Miller-Caris's account of what she saw when she slid open the bathroom door. I found her to be a credible witness. Her evidence was clear, detailed, consistent and convincing. She made appropriate concessions. In answering questions in cross-examination, she did not have an eye to defend her credibility or any forensic advantage. She was candid in her responses. She showed no sign of animosity towards Mr Drake. Mr Drake said that he blew the raspberry on his arm, after putting on the continence aid. But for this to be true, Ms Miller-Caris would either need to be mistaken or lying. I find that neither is the case.

[25] I find that from her position at the entrance to the bathroom, with the door open slightly wider than the width of her head, Ms Miller-Caris was able to see the things that she described in her evidence. Some of these things she saw directly, such as M's back. Others, such as Mr

Drake's actions, she saw in the reflection in the mirror. The position of the mirror on the side wall, to the righthand side of where Ms Miller-Caris was standing, allowed her to see 'around' M's back. It was a side-on view. Her direct view of Mr Drake was blocked by M, but her indirect view, in the mirror, was not. Ms Miller-Caris, M, and Mr Drake were positioned on points more or less along a primary line, with the mirror on the wall running roughly parallel to that line. The two lines of reflection by which Mr Drake was visible to Ms Miller-Caris (Drake to mirror, mirror to Miller-Caris) formed a triangle with the primary line.

[26] I have considered whether perhaps Mr Drake blew the raspberry in the crook of his elbow as he was crouching, with his face very near M's stomach, and that the distance between Mr Drake's arm and M's stomach was so small that Ms Miller-Caris might not have noticed that the raspberry was blown on his arm. But this cannot have been the case because Mr Drake's own evidence was that he blew the raspberry when he was standing up; he also said that his arm was not touching M's stomach.

[27] I accept Ms Miller-Caris's evidence that she saw Mr Drake's face move towards M's stomach and saw his lips make contact with her. Her account was clear and credible. It also fits with the surrounding circumstances. Mr Drake had assisted M to put on her continence aid. To do so he had to bend down or crouch. His face would have been close to M's stomach.

[28] Mr Drake suggested that a view in the reflection of a mirror is somehow less reliable than a direct view. But there is no reason why a mirror view should be regarded as less reliable than a direct one, provided one bears in mind the reverse effect of a mirror, whereby the left side appears as the right side. Further, Ms Miller-Caris said that she had a clear view in the mirror. There was no steam from the shower.

[29] In cross-examination, it was suggested to Ms Miller-Caris that, because she had said in the incident report that it '*appeared*' to her that Mr Drake had blown a raspberry on M's stomach, she was not really sure what she had seen. She replied that she assumed it was a raspberry. But she saw Mr Drake's mouth make contact with M skin. It is clear that the doubt that Ms Miller-Caris implied by saying that it '*appeared*' to be a raspberry related to how one might describe the action that she witnessed. However, Ms Miller-Caris was not in any doubt that she had seen Mr Drake put his lips on M's stomach.

[30] Contrary to the suggestion of Mr Drake, Ms Miller-Caris had no motive to lie. There is no evidence at all that she stood to gain from making an allegation against him. There is no reason to think that this could have resulted in her obtaining Mr Drake's permanent position. There is no evidence that she has in fact derived any gain from making her complaint. I consider that Ms Miller-Caris found it difficult to make her complaint. After the incident, she contacted the on-call manager and sought guidance. She was upset. She was told to file an incident report and did so. She later told Melba that she did not want to work at Palmerston House any longer. Mr Drake and HACSU suggested that Ms Miller-Caris's allegation was vexatious, made essentially out of spite, because Mr Drake succeeded in obtaining a permanent position when she did not. I reject this suggestion. There is no evidence to support the theory. There was no history of ill feeling between Mr Drake and Ms Miller-Caris. She had helped him to apply for the permanent position. On the evening of 4 October 2022, Mr Drake gave Ms Miller-Caris a hug, possibly because he had noticed that she was upset about something. Evidently, Mr Drake and Ms Miller-Caris were on reasonably friendly terms. There is nothing in the written or oral

evidence to suggest that Ms Miller-Caris bore Mr Drake any ill will. The idea that Ms Miller-Caris would be so embittered by not getting a permanent role that she would concoct a malicious lie about Mr Drake is fanciful and I reject it. Mr Drake's contention that, from the hall-side of the closed bathroom door, Ms Miller-Caris was able to construct around this supposed lie an otherwise accurate account of events is also unrealistic, and I reject that too.

[31] Mr Drake suggested that it was not credible that, having seen him put his mouth on M's stomach, Ms Miller-Caris would have left her alone with him. I disagree. It is understandable that Ms Miller-Caris was upset by what she saw. She went outside to collect her thoughts before reporting the incident. Her response might not have been perfect. She could have immediately intervened and asked Mr Drake what he thought he was doing. But not everyone is able to confront a person about their behaviour. Shock often results in hesitation, while a person processes confronting information. Moreover, I consider that her duty in the circumstances was to ensure that she promptly reported what she had seen. This she did. In my opinion, Ms Miller-Caris's account of her reaction was entirely credible.

[32] Am I certain that Mr Drake put his mouth on M's naked stomach? No. But certainty is not required. Mr Drake is not charged with a criminal offence where the standard of proof is *'beyond all reasonable doubt.'* I make my factual findings about what occurred on the balance of probabilities, applying the considerations in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*). As Dixon J said in that case, the nature of the relevant issue necessarily affects the *'process by which reasonable satisfaction is attained'* (at 363). Where serious allegations are made, such satisfaction *'should not be produced by inexact proofs, indefinite testimony, or indirect inferences'* or *'circumstances pointing with a wavering finger to an affirmative conclusion'* (per Dixon J at 362, and Rich J at 350). Mr Drake was accused of a grave matter. In the ordinary course a person does not do such a thing. Nevertheless, I am comfortably persuaded that Ms Miller-Caris saw Mr Drake put his mouth on M's stomach. The totality of the evidence points decisively to this conclusion. I accept Ms Miller-Caris's evidence as truthful and accurate. I reject Mr Drake's denial of the allegation.

Consideration

[33] In order for a dismissal to be unfair, the Commission must be satisfied that it was harsh, unjust or unreasonable (s 385(b)). In considering whether it is so satisfied, the Commission must take into account the matters specified in s 387. The Commission is required to consider whether there was a valid reason for the dismissal related to the person's capacity or conduct (s 387(a)). A valid reason is one that is sound, defensible and well-founded. In cases relating to alleged misconduct, the Commission must make a positive finding on the evidence as to whether, on the balance of probabilities, the conduct occurred. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.

[34] In light of my factual findings above, I consider that Melba had a valid reason to dismiss Mr Drake. This conduct violated the dignity of a vulnerable person who was in the care of Mr Drake, and of Melba. M was standing alone in a private room with her carer, naked after a shower. It was grossly inappropriate for a carer to place his mouth on her body. In my assessment, there was no sexual element to Mr Drake's conduct on 4 October 2022. I consider rather that Mr Drake made a very serious error of judgment. He wanted to distract M but was busy attending to her needs. Blowing the raspberry on M's stomach was a means to distract her.

It was a momentary lapse, but a grave one. It constituted a breach of Melba's *Code of Conduct*, which Mr Drake was bound to observe under his contract of employment, and which required him to respect the dignity and privacy of supported persons (see clause 2.1). I consider that the conduct constituted serious misconduct because it breached this fundamental requirement of his position as a disability support worker. Observing the personal boundaries of residents is an obvious dimension of the respect which must be shown for residents' dignity. An organisation devoted to the care of persons with disabilities cannot be expected to tolerate a worker placing his mouth on a resident's bare stomach. The protection of residents is paramount.

[35] I reject Mr Drake's submission that the conduct could not be serious misconduct because it fell outside the scope of regulation 1.07. First, the regulation does not purport to define the meaning of serious misconduct for the purposes of an unfair dismissal application. Serious misconduct is not referred to in Part 3-2 of the Act. Rather, the regulation's definition of '*serious misconduct*' is for the purpose of s 12, which is relevant principally to the exclusions that apply to an employer's obligation to give notice and make redundancy payments (see s 123). Secondly, the regulation states that '*serious misconduct*' has its ordinary meaning and includes the matters listed. It is not a comprehensive statement of what can constitute serious misconduct. Thirdly, in any event, I consider that the conduct in this case would fall within regulations 1.07(2)(a) (wilful behaviour that is inconsistent with the continuation of the contract of employment) and 1.07(2)(b)(ii) (conduct that causes serious and imminent risk to the reputation of the employer's business).

[36] In considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether an employee has been notified of the reasons for dismissal and afforded an opportunity to respond to any reason related to his or her conduct or capacity (ss 387(b) and (c)). In the present case, both of these things occurred. Melba notified Mr Drake of the reason for his dismissal and gave him an opportunity to respond to the allegation against him at the meeting with Mr Evans.

[37] I reject Mr Drake's contention that Melba did not carry out a fair investigation. First, there was no reason why Mr Evans should not have conducted the investigation. There is no rule that a person independent of the employer must be the investigator of alleged misconduct. The primary purpose of an investigation into an allegation of misconduct is to enable the employer to reach the correct factual conclusion. In determining an unfair dismissal application, the Commission will make its own factual finding as to whether the allegation is substantiated. In doing so, it will assess the evidence put before the Commission, not simply review the employer's investigation. If there are flaws in the investigation, the employer runs the risk of reaching a factual conclusion that the Commission considers to be unsubstantiated. While the presence of shortcomings in an investigation might also have a bearing on the Commission's consideration of whether the dismissal was unfair, this is unlikely to be the case where the deficiency is inconsequential, in the sense that the Commission concludes that the employer reached the correct factual conclusion.

[38] Mr Drake contended that one flaw in Melba's investigation of the allegation was that it failed to interview Mr Johnson or other people who were on duty on the evening of 4 October 2022. As far as Mr Evans knew, the only persons with knowledge relevant to the question of what occurred in the bathroom were Mr Drake, Ms Miller-Caris and M. (I note that neither party suggested that it would have been evidentially helpful, or appropriate, for M to be called

to give evidence.) But importantly, any shortcoming has now been cured. Mr Johnson has given his evidence and I have made findings about it, including that there was ample scope for him not to have seen Ms Miller-Caris briefly open the bathroom door. This alleged procedural flaw was inconsequential. As to whether anyone else should have been interviewed, there is no indication that there are other relevant witnesses.

[39] Mr Drake contended that Melba had not conducted a thorough and genuine investigation and had merely gone through the motions of putting the allegation and receiving his responses. I disagree. Ms Miller-Caris's allegation was treated very seriously, as it had to be. Mr Drake's union was able to represent him effectively throughout the process. I consider that Melba conducted a genuine investigation with a view to establishing whether the allegation was true.

[40] Mr Drake said that Melba should have made and provided to him notes of its discussions with Ms Miller-Caris. I do not consider that this was required. Ms Miller-Caris's complaint was provided to Mr Drake. Although he did not know initially who had made the complaint, this was only for some days. By the time Mr Drake was interviewed by Mr Evans, he knew that Ms Miller-Caris was the complainant. Mr Drake said that he should have been provided with an unredacted copy of the incident report. He did not say why. His representative did not seek to have Melba produce an unredacted copy for the purposes of the proceeding. To my knowledge, the only relevant redacted information was the identity of the complainant. Mr Drake said that he was asked leading questions during the interview process. But there is nothing wrong with this. A leading question can simply be refuted. Mr Drake said that Melba did not investigate whether Ms Miller-Caris's account of seeing him in the mirror was possible. I reject this. It is perfectly understandable how this was possible, as I have explained in my factual findings.

[41] Mr Drake said that Melba did not reach a conclusion as to whether the allegation was substantiated based on the balance of probabilities. In my view, it did. In this regard, for Melba to say that it 'preferred' the evidence of Ms Miller-Caris to that of Mr Drake is not incompatible with a finding that is based on the balance of probabilities. But in any event, what is relevant in these proceedings is the Commission's factual finding, not that of the employer. As I have explained above, I consider that the allegation is substantiated on the balance of probabilities, applying the considerations in *Briginshaw*.

[42] Contrary to Mr Drake's submissions, I do not consider that the various concerns he raises about the investigation process entailed a breach of the disciplinary procedure in Schedule C of the *Disability Services Enterprise Agreement Victoria 2018-2022*, which applied to his employment. But if they did so, they were minor and inconsequential, and are clearly outweighed by the gravity of the conduct which I have found to have occurred.

[43] In relation to the other matters which s 387 requires the Commission to take into account, Melba did not refuse to allow Mr Drake to have a support person present to assist in discussions relating to the dismissal (s 387(d)). If a dismissal relates to unsatisfactory performance, s 387(e) requires the Commission to consider whether the person has been warned about this prior to dismissal. In this case, the reason for dismissal related to conduct, not performance. The Commission is required to consider the degree to which the size of the employer's enterprise and any absence of dedicated human resources specialists could impact on the procedures followed in effecting the dismissal (ss 387(f), (g)). Melba is not a small

employer and has human resources advisers. These considerations carry no weight in the present circumstances.

[44] In assessing whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission is required to take into account any other matters that it considers relevant (s 387(h)). I take account of the fact that Mr Drake is 55 years of age, that his dismissal has had a significant financial impact on him, and that he may find it difficult to find another role that he regards as comparable. Mr Drake contended that dismissal was disproportionate to the conduct of which he was accused but I reject this. It was a single offence. But it was a serious one. Further, Mr Drake's response was not to make a swift disclosure, acknowledge that he had done the wrong thing, and solemnly affirm that it would never happen again. He denied the allegation. But I have found it to be substantiated. In my view, the dismissal was fair.

Conclusion

[45] Taking into account all of the circumstances, I consider that the dismissal of Mr Drake was not harsh, unjust or unreasonable. It was not unfair. Mr Drake's application is dismissed.



DEPUTY PRESIDENT

Appearances:

M. Davis for Mr Drake

C. Pase of counsel for Melba Support Services Australia Limited

Hearing details:

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Melbourne

7 March

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