DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Mark Andrew Hutton
v
Evolution Support Services
(U2023/199)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 19 APRIL 2023

Application for relief from unfair dismissal – valid reason for dismissal – dismissal not harsh, or unjust but unreasonable because the respondent failed to comply with its own appeals process – compensation ordered.

Introduction

[1] Mr Mark Hutton was employed by Evolution Support Services Pty Ltd (***ESS***) as a Disability Support Worker until his dismissal on 19 December 2022. Mr Hutton was dismissed as a result of events which allegedly took place while he was caring for a highly autistic NDIS participant on 30 October 2022. Mr Hutton denies that he engaged in any misconduct and contends that his dismissal was harsh, unjust and unreasonable. ESS contends that it had a valid reason to dismiss Mr Hutton and the dismissal was not harsh, unjust or unreasonable.

[2] I heard Mr Hutton's unfair dismissal case against ESS on 22, 23 and 24 March 2023. Mr Hutton gave evidence in support of his case. Ms Chantal Nash, Mr Hutton's partner, and Mr Cameron Howells, former NDIS – National Access Assessor, also gave evidence for Mr Hutton. The witnesses for ESS included Mr Jeremy Kennedy, General Legal Counsel, Mr Roman Abbassi, Disability Support Worker, Mr Benjamin Lawrence, Operations Coordinator, Ms Lynn Butterworth, Human Resources & WHS Manager, Mr Geoff Neate, Strategic Operations Manager, and Ms Shaye Mahon, Practice Consultant. Mr Matthew Probert, a previous employee of ESS, was also ordered to attend the hearing to give evidence upon request of ESS.

Initial matters to be considered

[3] Section 396 of the *Fair Work Act 2009* (Cth) (***Act***) sets out four matters which I am required to decide before I consider the merits of the application.

[4] There is no dispute between the parties and I am satisfied on the evidence that:

(a) Mr Hutton's application for unfair dismissal was made within the period required in s 394(2) of the Act;

(b) Mr Hutton was a person protected from unfair dismissal;

(c) the Small Business Fair Dismissal Code did not apply to Mr Hutton's dismissal; and

(d) Mr Hutton's dismissal was not a genuine redundancy.

Was the dismissal harsh, unjust or unreasonable?

[5] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Hutton's dismissal was harsh, unjust or unreasonable. I will address each of these matters in turn below.

Valid reason (s 387(a))

General principles

[6] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.[1] In order to be "valid", the reason for the dismissal should be "sound, defensible and well founded"[2] and should not be "capricious, fanciful, spiteful or prejudiced."[3]

[7] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[4] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[5]

[8] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[6] It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[7]

[9] The question of whether there was a valid reason must be assessed by reference to facts which existed at the time of the dismissal, even if they did not come to light until after the dismissal.[8]

[10] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.[9] In cases such as the present where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.[10]

[11] A reason will be 'related to the capacity' of the applicant where the reason is associated or connected with the ability of the employee to do his or his job.[11] The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.[12]

ESS's contentions on valid reason

[12] ESS made the following findings after investigating allegations against Mr Hutton:[13]

> "1. Allegation 1 is partially established. It is found that Mark Hutton did kick or use his knee in a physical way against [the participant] and however this was at the time to protect himself and was reasonably justifiable conduct. No disciplinary action should be taken regarding this allegation.
>
> 2. Allegation 2 is fully established. It [is] found that Mark Hutton deliberately and without justification struck [the participant] at least once and most likely 2 to 3 times in the head behind his left ear with his right knee causing injury to him. Given the serious nature of this conduct disciplinary action should be taken as recommended.
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> 3. Allegation 3 is fully established. It is found that Mark Hutton was abusive and disrespectful to [the participant] when in the process of committing the actions in Allegation 2 he also called him a "… fucking little cunt". Given the serious nature of this conduct disciplinary action should be taken as recommended.
>
> 4. Allegation 4 is fully established. Mark Hutton failed to report the extent of the level of force used in terms of kicking and kneeing of [the participant]. He completed the report without assessing or properly assign [sic] [the participant] for any injury and taking any steps to give him first aid or have him assesses [sic] by appropriate health professionals. Given the serious nature of this conduct disciplinary action should be taken as recommended.
>
> 5. Allegation 5 is fully established. Mark Hutton had a conversation with [the participant's mother] after the incident and deliberately misled her in relation to the extent of the incident and the level of force and the manner in which it was used. He also failed to inform her that [the participant] had suffered an injury."

[13] By reason of Mr Hutton's conduct in connection with allegations 2 to 5, ESS contends that it had a sound, defensible and well-founded reason to dismiss Mr Hutton.

Relevant facts

[14] The participant for whom Mr Hutton was providing care on 30 October 2022 has been diagnosed with autism spectrum disorder and mild to moderate intellectual disability.[14] From time to time the participant can become extremely violent. For example, on 11 October 2022 the participant attacked his mother and caused significant injuries to her. Mr Probert was one of the Disability Support Workers who was caring for the participant at the time he attacked his mother. Mr Probert accepts that he should have intervened earlier than he did when the participant attacked his mother on 11 October 2022.

[15] The participant lives in a house. At all times he has two Disability Support Workers caring for him.

[16] Prior to the incident on 30 October 2022, Mr Hutton and Mr Probert were two of the Disability Support Workers who regularly cared for the participant. Mr Hutton and Mr Probert have been attacked by the participant in the past. Notwithstanding this, it is clear from the evidence given by each of Mr Hutton and Mr Probert that they care deeply for the participant and are proud of their efforts in improving the participant's quality of life and behaviours, most of the time, over the past few years.

[17] At no time prior to the incident on 30 October 2022 did Mr Hutton engage in any inappropriate conduct or behaviour in relation to the participant.

[18] Mr Hutton is very experienced in dealing with underprivileged members of society and situations where the controlled restraint of difficult individuals is required. In addition to his work and training as a Disability Support Worker, Mr Hutton has taught martial arts and self-defence, trained security guards, and conducted training courses for long-term unemployed persons. Mr Hutton has a black belt in jujitsu, and has been formally trained in ninjutsu, boxing, kickboxing and wrestling. Mr Hutton is passionate about justice, particularly for those less fortunate members of society.

[19] On 29 October 2022, Mr Hutton worked with the participant until about 10:30pm or 11pm. During that evening, there was a party at the property adjacent to the property in which the participant resides. Loud music was played at the party. The participant does not like loud music. It is one of the known triggers for the participant. Mr Hutton was asked to work the evening shift, rather than his originally rostered morning shift, with the participant to attempt to manage his behaviour while the party next door was going on. Mr Hutton finished the evening shift with the participant without incident.

[20] At 6:30am on 30 October 2022, Mr Hutton commenced his day shift caring for the participant in the house in which he resides. At 7am on 30 October 2022, Mr Probert commenced work with Mr Hutton, caring for the participant.

[21] The participant woke up at about 9:30am on 30 October 2022. Mr Hutton conducted a welfare check on the participant and asked him if he needed to go to the toilet, which he did. On returning the participant to his bedroom, Mr Hutton congratulated the participant on getting through the previous night with the loud music next door. The participant then changed. His eyes went dark and he came towards Mr Hutton to attack him. Mr Hutton closed the door to the participant's bedroom and attempted to calm him verbally. The participant was pulling on his bedroom door handle, attempting to open it and attack Mr Hutton. Mr Hutton was trying to hold the door closed. Mr Probert was standing next to Mr Hutton in the hallway. Mr Probert was also trying to calm the participant verbally. The door handle then broke off, allowing the participant to pull the door to his bedroom open. The participant then charged, with his hands raised, at Mr Hutton, who was standing in the hallway with his back to the hallway wall. Mr Hutton did not have time to retreat to any other location. He raised his right knee to his chest to create some distance between himself and the participant. When the participant charged into Mr Hutton to attack him, Mr Hutton's foot came into contact with the participant's chest or stomach area and Mr Hutton extended his right leg to push the participant backwards. There is a dispute as to whether Mr Hutton used his leg in this manner once, as he contends, or two or three times, as Mr Probert contends. I do not need to resolve this controversy because ESS

accepts, rightly in my view, that Mr Hutton acted in an appropriate manner when he used his leg to exert reasonable force on the participant and push him away.

[22] As a result of being pushed backwards by Mr Hutton's leg, the participant stumbled into his room towards his bed, which is a mattress on the floor. Mr Hutton followed the participant into his room and secured his wrists while wrestling him down to the floor to put him into a recovery position, on his side, and physically restrain him. Mr Hutton was attempting to restrain the top half of the participant's body. Mr Probert was attempting to restrain the bottom half of the participant's body. The participant was thrashing around wildly, attempting to kick, scratch, headbutt and bite so that he could free himself from the restraint and attack Mr Hutton and Mr Probert. The participant managed to get one of his hands free and scratch both Mr Hutton and Mr Probert, removing some skin off each of them. The participant also managed to spin his body around, in what was described as a 'crocodile roll', to become free and continue to attack.

[23] Mr Probert alleges that during their physical restraint of the participant, Mr Hutton deliberately struck the participant in the head with his right knee on two to three occasions. On one of these occasions, Mr Probert alleges that Mr Hutton said to the participant words to the effect, "stop attacking us, you fucking little cunt". Mr Probert says that Mr Hutton was uncharacteristically angry during their physical restraint of the participant on 30 October 2022.

[24] Mr Hutton denies deliberately striking the participant in the head with his knee. He also denies making the comment suggested by Mr Probert. Mr Hutton says that he was initially crouching and/or kneeling when he was trying to restrain the participant, but when the participant did his 'crocodile roll' Mr Hutton stood up, lost his footing and then fell, causing his right knee to come into contact with the back of the participant's head, behind his left ear. Mr Hutton was aware that his knee had hit the participant at some stage because he "sort of fell on him".[15]

[25] Mr Hutton and Mr Probert have different recollections as to the precise location within the participant's bedroom where the physical restraint took place.[16] They also gave different evidence as to whether the participant was initially put into a resting position on his left side or his right side. I do not consider these differences to be significant. It is not surprising that there are such differences, having regard to the speed at which the events took place and the extent to which the participant was thrashing about in his attempt to avoid being physically restrained. I do not consider either version of events in relation to these particular matters to be more plausible than the other. Further, I do not need to resolve these controversies because they do not have any material bearing on the central question in dispute: did Mr Hutton deliberately strike the participant with his knee on two or three occasions and make the comment alleged by Mr Probert, or did Mr Hutton accidentally fall onto the participant on one occasion?

[26] Mr Hutton and Mr Probert held the participant down for about 10 minutes, during which time they used verbal redirection, together with a soothing technique known as the 'hand trick' (holding the participant's hands with light pressure), to calm and reassure the participant. The participant agreed to cease attacking Mr Hutton and Mr Probert. He was then released from the restraint.

[27] At the time of the attack by the participant, Mr Hutton was fearful, tired, and frustrated at what he perceived to be inadequate efforts by Mr Probert to assist him to physically restrain the participant. Mr Hutton described these types of attacks as violent, quick and abrupt.

[28] After the physical restraint of the participant, Mr Probert remained with the participant in his bedroom for some time, while Mr Hutton made the participant breakfast and then went into the lounge room in the property to complete an incident report. Mr Probert talked to the participant and sought to reassure him. Mr Probert says that he knowingly lied to the participant at this time, suggesting that Mr Hutton had slipped and the strikes were accidental.

[29] Mr Hutton's incident report states:

"**[Participant] incident Report**

Incident No.	Incident 10816
Reportable Incident:	Physical Contact Use of a Restricted Practice
Behaviours of Concern:	Physical Aggression Property Damage
Physical Contact Box	major
Injury Box	minor
Emergency services	
Location:	Home
Report Date/Time	Sun, 30 October 2022 10:21
Incident Date/Time	Sun, 30 October 2022 09:05
Incident Duration	30 mins
Incident Location	Home, bedroom.
Reported By	Mark Hutton (FT)
Persons Involved	3
Witness	DSW MP

What happened before the incident
[The participant] was asleep after a big party from next door. [The participant] was heard coughing minimally as staff went to perform welfare check.
What happened during the incident
Staff had supported participant in making healthy lifestyle choices and decisions with regards to his health and day and [the participant] had been to the toilet and washed his hands and was returning to his bedroom as staff started to prepare breakfast for [the participant]. DSW MH asked [the participant] would he like a coffee or tea and [the participant] had just asked what would be better for his sore throat and staff had suggested some manuka honey in a hot tea may help as it had in the past. Staff commented how proud they were of [the participant] after last night with the loud music and [the participant] began to attack staff with his hands, scratching at staffs arms. Staff used verbal crisis control techniques as per training and attempted to put some space between [the participant] and staff by closing the bedroom door over, as per protocol.

The handle on the bedroom door had become visibly unstable over the time [the participant] has been in the house and as staff put the door closed the handle fell to the

floor. Staff used crisis control techniques with [the participant] de-escilating [sic] him verbally and used the hand trick as per request from [the participant] to help make [the participant] feel safe and continued verbal de escalation as [the participant] began to subside in his attacks on his staff.

What happened after the incident

[The participant] returned to baseline and asked staff to talk to the neighbours about the loud music. [The participant] has since been served his breakfast and is currently back in his bedroom calm and comfortable sitting on his bed and eating his breakfast and listing to his radio stations.

Actions taken to prevent recurrence

Loud music and house party at the property next door.

Immediate actions taken

NA

Injury Details

Was an injury sustained in the event	No
Detail	Scratches on staff hands. Cleaned with first aid kit.

Emergency Services

Emergency Service	No
Description of what happened	

First Aid Details

Was first aid administered?	No
First Aid administered by	
Time administered	2022-10-30 10:05:00
Immediate action/description of first aid	

Property Damage

Was there any property damage?	Yes
Description of property damage	[The participant]'s bedroom door handle
Property damage box	Urgent Repair Required
Phone on call to notify	No

Images

[image of door handle]

Management Comments

-Shaye Mahon – 31 Oct 2022 10:09pm"

[30] Neither Mr Hutton nor Mr Probert noticed any injury to the participant at the time of the restraint.

[31] Later in the morning, after the physical restraint, the participant called his mother on his mobile telephone. Mr Hutton spoke to the participant's mother, who asked him what happened. Mr Hutton says that he told the participant's mother that there had been a party next door the previous night. He also spoke to her about the participant's medication and sleep routine. Mr Hutton denies apologising to the participant's mother for kneeing him in the head.[17] Mr Probert also spoke to the participant's mother. He told the participant's mother that Mr Hutton had slipped and come into contact with the participant. Mr Probert says that he lied to the participant's mother because he was fearful of Mr Hutton and he did not want to 'rock the boat'.

[32] At about 1:20pm on 30 October 2022, Mr Probert telephoned Mr Lawrence and told him that there had been an incident involving the participant. Mr Probert said to Mr Lawrence that he did not want to talk about it at the time, but he described the situation as "fucked". Mr Lawrence asked Mr Probert to send him an email with the details of the incident.

[33] Mr Hutton finished his shift at about 2:30pm on 30 October 2022. Mr Brenton Shiels, Disability Support Worker, took over from Mr Hutton. At about 2:40pm or 2:50pm, Mr Hutton received a text message from Mr Shiels, asking Mr Hutton whether he was aware that there was a bruise behind the participant's left ear. Mr Hutton replied in words to the effect, "No, I wasn't aware, but that would make sense". Mr Hutton explained during his re-examination that he sent this reply to Mr Shiels because Mr Hutton knew that his knee had come into contact with the participant during the physical restraint.

[34] Mr Probert says that Mr Shiels told him about the lump on the participant's head shortly after Mr Shiels commenced his shift at 2:30pm.[18] Mr Probert then spoke to the participant, who told him that he had a medium sized lump on the side of his head, near his ear.[19] Mr Probert explained to Mr Shiels what had happened earlier in his shift.

[35] Mr Probert finished his shift at about 3pm on 30 October 2022. Mr Roman Abbassi, Disability Support Worker, took over from Mr Probert.

[36] During the afternoon of 30 October 2022, Mr Abbassi and Mr Shiels showered the participant. They observed a significant bruise on the back of the participant's head, behind his left ear. Mr Abbassi also noticed a small amount of dried blood in the upper part of the participant's left ear. Mr Abbassi provided first aid to the participant and asked him if he was feeling okay. Mr Abbassi did not believe that the extent of the participant's injuries justified an ambulance being called.

[37] At 9:06pm on 30 October 2022, Mr Probert sent an email to Mr Lawrence, to which he attached a document setting out his account of the incident involving the participant earlier that day. The account written by Mr Probert states:

> "Report concerning events on 30/10/2022
> To whom it may concern,
> I am writing to convey events that occurred on the 30/10/2022. I have attempted to include all relevant details, without omission.
>
> *What happened prior to the incident?*
> [The participant] woke up at around 09:30. At this time, he was prompted by DSW MH to use the toilet, commencing his morning routine. [The participant] appeared to be in a calm, stable mood at this time- completing the task without issue. Whilst using the toilet, [the participant] asked for a new Bluetooth headband, which was introduced to [the participant] the day prior. [The participant] also confirmed that he would like pancakes for breakfast whilst completing the task.
>
> *What happened during the incident?*
> [The participant] re-entered his room following successful use of the toilet. However, upon re-entry to his room, [the participant] turned around, pacing towards the door. At

this time DSW MH held the door closed, concurrently attempting to reassure [the participant]. [The participant] verbally communicated that he didn't like the loud music from the neighbours last night and that he did not feel safe.
Shortly thereafter, DSW MP attended the scene, concurrently engaging in positive, therapeutic communication with [the participant]. [The participant] continued in his attempts to assault support staff as DSW MH held the door. After a period of around 2 minutes, the outside door handle snapped & as such, DSW MH was unable to prevent [the participant]'s attempted assaults. Following this, [the participant] lunged towards DSW MH, who initially pushed [the participant] away from him with both hands. [The participant] seemed unfazed by the push, again attempting to assault DSW MH. MH then lifted his leg, kicking [the participant] in the stomach. [The participant] again charged towards DSW MH, who again raised his leg to kick [the participant] in the stomach. Following another charge, DSW MH forced [the participant] to ground – once on the ground, DSW MH restrained the top half of [the participant]'s body and one of his arms, whilst DSW MP held down his legs and an arm, to prevent assault.

[The participant] repeatedly continued his attempts to assault support staff, successfully causing mild lacerations to DSW MP and MH's hands. [the participant] also attempted to gouge DSW MH's eyes. Throughout the restraint, DSW MH struck [the participant] in the head using his knee on approximately two to three occasions. On one of these occasions, DSW MH said in an aggressive manner to [the participant] 'stop attacking us, you little fucking cunt', as well as other forceful comments to similar effect. Following successful laceration of his right hand, DSW MP used a forceful tone to inform [the participant] if he did not discontinue attacking support staff, he would likely get 'the needle' (an approved, intra-muscular sedative that under certain circumstances, can be administered by paramedics/nurses).

DSW MH continued to restrain the top half of [the participant]'s body and an arm, whilst DSW MP held down his legs and the other arm, for approximately 15 minutes. Throughout, both support staff attempted to assure and calm [the participant], expressing that they would ask the neighbours not to play loud music again. Following a prolonged period of discussion, [the participant] agreed to cease attacking support staff and as such, he was released from the restraint. At his request DSW MP therapeutically held his hands with light pressure for a period of around 20 minutes, whilst [the participant] sat up in bed. During this time, [the participant] asked questions such as 'will there be good days and bad days' as well as 'will there be more hard restraints'. [The participant] also expressed that 'whacks' reminded him of 'dad'. DSW MP knowingly lied to [the participant] at this time, suggesting that DSW MH 'slipped' and that the strikes were 'accidental'. [The participant] later called his mother and when [the participant] described circumstances pertaining to the restraint, DSW MP again communicated that DSW MH slipped & the strikes were the result of an 'accident'.

What happened after the incident?
[The participant] spent an extensive period of time speaking with his mother on the phone. During this time, DSW MH and MP gave [the participant] space. At around 14:30, [the participant] communicated to DSW MP that he had a medium sized lump on the side of his head, near his ear. The lump was confirmed to exist by DSW MP and was highly likely the result of DSW MH's repeated strikes."

[38] Mr Probert says that he was negligent in not arranging to have the participant medically examined on 30 October 2022.

[39] Mr Lawrence read Mr Probert's account of the incident on the night of 30 October 2022. Mr Lawrence did not call an ambulance or take any steps on the night of 30 October 2022 to have the participant medically examined. Mr Lawrence accepted during his evidence that he should have called an ambulance after he read Mr Probert's account on the night of 30 October 2022.

[40] Mr Hutton worked a shift with the participant on 31 October 2022. During the morning on that shift, Mr Lawrence, Mr Neate and Ms Mahon attended the property in which the participant was residing and told Mr Hutton that he was suspended, on pay, pending an investigation into the incident. Mr Hutton responded by saying words to the effect, "This is because of Probert, isn't it?"

[41] Mr Neate then called an ambulance to have the participant medically examined. A paramedic examined the participant at about 1:10pm on 31 October 2022. The paramedic then wrote a report, which relevantly states:

> "[The participant] was struck behind his left ear 1 day ago. Pt states it was a 'knee to head'. Nil report of any LOC, N&V or headache through the day post event. O/E pt airway potent & clear. Nil respiratory distress, clear lung sounds. All vitals within range… Pt nil dizziness, nil lightheadedness, nil headache, nil LOC, nil seizures, nil fainting. Pt with bruising and swelling behind L ear, nil any other deformity or injury on head to toe assessment. Pt well perfused and normal self since event."

[42] I am not prepared to give any weight to any of the oral statements which the participant made to the paramedic who examined him or any employees of ESS, or any written notes made by the participant, about the incident on 30 October 2022. I have reached that view for two reasons. First, the participant was not called to give evidence in the proceedings. It is understandable why he was not called, but Mr Hutton has not been able to test with the participant any of the comments or handwritten notes made by him. Secondly, both Mr Probert and Mr Hutton gave evidence that, from time to time, the participant makes oral statements and handwritten notes which do not reflect the reality of what has in fact happened. Coupled with this evidence is the fact that I do not have the benefit of any expert medical opinion evidence to the effect that what the participant has said or written is reliable evidence of what has in fact happened. The participant's interim behavioural assessment and support plan notes that his "written communication skills exceed his verbal communications skills",[20] but this does not say anything about the accuracy or reliability of his written or oral communications.

[43] I have carefully considered the evidence given by Mr Hutton, Mr Probert, and the other witnesses who gave evidence in the proceedings. After much deliberation, I have reached the conclusion that, on the balance of probabilities and having regard to the *Briginshaw* standard, I prefer the evidence given by Mr Probert over the evidence given by Mr Hutton on the crucial question of whether Mr Hutton deliberately kneed the participant in the back of the head and called him a "little cunt" on 30 October 2022. My reasons for so concluding are as follows.

[44] First, Mr Hutton accepted in his evidence that the incident report prepared by him shortly after the incident on 30 October 2022 omits significant information. It states that the "handle on the bedroom door had become visibly unstable over the time [the participant] has been in the house and as staff put the door closed the handle fell to the floor". Even on Mr Hutton's own account of the incident, this is not an accurate description of what happened. There was a tug of war between Mr Hutton, who was pulling on the door handle from outside the room in an attempt to keep the door closed, and the participant, who was pulling on the door handle from inside the room in an attempt to open it so that he could attack Mr Hutton and Mr Probert. This is what led to the door handle snapping. In addition, although the incident report refers to attacks by the participant on staff, it does not make *any* reference to the physical restraint imposed by Mr Hutton and Mr Probert on the participant. I do not accept Mr Hutton's argument that the inclusion in his incident report of a reference to use of the 'hand trick' or 'attempting to put some distance between [the participant] and staff' would have been sufficient to inform any reader of the report that a physical restraint had been imposed on the participant. There is a significant difference between using the 'hand trick' by applying light pressure to the participant's hands and two Disability Support Workers attempting to physically restrain the participant while he thrashes about wildly and attempts to attack them. Finally, the incident report does not include any reference to the fact that Mr Hutton's knee came into contact with the participant during the physical restraint. Mr Hutton knew, at the time he prepared the report, that his knee came into contact with the participant during the physical restraint. So much is clear from the text message sent by Mr Hutton to Mr Abbassi on the afternoon of 30 October 2022 and the reason Mr Hutton gave in re-examination for sending that text message to Mr Abbassi.[21] Mr Hutton accepts that he should have included such information in his incident report. If, as Mr Hutton contends, his knee accidentally came into contact with the participant's head when he fell during the physical restraint, there would have been no difficulty in Mr Hutton including such a statement in his incident report. I do not accept Mr Hutton's argument that he omitted such information from his report on the basis that he could have included further details in the report at a later time if he was asked for more information about the incident. That the information in the report did not make any reference to the imposition of a physical restraint on the participant meant that any reader of the report would not be in a position to ask for further information about the restraint or any contact between Mr Hutton and the participant during the restraint. Nor do I accept Mr Hutton's argument that he omitted significant details from his incident report because he was fatigued after completing a night shift the previous night and starting a new shift at 6:30am on 30 October 2022. The information included by Mr Hutton in his incident report is well written and suggests that he was capable of including other, highly relevant details in his report when he wrote it on 30 October 2022. I accept ESS's submission that Mr Hutton's incident report was 'sanitised' to such an extent that it suggests he was trying to cover up what really happened.

[45] ESS contends that Mr Hutton had a further reason to want to cover up the fact that he had imposed a physical restraint on the participant, during which his knee came into contact with the participant. That reason, so ESS contends, is related to the fact that in September 2021 Mr Hutton physically restrained a participant and during that restraint the participant's arm was broken. Mr Hutton described that incident in the following way when it happened:[22]

> "… The participant had tried to push past him and raise his hands, that's when the Restraint was performed. He physically redirected him to the lounge and he landed in an awkward position. He said let me go and let me get my gun and shoot you. The

> Participant started bucking and headbutting and attempting to bite the Respondent [Mr Hutton]. The Respondent stated that he was reassuring the Participant that he was keeping him safe. The Participant continued to buck and move his arm and then started to complain about his arm being broken.
>
> It was stated that no excessive force had been placed on him. After this the Ambulance was called and he was taken away to the hospital."

[46] ESS's report in relation to this incident included the following information in relation the video footage of the incident:

> "… The Respondent is shown to attempt to redirect the Participant with calm words. As a result of the Participant assaulting the Respondent with his right arm and shoulder the Respondent has physically redirected the Participant safely whilst defending himself as well and protecting the other participants and staff that were close by. Part of the video shows the Respondent holding the left arm of the Participant while struggling to restrain the other arm from hitting him before the Participant has claimed that his arm has been broken."

[47] ESS found that Mr Hutton had used an unauthorised restrictive practice, but he did this in self-defence.[23] The following recommendation was made in relation to this incident:

> "The Respondent be removed from providing supports to the Participant and other Participants at that site for his own health and safety and the health and safety of others. The Respondent will be suitable to work with other participants."

[48] Consistent with this recommendation, Mr Hutton was moved to a different property to care for a different participant following the incident in September 2021. I do not accept ESS's contention that changing Mr Hutton's duties by assigning him to support a different participant was a form of disciplinary action against him. That is because Mr Hutton was not given an oral or written warning in relation to this incident and the reason for the change in duties, as explained in the recommendation, was to protect Mr Hutton's health and safety, as well as the health and safety of others. Nevertheless, I do accept that the existence of this relatively recent event involving a physical restraint and an injury to a participant increases the likelihood that Mr Hutton deliberately omitted significant information from his incident report into the incident on 30 October 2022 because he did not want an investigation into that incident.

[49] Secondly, there are material differences between the accounts given by Mr Hutton of the incident on 30 October 2022 in (a) his incident report, (b) his initial interview with ESS on 9 November 2022, and (c) his second interview with ESS on 21 November 2022. Mr Hutton's incident report makes no mention of any physical contact between his knee, or any other part of his body, and the participant. In his first interview with ESS on 9 November 2022, Mr Hutton said that his knee made "contact with *either* the floor *or* [the participant's] shoulder *or* potentially [the participant's] ear. This happened extremely quickly and is hard to distinguish what exactly happened in the moment."[24] [emphasis added] This is to be contrasted with Mr Hutton's knowledge, on 30 October 2022, that his knee came into contact with the participant.[25] In his second interview with ESS on 21 November 2022, Mr Hutton said, "I was aware that my

knee had hit him at some stage, whether it was the shoulder, back of his head or – 'cause I sort of fell on him."[26]

[50] Thirdly, I considered Mr Probert to be a credible witness. He did not volunteer to give evidence in these proceedings. Mr Probert has been dismissed by ESS and he is suing ESS in relation to his dismissal. At the request of ESS, I ordered Mr Probert to attend the hearing to give evidence. He answered questions in a direct and responsive manner. He made concessions which were against his interest, including that he should have called an ambulance on 30 October 2022 and that he lied to both the participant and the participant's mother about the 'accidental' nature of the contact between Mr Hutton's knees and the participant. Mr Probert accepted when he could not recall particular conversations and events, but he was steadfast in his consistent account - in his initial email report to Mr Lawrence, during both in his interviews with ESS, and in his evidence before the Commission – that (a) there were "definite and deliberate strikes on the head by Mark's knee. There is no question"[27] and (b) Mr Hutton referred to the participant during the physical restraint as a "little cunt". Mr Probert reported the fact that an incident had occurred involving the participant to the relevant supervisor, Mr Lawrence, at 1:20pm on the day of the incident. He then made a written report and sent it to Mr Lawrence at 9:06pm on the day of the incident. Mr Probert has not waivered to any material or significant extent from the contemporaneous account he gave, in writing, of the incident to Mr Lawrence on the evening of 30 October 2022.

[51] Mr Hutton points to the fact that, at different times in Mr Probert's interview with Mr Kennedy on 18 November 2022, Mr Probert said "I'll just go with what I think happened first"[28] and "I've just made the stuff up".[29] As to the first of these comments, it needs to be considered in the context where Mr Probert was having some difficulty in recalling during his interview with Mr Kennedy the exact sequence of events, but he was very clear in his recollection that Mr Hutton made definite and deliberate strikes to the participant's head with his knee. So much is apparent from the following answers given by Mr Probert to Mr Kennedy:

> "As [the participant] attempted to exit the room, and again I cannot with absolute certainty and I believe I reflected on this and communicate which of the responses occurred first, and the exact number of responses – I'll just go with what I think happened first. So he was –[30]
> …
>
> I know that these things happen. It's just remembering the exact sequence. So essentially, [the participant] tried to exit the room and he was Kung-Fu kicked to the stomach and [the participant] was pushed back. He was pushed back on one occasion.[31]
> …
>
> … There's nothing that I've intentionally fabricated and I've essentially come here to do the right thing by [the participant]. And the one thing that I'll be absolutely clear on is that there was kicks to the stomach and there was intentional and deliberate knees to the head. It's not right …"[32]

[52] As to the second of these comments, Mr Probert was asked by Mr Kennedy during his interview to mark on a diagram the location of each person at a particular point in time during the incident on 30 October 2022.[33] Having marked the diagram, Mr Kennedy asked Mr Probert

whether he was standing in the hallway or the doorway to the participant's bedroom, in response to which Mr Probert said:

> "My apologies, I have labelled this document incorrectly. So essentially, we were both here. I was slightly to the left and slightly behind and [the participant] was actually there. So for some reason, I'm not wearing glasses today, I've just made the stuff up."

[53] Mr Kennedy then told Mr Probert that he had another version of the diagram and they could "start again" to mark it up.[34] Mr Probert went on to mark up another version of the diagram.[35] Mr Probert's evidence before the Commission concerning the location of himself, Mr Hutton and the participant at the time of the physical restraint, including the marking up (in blue pen) of a further diagram by Mr Probert,[36] was consistent with the explanation he provided to Mr Kennedy after he realised that he had incorrectly labelled the first diagram. Viewed in this context, I consider Mr Probert's statement to Mr Kennedy that he "just made the stuff up" to mean that he made a mistake in marking the initial diagram during his interview, rather than an admission that he was making up his version of events as he explained the incident to Mr Kennedy.

[54] It is of some concern that Mr Probert admittedly lied to the participant and his mother about the incident on 30 October 2022. Mr Probert told each of them that Mr Hutton slipped and the strikes were accidental. However, Mr Probert freely admitted to these lies in his contemporaneous email to Mr Lawrence on the evening of 30 October 2022.[37] Further, I accept Mr Probert's evidence that his lie to the participant was a 'necessary evil' because he was trying to calm the participant after the event, not trigger a further violent event. Mr Probert explained that he lied to the participant's mother partly because he was in fear of Mr Hutton and partly because he did not want to 'rock the boat'. This explanation has a ring of truth to it. Ultimately, I have formed the view that Mr Probert gave honest and reliable evidence to the Commission about the events which took place on 30 October 2022, notwithstanding his admitted lies to the participant and his mother on the day of the incident.

[55] I am satisfied on the evidence that Mr Probert did not have a motive to lie in his reporting of the events of 30 October 2022 to ESS, which supports his credibility as a witness in these proceedings.[38] During his initial interview with ESS on 9 November 2022, Mr Hutton provided information to ESS about alleged misconduct on the part of Mr Probert, including in relation to Mr Probert turning up to work late, eating the participant's food, and disappearing during shifts.[39] Some of the matters Mr Hutton reported to ESS in relation to Mr Probert formed part of the reason why ESS decided to terminate Mr Probert's employment on 2 December 2022.[40] However, Mr Hutton did not report these matters to ESS prior to 30 October 2022. It follows that the reporting of matters by Mr Hutton to ESS about Mr Probert could not have been, or formed part of, any motivation by Mr Probert to lie in his email to Mr Lawrence on the evening of 30 October 2022 about Mr Hutton's conduct earlier that day.

[56] Mr Hutton says that he was speaking to other co-workers at ESS about Mr Probert in the weeks leading up to 30 October 2022 and Mr Probert may have become aware of those discussions and complaints, which may have provided Mr Probert with a motive to 'get in first' and make false allegations against Mr Hutton. I am not satisfied on the evidence that Mr Probert was aware of any such discussions between Mr Hutton and other employees of ESS. These discussions were not put to Mr Probert during his evidence.

[57] In the weeks leading up to the incident on 30 October 2022, Mr Probert noticed that Mr Hutton had been talking to him less than previously. Mr Probert says that he did not infer any reason for this decrease in communication from Mr Hutton. Mr Probert says that he was not close friends with Mr Hutton, but there was no bad blood between them.[41] I accept Mr Probert's evidence in this regard. I also accept that Mr Hutton was becoming increasingly frustrated at what he perceived to be a lack of effectiveness and effort on Mr Probert's part in his duties as a Disability Support Worker, but this did not lead to any significant confrontation or dispute between Mr Hutton and Mr Probert prior to 30 October 2022.

[58] It is contended by Mr Hutton that Mr Probert is not a credible or reliable witness because he consumed drugs prior to working a shift on a particular day (not 30 October 2022). Mr Probert admitted this matter to Mr Neate when he was asked about it. Mr Neate formed the view that although Mr Probert had engaged in inappropriate conduct in a number of respects, he had been honest and forthcoming with information and admissions when he was questioned by ESS. These matters do not cause me to have any significant concern about the honesty or reliability of the evidence given by Mr Probert about the events which allegedly took place on 30 October 2022.

[59] Fourthly, I do not accept Mr Hutton's argument that it was impossible for him to have kneed the participant in the head, behind his left ear. There is no dispute that Mr Hutton's knee came into contact with the participant's head during the physical restraint and that the participant ended up with bruising and swelling behind his left ear. The contentious issue is whether Mr Hutton deliberately kneed the participant in the head, and did so on two or three occasions.

[60] Fifthly, Mr Hutton contends that if he had exerted excessive blows with his knee to the participant's head two or three times, the participant would have suffered far more extensive injuries than bruising and swelling behind his left ear. I do not accept this argument. It is based on a false premise. ESS does not contend that Mr Hutton exerted excessive blows with his knee to the participant's head. In his initial email account of the incident, Mr Probert stated that Mr Hutton had "struck [the participant] in the head using his knee on approximately two to three occasions".[42] In his first interview with ESS on 8 November 2022, Mr Probert described the incident as "moderate force used 6.5 – 7.0 earthquake, weight more than power".[43] In his second interview with ESS, Mr Probert said:[44]

> "I wouldn't say it was full force but it was significant force. The action in itself is unwarranted and excessive. Mark is quite a capable human being in that realm. That wouldn't have been full force but it was certainly a significant force."

[61] Sixthly, Mr Hutton gave evidence that he was fearful, frustrated (at Mr Probert) and tired at the time of the incident. In my view, these understandable emotions increase the likelihood that Mr Hutton momentarily and uncharacteristically lost control of his temper during the violent attack by the participant on 30 October 2022.

[62] Seventhly, Mr Hutton contends that the participant did not flinch during the incident and he would have done so if he had been deliberately kneed in the head. Given that the participant was thrashing about during the physical restraint, I am not confident that Mr Hutton would have

been able to determine whether the participant flinched at the time Mr Hutton's knee came into contact with his head. In any event, there is no doubt that the participant has been involved in many violent incidents with the police, support workers and others who have sought to restrain him over the years. It is not known what the participant's level of pain tolerance is. Further, there is no dispute that Mr Hutton's knee came into contact with the participant's head. The question is whether the contact was deliberate or accidental and whether it happened more than once.

[63] Eighthly, much was made by Mr Hutton of the fact that no ambulance was called on 30 October 2022. That is true. But it does not have any material bearing on the dispute I need to determine. The position would be otherwise if there was a dispute about whether Mr Hutton made any contact with the participant or whether the participant was injured. Neither of those facts are in dispute. Mr Hutton was aware on the day of the incident that his knee came into contact with the participant and the participant had a bruise behind his ear. Mr Hutton did not call an ambulance. Mr Abbassi did not consider the extent of the participant's injury to warrant an ambulance being called. Both Mr Probert and Mr Lawrence say they should have called an ambulance in order to have the participant examined on 30 October 2022, rather than the following day. Whether or not that was the prudent course of action to take in the circumstances is not a matter I need to determine in this case. Nor does it have any material bearing on my assessment of the credibility of Mr Probert or Mr Hutton.

[64] Ninthly, Mr Hutton submits that Mr Probert omitted important information from his incident report relating to the attack by the participant on his mother on 11 October 2022. This case does not concern the question of whether Mr Probert acted appropriately on 11 October 2022. In any event, Mr Probert admitted that he should have intervened earlier than he did during the incident on 11 October 2022.

Conclusion re valid reason

[65] I am satisfied on the evidence that ESS had a valid reason to terminate Mr Hutton's employment on the basis that he (a) deliberately kneed a participant in the back of his head on two or three occasions, and called him a "little cunt", during a physical restraint on 30 October 2022, (b) failed to report the extent of the level of force used in physically restraining the participant, including that his knee came into contact with the participant during the physical restraint, and (c) did not inform the participant's mother after the incident of the level of force and the manner in which it was used during the physical restraint. Mr Hutton's conduct in this regard was in breach of ESS's Abuse, Neglect and Exploitation Policy,[45] in which Mr Hutton had been trained.[46] That policy provides:[47]

> "Any workers found to be perpetuating any form of abuse or neglect will lead to disciplinary action, including the possibility of termination of employment.
>
> Any attempt to cover up or failure to report suspected or actual incidents of abuse will lead to disciplinary action, including the possibility of termination of employment."

[66] That ESS had a sound, defensible and well-founded reason to terminate Mr Hutton's employment weighs against Mr Hutton's contention that his dismissal was harsh, unjust and unreasonable.

Notification of reason (s 387(b))

[67] I am satisfied on the evidence that Mr Hutton was notified of the valid reasons for his dismissal. The notification was provided in the investigation report and through the investigation process.

[68] This factor (s 387(b)) weighs in support of ESS's argument that Mr Hutton's dismissal was not harsh, unjust or unreasonable.

Opportunity to respond (s 387(c))

[69] By letter dated 18 November 2022, Mr Kennedy informed Mr Hutton of the allegations against him and invited him to attend a meeting to respond to the allegations.[48]

[70] Mr Hutton attended a meeting with Ms Butterworth and Ms Mahon on 9 November 2022. At that meeting Mr Hutton read from a pre-prepared response to the allegations. He also answered a number of questions about what happened on 30 October 2022.

[71] On 21 November 2022, Mr Hutton attended a second interview in relation to the events of 30 October 2022. Mr Kennedy conducted this interview. Mr Hutton took up the opportunity given to him at this interview to answer a range of questions in relation to the allegations and what happened on 30 October 2022.

[72] On 15 December 2022, Mr Hutton was sent a copy of the investigation report prepared by Mr Kennedy.

[73] On 19 December 2022, Mr Hutton attended a meeting at which he was asked to show cause why his employment should not be terminated.

[74] Having regard to all the circumstances, I am satisfied that Mr Hutton understood the allegations made against him and was given an opportunity to respond to the reasons for his dismissal. This weighs in support of ESS's argument that Mr Hutton's dismissal was not harsh, unjust or unreasonable.

Unreasonable refusal to allow a support person (s 387(d))

[75] Mr Hutton had one or two support people with him at every meeting with ESS in relation to his dismissal.

[76] I am satisfied on the evidence that there was not any unreasonable refusal by ESS to allow Mr Hutton to have a support person present to assist in any discussions relating to his dismissal.

Warnings of unsatisfactory performance (s 387(e))

[77] Mr Hutton was not dismissed for unsatisfactory performance. This factor is not relevant to my assessment of the fairness of Mr Hutton's dismissal.

Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))

[78] ESS is part of a group of companies which has a reasonable size. ESS has human resource management specialists and expertise. In all the circumstances, I am satisfied that neither the size of ESS's enterprise nor any absence of human resource management specialists or expertise had any impact on the procedures followed in effecting Mr Hutton's dismissal.

Other relevant matters

[79] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[80] There are four other relevant matters to consider.

[81] First, I accept that Mr Hutton was employed by ESS for a period of about three years prior to his dismissal. Other than the events which led to Mr Hutton's dismissal, Mr Hutton had not received a written or oral warning during his employment with ESS. He was considered to be a very good employee. The length and quality of his employment record provides support for Mr Hutton's contention that his dismissal was harsh.

[82] Secondly, ESS admits that it did not comply with its internal appeals process before it made the decision to dismiss Mr Hutton. During the show cause meeting on 19 December 2022, Mr Kennedy told Mr Hutton that ESS did not have an internal appeals process. I accept Mr Kennedy's evidence that he was not aware of ESS's internal appeals process at the time of the show cause meeting. Mr Kennedy commenced employment with ESS on 26 September 2022. I also accept Ms Butterworth's evidence that she was not aware of ESS's internal appeals process at the time of the show cause meeting, albeit she has been employed in the ESS group of companies since December 2018 and is responsible for employee relations, including assisting in investigations and exit processes for employees.[49]

[83] ESS's internal appeals process is described in its Investigation Procedure, which was last reviewed in April 2022.[50] The relevant part of the Investigation Procedure states:[51]

> "**Appeals**
>
> A matter may be referred for appeal following a completed formal investigation where a person involved in the investigation feels the investigation outcome was flawed or the outcome was harsh and/or unjust. All appeals must be in writing on the approved Evolution Support Services Application for Appeal form and forwarded to the Managing Director.
>
> An appeal will involve a review of the final report findings and the process undertaken. The Managing Director will review the information and advise the person making the appeal in writing of the outcome.
>
> Should the Managing Director deem the investigation to be flawed or the outcome as harsh and/or unjust, the appropriate action will be instigated, and the investigation may

> be redone. Where the report findings are upheld no further action will be taken and the matter will be closed.
>
> The Managing Directors decision is final. Evolution Support Services encourages our people to seek external legal avenues where appropriate."

[84] There is no doubt that Mr Hutton felt that the investigation outcome reached by Mr Kennedy was flawed and the outcome was harsh and unjust. ESS ought to have known about, and complied with, its own policies. It should have informed Mr Hutton that he had a right under the Investigation Procedure to lodge an internal appeal against the investigation outcome. Had ESS done so, there can be no doubt that Mr Hutton would have pursued such an appeal with vigour. He would, I am satisfied, have submitted a detailed appeal application, with numerous allegations and a significant amount of supporting material in relation to both the report findings and the process undertaken.

[85] On the balance of probabilities, I consider it more likely than not that the Managing Director of ESS would have rejected Mr Hutton's internal appeal, for essentially the reasons I have found in this decision. But the review required by the Investigation Procedure to be undertaken by the Managing Director of such an application for an internal appeal would have taken a significant amount of time. Much more would have been involved than the discussion which took place between Mr Kennedy and Mr Johnston, the Managing Director, following the show cause meeting on 19 December 2022.

[86] ESS contends that the appeals process would have taken until about mid-February 2023, having regard to the time of year when the investigation was completed and the detailed nature of the allegations and supporting documents relied on by Mr Hutton during both Mr Kennedy's investigation and the proceedings before the Commission. It was initially contended on behalf of Mr Hutton that the internal appeals process would have taken about three weeks. That was later revised to a period of about seven weeks. I agree with ESS's assessment that the internal appeals process would have been concluded in mid-February 2023 had Mr Hutton been told that there was such a process and been permitted to engage in it. There can be little doubt that Mr Hutton would have remained in employment, stood down on pay, during the appeals process. It follows that Mr Hutton missed out on receiving income in respect of the period from the date of his dismissal, 19 December 2022,[52] until 15 February 2023. In my assessment, it was unreasonable for ESS to fail to comply with its own internal appeals process and thereby deny Mr Hutton income for a period of about eight weeks.

[87] Thirdly, it is relevant that I have regard to the fact that Mr Hutton was summarily dismissed as part of my overall assessment concerning the harshness of his dismissal. The proportionality of the summary nature of Mr Hutton's dismissal must be weighed against the gravity of his misconduct.[53]

[88] In *Sharp v BCS Infrastructure Support Pty Ltd*,[54] a Full Bench of the Commission discussed the question of whether particular conduct by an employee warranted their summary dismissal as an "other relevant matter" within the meaning of s 387(h) of the Act (references omitted):

> "[33] The relevance of the definition of "serious misconduct" in reg.1.07 to the matter is also, with respect, obscure. Section 12 of the Act contains a definition of "serious misconduct" for the purposes of the Act which simply cross-refers to reg.1.07. Apart from s.12 itself, the expression "serious misconduct" is used in only three places in the Act. In s.123(1)(b), a dismissal for serious misconduct is a circumstance in which the notice and redundancy entitlement provisions of Pt 2-2 Div 11 are not applicable; in s.534(1)(b) a dismissal for serious misconduct is one to which the requirements for notification and consultation in Pt 3-6 Div 2 do not apply; and in s.789(1)(b) a dismissal for serious misconduct is one in relation to which the requirements established by Pt 6-4 Div 3 for notification and consultation do not apply. The expression "serious misconduct" is not used anywhere in Pt 3-2, Unfair Dismissal, of the Act. Section 392(3) requires the Commission, in relation to the award of compensation for an unfair dismissal, to reduce the amount that it would otherwise order by an appropriate amount where it is "satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person". However, it is clear that conduct may constitute "misconduct" for the purpose of s.392(3) without necessarily being "serious misconduct". The expression is used in the Small Business Fair Dismissal Code, but that had no application in this case (and it is at least highly doubtful in any event whether the reg.1.07 definition applies to the Small Business Fair Dismissal Code). Reg.1.07 therefore had no work to do in the application of the provisions of Pt 3-2 to the circumstances of this case.
>
> [34] It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee's conduct met a postulated standard of "serious misconduct". In *Rankin v Marine Power International Pty Ltd* Gillard J stated that "There is no rule of law that defines the degree of misconduct which would justify dismissal without notice" and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship. "Serious misconduct" is sometimes used as a rubric for conduct of this nature, but to adopt it as a fixed standard for the consideration of misconduct for the purpose of s.387(h) may be confusing or misleading because the expression, and other expressions of a similar nature, have been considered and applied in a variety of contexts in ways which are influenced by those contexts. In *McDonald v Parnell Laboratories (Aust) Pty Ltd* Buchanan J said:
>
> > "[48] The terms 'misconduct', 'serious misconduct' and 'serious and wilful misconduct' are often the subject of judicial and administrative attention as applied to the facts of particular cases but there is relatively little judicial discussion about their content and meaning. Naturally enough, when the term 'serious misconduct' is under consideration an evaluation of what conduct represents 'serious' misconduct is influenced by the (usually statutory) setting in which the phrase must be given meaning and applied. Frequently, for example, the question at issue is whether an employee is disentitled by reason of his or her conduct to a statutory entitlement (eg. in New South Wales, where

> Ms McDonald was employed, see Long Service Leave Act 1955(NSW) s 4(2)(a)(iii); Workers Compensation Act 1987(NSW) s 14(2)."
>
> [35] In the Decision, the Vice President, correctly, did not attempt to address the parties' submission concerning "serious misconduct" in the context of his consideration of whether there was a valid reason for the dismissal, but only as a relevant matter under s.387(h). His findings at paragraph [55] and [56] that Mr Sharp's conduct was "serious misconduct" was, we consider, responsive to the submission of BCS noted in the first sentence of paragraph [52] that "the Applicant's conduct constituted serious misconduct justifying immediate dismissal". That is, "serious misconduct" was used as a shorthand expression to describe misconduct of a nature that justified summary dismissal. A finding of that nature was a matter which was open to be taken into account as relevant under s.387(h) because it involved an assessment of the seriousness of the conduct in question."

[89] I will now consider whether Mr Hutton's conduct warranted his summary dismissal.

[90] I consider that Mr Hutton's conduct on 30 October 2022 was of such a grave nature as to be repugnant to the employment relationship. His conduct was incompatible with the employment in which he had been engaged by ESS as a Disability Support Worker. Although the conduct only occurred on one occasion and involved difficult circumstances in which Mr Hutton was the subject of a violent attack by the participant, ESS operates in an industry in which it needs its Disability Support Workers to be able to safely restrain a participant in all circumstances and at all times, even if the participant is engaged in a violent attack. I am satisfied that Mr Hutton's conduct warranted his summary dismissal.

[91] Fourthly, Mr Hutton contends that he was not afforded procedural fairness or natural justice during ESS's investigation into the incident. As part of this argument, Mr Hutton submits that Mr Kennedy did not ask him enough questions during his investigation in relation to the location of the participant, Mr Probert and himself during the incident. For example, Mr Hutton says that Mr Kennedy asked Mr Probert to mark on a diagram the location of the participant when he was being physically restrained, but Mr Kennedy did not ask Mr Hutton to mark a diagram to the same level of detail during his interview.[55]

[92] Save for the appeals process point which I have already addressed, I am satisfied that Mr Hutton was afforded procedural fairness and natural justice during ESS's investigation into the incident. Clear allegations were put to Mr Hutton in writing. He was interviewed twice about the incident. Mr Hutton took up the opportunities afforded to him to respond to the allegations put to him and explain his version of events, including what happened during the physical restraint of the participant and where those events took place within the house in which the participant was living. That Mr Hutton was not specifically asked to mark on a diagram where people were located within the hallway or the participant's bedroom at particular points in time does not constitute a failure to provide procedural fairness or natural justice.

[93] I do not accept the contentions advanced on behalf of Mr Hutton that Mr Kennedy was biased against Mr Hutton during his investigation, or that he smirked behind his hand during the show cause meeting. It is plain from the evidence that Mr Kennedy conducted a detailed investigation into the incident on 30 October 2022 and considered an extensive range of

information before making his findings that some, but not all, of the allegations were substantiated. I do not consider there to be anything unusual in a person in Mr Kennedy's position reporting relevant matters to the police, prior to Mr Hutton's dismissal, in circumstances where it is alleged that a vulnerable member of society has been assaulted by an employee of ESS.

[94] Nor do I accept that a decision was made to terminate Mr Hutton's employment before the show cause process. Both Mr Kennedy and Ms Butterworth rejected that proposition. Mr Kennedy also gave unchallenged evidence that he discussed what Mr Hutton said during the show cause process with the Managing Director of ESS and a decision to terminate Mr Hutton's employment was made after that discussion.[56] Mr Hutton was upset that he was not given the opportunity at the show cause meeting to dispute or challenge the findings made by Mr Kennedy in his investigation report. It was explained to Mr Hutton that the show cause meeting was not an opportunity to challenge the findings which had already been made; it was a chance to explain why Mr Hutton's employment should not be terminated. I accept the evidence given by Ms Butterworth and Mr Kennedy that they were not disinterested in what Mr Hutton had to say in the show cause meeting. As Ms Butterworth explained, the show cause meeting was a serious meeting and she treated it seriously. That is why she was not her 'bubbly' usual self during the show cause meeting.

[95] A complaint was made during final submissions on the topic of procedural fairness that the show cause meeting took place when Mr Hutton was suffering from stress and had provided ESS with a medical certificate. The relevant sequence of events is as follows. Mr Hutton's partner, Ms Nash, had been contacting ESS and asking for updates on the investigation.[57] Mr Kennedy's investigation report was finalised on 13 December 2022. The investigation report was provided to the senior management team at ESS and considered by the Managing Director, Mr Vincent Johnston, who instructed Mr Kennedy to invite Mr Hutton to attend a show cause meeting to explain why his employment should not be terminated. By email sent at 10:38am on Thursday, 15 December 2022, Ms Nash informed Ms Butterworth that Mr Hutton had experienced some major distress and had been given a mental health plan by his doctor.[58] A doctor's certificate dated 13 December 2022, certifying Mr Hutton to be unfit to attend work from 13 December 2022 to 7 January 2023, was attached to Ms Nash's email to Ms Butterworth. Later during the morning of 13 December 2022, Ms Butterworth spoke to Mr Hutton by telephone and asked him to attend a show cause meeting on Monday, 19 December 2022. Mr Hutton did not ask for the meeting to be put back or state that he was unfit to attend the meeting. At 11:50am on 15 December 2022, Ms Butterworth emailed Mr Hutton and stated: "As just discussed on the phone please see attached invite to show cause meeting and a copy of the investigation report."[59] By email sent at 8:48am on Friday, 16 December 2022 to Ms Butterworth, Ms Nash stated: "Thank you Lynn, see you Monday."[60] During the show cause meeting on Monday, 19 December 2022, which Mr Hutton attended with Ms Nash as his support person, no request was made for an adjournment of the meeting, nor did Mr Hutton state that he was not well enough to participate in the show cause meeting. In light of these events, I do not consider that it was unfair for the show cause meeting to take place on 19 December 2022.

Conclusion on whether a harsh, unjust or unreasonable dismissal

[96] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that ESS's dismissal of Mr Hutton was not harsh or unjust, but it was unreasonable.

[97] ESS had a valid reason for Mr Hutton's dismissal and, save for the appeals process issue, it afforded procedural fairness to Mr Hutton prior to making a decision to bring his employment to an end. ESS operates in a highly regulated industry involving vulnerable persons and funding from the NDIS. It is essential that ESS be able to employ persons who can deal with personal restraints, where they are required, in a safe manner and who it can trust to provide full and frank reports when an incident occurs. There is no dispute that Mr Hutton was ordinarily dedicated in his care to the participant, but I have found that he used excessive force in difficult circumstances on 30 October 2022 and did not report to his employer that he had been involved in a physical restraint with the participant in which his knee had come into contact with the participant. For these reasons, I consider that Mr Hutton's dismissal was not unjust or harsh.

[98] However, because ESS failed to comply with its own appeals process, Mr Hutton was denied the opportunity to participate in an internal appeals process and remain employed (and paid) by ESS for a period of about eight weeks. In my assessment, ESS's failure to comply with its own internal appeals process and thereby deny Mr Hutton income for a period of about eight weeks warrants a conclusion that Mr Hutton's dismissal was unreasonable in all the circumstances. This is not a case in which the failure to provide procedural fairness (by failing to comply with the internal appeals process) did not give rise to any practical unfairness to the applicant or the period of his employment with the respondent.

[99] I find that ESS's dismissal of Mr Hutton was unfair because it was unreasonable.

Remedy

[100] Having found that Mr Hutton was protected from unfair dismissal, and that his dismissal was unreasonable, it is necessary to consider what, if any, remedy should be granted to him. Mr Hutton does not wish to be reinstated to employment with the ESS. In any event, I am satisfied that it would be inappropriate to reinstate Mr Hutton in all the circumstances.

[101] In closing submissions, it was put on behalf of Mr Hutton that he was seeking six weeks' compensation for his unfair dismissal.

[102] Section 390(3)(b) of the Act provides the Commission may only issue an order for compensation if it is appropriate in all the circumstances. A compensation remedy is designed to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal within the bounds of the statutory cap on compensation that is to be applied.[61]

[103] Having regard to all the circumstances of the case, including the fact that Mr Hutton has suffered financial loss as a result of his unfair dismissal, I consider that an order for payment of compensation to him is appropriate.

[104] It is necessary therefore for me to assess the amount of compensation that should be ordered to be paid to Mr Hutton. In assessing compensation, I am required by s 392(2) of the

Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of this subsection.

[105] I will use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket*[62] and applied and elaborated upon in the context of the current Act by Full Benches of the Commission in a number of cases.[63] The approach to calculating compensation in accordance with these authorities is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount she or she would have received if they had continued in their employment.
>
> Step 5: Apply the legislative cap on compensation.

Remuneration Mr Hutton would have received, or would have been likely to receive, if he had not been dismissed (s 392(2)(c))

[106] Like all calculations of damages or compensation, there is an element of speculation in determining an employee's anticipated period of employment because the task involves an assessment of what would have been likely to happen in the future had the employee not been dismissed.[64]

[107] For the reasons explained above, I am satisfied on the balance of probabilities that if Mr Hutton had not been dismissed on 19 December 2022, he would have remained employed by the ESS until 15 February 2023, by which time the internal appeals process would have concluded and it is more likely than not, in my assessment, that a decision would have been made by the Managing Director of ESS to summarily dismiss Mr Hutton.

[108] I am satisfied on the balance of probabilities that if Mr Hutton had not been dismissed on 19 December 2022, he would have continued to be stood down on pay at the rate of $1,444.87 gross per week.[65]

[109] Accordingly, I am satisfied that $12,136.91 (8.4 weeks x $1,444.87 = $12,136.91) is the remuneration that Mr Hutton would have received, or would have been likely to receive, if he had not been dismissed.

Remuneration earned (s 392(2)(e)) and income reasonably likely to be earned (s 392(2)(f))

[110] I accept Mr Hutton's evidence that he did not earn any remuneration in the period from 19 December 2022 to the commencement of his new job at the start of February 2023. In that

new job Mr Hutton has earned approximately at least as much remuneration as he was paid when he was stood down by ESS. Accordingly, Mr Hutton has a period of financial loss from his dismissal on 19 December 2022 until 31 January 2023. If Mr Hutton had remained employed by ESS during that period, he would have received gross remuneration from ESS in the sum of $8,958.19 (6.2 weeks x $1,444.87 = $8,958.19). This calculation is intended to put Mr Hutton in the position he would have been in but for the termination of his employment.[66]

Viability (s 392(2)(a))

[111] No submission was made on behalf of the ESS that any particular amount of compensation would affect the viability of the ESS's enterprise.

[112] My view is that no adjustment will be made on this account.

Length of service (s 392(2)(b))

[113] My view is that Mr Hutton's period of service with the ESS (about three years) does not justify any adjustment to the amount of compensation.

Mitigation efforts (s 392(2)(d))

[114] The evidence establishes that Mr Hutton was suffering from depression and anxiety in the period leading up to, and following, his dismissal. He made efforts to obtain alternative employment and secured such employment on a casual basis at the start of February 2023.

[115] In all the circumstances, my view is that Mr Hutton acted reasonably to mitigate the loss suffered by him because of the dismissal and I do not consider it appropriate to reduce the compensation on this account.

Any other relevant matter (s 392(2)(g))

[116] It is necessary to consider whether to discount the remaining amount ($8,958.19) for 'contingencies'. This step is a means of taking into account the possibility that the occurrence of contingencies to which Mr Hutton was subject might have brought about some change in earning capacity or earnings.[67] Positive considerations which might have resulted in advancement and increased earnings are also taken into account.

[117] The discount for contingencies should only be applied in respect to an 'anticipated period of employment' that is not actually known, that is a period that is prospective to the date of the decision.[68]

[118] Because I am looking in this matter at an anticipated period of employment which has already passed (20 December 2022 to 31 January 2023), there is no uncertainty about Mr Hutton's earnings, capacity or any other matters during that period of time.

[119] In all the circumstances, my view is that it is not appropriate to discount or increase the figure of $8,958.19 for contingencies.

[120] Save for the matters referred to in this decision, my view is that there are no other matters which I consider relevant to the task of determining an amount for the purposes of an order under s 392(1) of the Act.

[121] I have considered the impact of taxation, but my view is that I prefer to determine compensation as a gross amount and leave taxation for determination.

Misconduct (s 392(3))

[122] I have found that Mr Hutton did engage in misconduct on 30 October 2022. That misconduct was the reason for ESS's decision to dismiss Mr Hutton. I will reduce the compensation to be awarded to Mr Hutton by 20% on account of his misconduct.

[123] In all the circumstances, I consider 20% to be an appropriate amount to reduce the compensation on account of Mr Hutton's misconduct. This reduces the compensation to $7,166.55 ($8,958.19 – 20% = $7,166.55).

Shock, distress or humiliation, or other analogous hurt (s 392(4))

[124] I note that in accordance with s 392(4) of the Act, the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap (s 392(5)-(6))

[125] The amount of $7,166.55 is less than half the amount of the high income threshold immediately before the dismissal. It is also less than the total amount of remuneration to which Mr Hutton was entitled in his employment with the ESS during the 26 weeks immediately before his dismissal. In those circumstances, my view is that there is no basis to reduce the amount of $7,166.55 by reason of s 392(5) of the Act.

Instalments (s 393)

[126] No application has been made to date by the ESS for any amount of compensation awarded to be paid in the form of instalments.

Conclusion on compensation

[127] In my view, the application of the *Sprigg* formula does not, in this case, yield an amount that is clearly excessive or clearly inadequate. Accordingly, my view is that there is no basis for me to reassess the assumptions made in reaching the amount of $7,166.55.[69]

[128] For the reasons I have given, my view is that a remedy of compensation in the sum of $7,166.55 (less taxation as required by law) in favour of Mr Hutton is appropriate in the circumstances of this case. An order will be made to that effect.

DEPUTY PRESIDENT

Appearances:
Ms J Vine, Paid Agent, for the Applicant
Mr S Mueller, Counsel, for the Respondent

Hearing details:
2023.
Newcastle
22, 23 and 24 March

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[1] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

[2] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

[3] Ibid

[4] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[5] Ibid

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

[7] Ibid

[8] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [99]

[9] Ibid

[10] *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J

[11] *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]

[12] *Crozie v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 at [62]

[13] ESS's Investigation Report, Court Book at p 22

[14] Court Book at p 331

[15] Court Book at p 870

[16] See exhibit R3

[17] Court Book at p 872

[18] Court Book at pp 394-5

[19] Court Book at p 201

[20] Court Book at p 332

[21] See paragraph [33] above

[22] Court Book at p 991

[23] Court Book at p 993

[24] Court Book at p 768

[25] See paragraph [33] above

[26] Court Book at p 870

[27] Court Book at p 397

[28] Court Book at p 384

[29] Court Book at p 382

[30] Court Book at p 384

[31] Court Book at p 385

[32] Court Book at p 398

[33] Court Book at pp 381-2

[34] Court Book at p 382

[35] Court Book at p 375

[36] Exhibit R3

[37] Court Book at p 201

[38] *Corrective Services NSW and Fraser* [2015] NSWIRComm 1 at [187]-[188]

[39] Court Book at pp 769-770

[40] Exhibit A13

[41] Court Book at p 397

[42] Court Book at p 199

[43] Court Book at p 767

[44] Court Book at p 390

[45] Court Book at pp 694-7

[46] Court Book at p 876

[47] Court Book at p 697

[48] Court Book at pp 833-4

[49] Court Book at p 671

[50] Court Book at pp 718-729

[51] Court Book at p 729

[52] Court Book at p 66

[53] *Johnson v Northwest Supermarkets Pty Ltd* [2017] FWCFB 4453 at [5]; *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033 at [34]

[54]

[55] Court Book at p 937 (diagram marked by Mr Hutton)

[56] Court Book at p 830 [47]-[49]

[57] Court Book at p 828 [36]

[58] Court Book at p 796

[59] Court Book at p 1045

[60] Court Book at p 1046

[61] *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 at [17]

[62] (1998) 88 IR 21

[63] *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762*; Bowden v Ottrey Homes Cobram* [2013] FWCFB 431

[64] *Double N Equipment Hire Pty Ltd v Humphries* [2016] FWCFB 7206 at [16]-[17]

[65] Court Book at p 816

[66] *Bowden* at [24], citing *Ellawala v Australian Postal Corporation* Print S5109 at [35]

[67] *Ellawala v Australian Postal Corporation* Print S5109 at [36]

[68] *Enhance Systems Pty Ltd v Cox* PR910779 at [39]

[69] *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at [32]