[2024] FWC 246 [Note: An appeal pursuant to s.604 (C2024/972) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Scott Matthew Ashburner
v
St Marys Rugby League Club Ltd
(U2023/6215)

DEPUTY PRESIDENT GRAYSON — SYDNEY, 30 JANUARY 2024

Application for an unfair dismissal remedy

Introduction

[1] On 10 July 2023, Mr Scott Ashburner (the Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with St Marys Rugby League Club Ltd (the Respondent). The Applicant seeks to be reinstated to his former position by way of remedy or, in the alternative, to be paid compensation.

Background

[2] On 27 April 2022, the Applicant commenced working for the Respondent as a bar attendant, quality assurer and cashier.[1] The Respondent is a not-for-profit registered and licensed club in St Marys, New South Wales.

[3] The Applicant gave evidence that he had developed friendly relationships with a number of his colleagues throughout his employment.[2] In January 2023, Ms Kiara Gray, a fellow bar attendant, quality assurer and food & beverage attendant, disclosed to the Applicant that she had been subjected to sexual harassment by a Duty Manager in the workplace. Whilst at work on 22 January 2023, the Applicant had a verbal altercation with a colleague, Ms Natalie Gale.

[4] Following a night out on 11 February 2023, the Applicant's relationships with his colleagues Ms Gray and Ms Tara O'Cass soured somewhat. In late February 2023, he complained to the Respondent's HR Manager, Mr Hickey, that Ms Gray and Ms O'Cass had been promulgating false and degrading sexualised rumours about him in the workplace.

[5] The Applicant's relationships at work with Ms O'Cass and particularly Ms Gray worsened from this point forward. On multiple occasions, the Applicant and Ms Gray engaged in verbal altercations while on shift which were either noticed by or brought to the attention of the relevant Duty Manager. On at least one occasion, the Applicant made comments about Ms Gray to a colleague, Ms Brooke Whiting, accusing Ms Gray of mishandling the Applicant's

food. On 8 March 2023, Ms Gray made a complaint that the Applicant had sworn at Ms O'Cass and shoulder barged both herself and Ms O'Cass while the three were on shift. The Applicant admitted to telling Ms O'Cass to "*fuck out of the way*", but denied shoulder-barging either Ms Gray or Ms O'Cass, and denied swearing at Ms Gray.

[6] On 2 April 2023, Ms Gray made a further complaint in writing that the Applicant had repeatedly shouted at her to "*get out*" of the bar whilst the two were on shift. At around the same time, the Applicant was told he was to commence training to perform shifts in the Respondent's VIP team. From this point forward, the Respondent claims it made efforts to roster the Applicant and Ms Gray separately from one another.

[7] On 29 May 2023, the Respondent received another written complaint concerning the Applicant, this time from Ms Demi-Lee Measures, quality assurer, club host and fellow bar attendant, and a friend of Ms Gray. Ms Measures' complaint was that the Applicant:

- On 13 May 2023, at an out-of-hours social function not associated with the Respondent, said words to the effect of "*you're acting like Kiara, why don't you go get molested like her too?*"; and,

- On 25 May 2023, while on shift, made comments and jokes directed to Ms Measures about Ms Gray being molested.

[8] On 1 June 2023, the Respondent met with the Applicant to discuss Ms Measures' complaint. The Applicant subsequently apologised to Ms Measures.

[9] On 10 June 2023, the Applicant and Ms Gray engaged in another verbal altercation whilst on shift.

[10] On 15 June 2023, the Applicant attended for a scheduled shift and was directed to attend a meeting with Mr Hickey and another HR staff member, Ms Lisa Cassidy. The Applicant was provided a letter concerning the comments made to Ms Measures and the most recent altercation with Ms Gray, and was directed to attend a further meeting on 21 June 2023. Following the 15 June 2023 meeting, the Applicant made an application to the Fair Work Commission for orders to stop bullying, naming Ms Gray. The Applicant also corresponded with Ms Measures via Facebook to ask her to recommend to Mr Hickey that the Applicant should not be dismissed.

[11] On 16 June 2023, the Applicant made a written complaint about Ms Gray to the Respondent.

[12] On 21 June 2023, the Applicant attended a meeting with Ms Cassidy and Mr Hickey, where he was advised that his employment was terminated with immediate effect and provided with his letter of termination, which was dated 20 June 2023.

The hearing

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

[14] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing pursuant to s.399 of the FW Act.

Representation

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

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

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

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

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

[17] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.[3] The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.[4]

[18] On the question of representation, the Applicant submitted that he should be granted permission to be represented by a lawyer on the following bases:[5]

- The matter would be dealt with more efficiently given it concerned sufficiently complex legal matters as well as contested facts;[6]

- The Applicant was unable to effectively represent himself. The Applicant had been represented for the duration of the matter, had no understanding of the legal principles or evidence that was necessary to be put to the Commission during the hearing, and would be disadvantaged by a refusal to grant permission in circumstances where there was a power imbalance between the Applicant and the Respondent;[7]

- It would be fair between the parties to grant permission to the Applicant to be represented given the Respondent was represented by Clubs NSW, and the Applicant raised no objection to the Respondent being represented.[8]

[19] The Respondent is a member of Clubs NSW, being the peak representational body for registered clubs in New South Wales. Section 596(4)(b)(iii) of the FW Act provides that permission from the Commission is not required in circumstances where a party is represented by a lawyer who is an employee of a "peak council". Section 12 of the FW Act defines a peak council as "*a national or State council or federation that is effectively representative of a significant number of organisations (within the ordinary meaning of the term) representing employers or employees in a range of industries*." Therefore, the Respondent was not required to seek the Commission's permission to be represented by a lawyer employed by Clubs NSW.

[20] Having considered those matters, I determined to exercise my discretion to grant permission to the Applicant to be represented by a lawyer in the interests of efficiently dealing with the matter given its complexity, the effective representation of the Applicant's case, and fairness between the parties.[9]

[21] Accordingly, the Applicant was represented by a lawyer, Ms Leanne Tacey, and the Respondent was represented by Ms Nicola Shaw, Senior Legal Counsel at the Registered Clubs Association of NSW, trading as Clubs NSW.

Witnesses

[22] The Applicant filed the following material in the proceedings:

(a) Statement of Scott Ashburner dated 9 September 2023; and

(b) Statement in reply of Scott Ashburner dated 9 October 2023.

[23] The Applicant gave oral evidence on his own behalf during the hearing.

[24] The Respondent filed the following material in the proceedings:

(a) Statement of Shane Hickey dated 3 October 2023; and

(b) Statement of Demi-Lee Measures dated 3 October 2023.

[25] Mr Shane Hickey and Ms Demi-Lee Measures, Bar Attendant employed by the Respondent, gave oral evidence on behalf of the Respondent during the hearing.

[26] Ms Elaine Horsfall, Tiered Loyalty Manager, Relief Duty Manager, and Reception Manager employed by the Respondent, gave evidence during the hearing pursuant to an order to appear issued by the Commission on 11 October 2023 on the application of the Applicant.

Submissions

[27] The Applicant filed his submissions in chief on 12 September 2023 and his submissions in reply on 10 October 2023. The Respondent filed its submissions in chief on 3 October 2023.

[28] Final written submissions were filed by both the Applicant and the Respondent on 7 November 2023.

Applicant's case

[29] The Applicant submitted that his dismissal was harsh, unjust or unreasonable, as provided by s.385(b) of the FW Act. The Applicant contends;

(a) There was no valid reason for the dismissal, pursuant to s.387(a) of the FW Act;

(b) The Applicant was not notified of a valid reason for his dismissal prior to his being dismissed by the Respondent, pursuant to s.387(b) of the FW Act;[10] and,

(c) The Applicant was not provided an opportunity to respond to the reason for his termination by the Respondent, pursuant to s.387(c) of the FW Act.[11]

[30] The Applicant submitted that deficiencies in procedural fairness '*may render a dismissal unfair even where the circumstances otherwise justify dismissal'*,[12] and that a decision to dismiss an employee may be tainted by procedural unfairness where conclusions drawn by the employer are based on insufficient evidence.[13]

[31] The Applicant submitted that the letters and meetings concerning the Applicant's dismissal had failed to identify the evidence the Respondent relied upon to dismiss the Applicant, and that the Respondent had failed to afford the Applicant procedural fairness and '*a fair go all round'*.[14]

[32] The Applicant submitted that the Respondent is a business of considerable size and that it employs dedicated human resources staff, pursuant to s.387(f) and (g).[15]

[33] The Applicant submitted that, in its consideration of whether the Applicant's dismissal was harsh, the Commission should exercise its discretion under s.387(h) to consider *'any other matter that the FWC considers relevant'*.[16] The Applicant submitted that the Commission should consider that:[17]

(a) The Applicant had been a faithful employee of the Respondent and was in the process of being promoted;

(b) The Applicant was treated differently to Ms Gray in that she was not dismissed for swearing at him, making allegedly false complaints against him, and for spreading rumours about him between February 2023 and May 2023; and

(c) The Applicant had been unable (at that time) to find alternative employment since his dismissal despite making all reasonable attempts to do so.

[34] The remedy primarily sought by the Applicant as identified in its submissions in chief was:

(a) Reinstatement to the Applicant's position on a similar roster and hours, with the continuation of his training to his promoted position to VIP Host pursuant to s.391(1) of the FW Act;

(b) Continuity of service pursuant to s.391(2) of the FW Act; and,

(c) Backpay or payment of wages up to the date of the Applicant's reinstatement pursuant to s.391(3) of the FW Act.

[35] In the alternative to reinstatement, the Applicant sought orders for compensation for losses reasonably attributable to his unfair dismissal.[18] The Applicant submitted that there was no evidence that the Applicant would not have remained in the employ of the Respondent for the foreseeable future.[19] The Applicant submitted that the Commission consider that the egregiousness of the manner of his dismissal negate any diminishing of the quantum of compensation ordered attributable to his length of service, and that no amount be deducted from the quantum ordered in respect of contingencies due to his efforts to mitigate his loss since his dismissal.[20] Accordingly, the Applicant sought the maximum allowable 26 weeks of compensation.[21]

Respondent's case

[36] The Respondent submitted that the Applicant was validly terminated for "*ongoing workplace conflict and breaching the [Respondent's] Sexual Harassment Policy & Bullying and Harassment Policy*".[22] The Respondent relied on the comments allegedly made by the Applicant to Ms Measures while at work on 25 May 2023, being "*I hope your friend who got molested is okay*," and "*she is a liar and was never molested and would have made the whole thing up*."[23] The Respondent's submissions also referred to the Applicant's comment to Ms Measures on 13 May 2023, being words to the effect of "*why don't you go and get molested like Kiara*?".[24] The Respondent submitted that although the comment on 13 May 2023 was outside of hours, it established a pattern of behaviour and was further brought into the workplace by the Applicant's later comments to Ms Measures on 25 May 2023.

[37] The Respondent also referred to the following instances of misconduct by the Applicant, claiming that they formed a substantiated and valid reason for his termination:[25]

(a) The verbal altercation between the Applicant and a Bar Attendant/Quality Assurer, Ms Natalie Gale, on 22 January 2023;

(b) The Applicant telling Ms O'Cass to "*fuck out of the way*" on 8 March 2023;

(c) The Applicant's comments to colleague Ms Brooke Whiting about Ms Gray on 31 March 2023;

(d) The Applicant repeatedly shouting "*get out*" at Ms Gray on 2 April 2023; and

(e) The Applicant telling Ms Gray to "*fuck off*" on 10 June 2023.

[38] Referring to *Browne v Coles Group Supply Chain Pty Ltd,*[26] the Respondent submitted that "*a substantial and willful breach of a policy will often, if not usually, constitute a valid reason for dismissal*". The Respondent referred to the Applicant being warned verbally on 22 January 2023, 8 March 2023, and 31 March 2023 regarding his use of inappropriate language

towards his colleagues.[27] The Respondent issued these warnings, and also warnings to Ms Gray, as well as rostering the Applicant and Ms Gray separately, as measures to attempt to address an ongoing conflict between them both. The Respondent submitted that, as per *Lumley v Bremick Pty Ltd Australia ('**Lumley**'),*[28] the ongoing conflict in the workplace was caused by the Applicant's conduct and the conflict was therefore a valid reason for his dismissal.[29] The Respondent submitted that it had taken reasonable steps to investigate the allegations of misconduct and provided the Applicant an opportunity to respond to the allegations, as per *Department of Social Security v Uink Print*,[30] and that the Applicant admitted to conduct within the workplace on 25 May 2023 and 10 June 2023. [31] The Respondent submits that, having investigated the two incidents of misconduct by the Applicant, it honestly and genuinely believed that it had reasonable grounds to believe that the allegations of misconduct were substantiated,[32] and, in making the decision to dismiss the Applicant, it had taken into account both the duration of his employment with the Respondent, and his disciplinary history where he had been verbally warned about inappropriate workplace conduct previously.[33]

[39] The Respondent relied on *Anthony Clarke v Toll Transport Pty Ltd ('**Clarke**')*[34] and *Peter Graham v Bankstown District Sports Club Ltd* [2012] FWA 7977 in which the termination of an employee for making statements of a sexually harassing nature, including comments regarding molestation towards an employee at the workplace, was found to be for valid reasons.

[40] The Respondent also submitted that facts acquired after dismissal by an employer can justify a decision to terminate, as per *Shepherd v Felt & Textiles of Australia Ltd*[35] and referred to the Applicant having contacted Ms Measures via Facebook message following his receipt of the letter on 16 June 2023, to induce her to ask the Respondent not to sack him. The Respondent submitted that this was a failure by the Applicant to follow a lawful and reasonable direction as issued to him by way of the letter dated 30 May 2023, indicating he was "*not to speak about the matters being investigated with other team members*".[36] The Respondent also submitted that the Facebook message to Ms Measures constituted a breach of confidentiality and/or an unauthorised disclosure of confidential information.

[41] The Respondent submitted that the Applicant was terminated for a valid reason, pursuant to s.387(a) of the FW Act.

[42] Pursuant to s.387(b) of the FW Act, the Respondent submitted that the Applicant had been notified of the reason for his dismissal, being his conduct towards Ms Measures and Ms Gray, both before and during the meeting and by way of his termination letter on 21 June 2023.

[43] The Respondent submitted that the Applicant was notified in writing of the complaint made against him on 30 May 2023 and that he was provided opportunities to respond on 1 June 2023, 15 June 2023, and 21 June 2023. The Respondent submitted that the Applicant did not provide any reasons as to why the Respondent should not terminate the Applicant's employment.[37] Accordingly, the Respondent submitted that the Applicant was provided an opportunity to respond to the reason for his termination for the purposes of s.387(c) of the FW Act.

[44] In relation to ss.387(f) and (g) of the FW Act, the Respondent submitted that it effected a thorough and procedurally fair process in its investigation and ultimate dismissal of the

Applicant pertaining to the Respondent's size and employ of dedicated human resources specialists.[38]

[45] Pursuant to s.387(h), 'any other matters that the FWC considers relevant', the Respondent submitted that the Applicant's relatively short length of service with the Respondent, his being verbally warned on 22 January 2023 and 31 March 2023, his involvement in five incidents that disrupted the Respondent's business, the ability for the Applicant to find alternative work in the industry given his performance and experience, were all relevant to the Commission's consideration of the Applicant's dismissal. The Respondent noted that the Applicant had been terminated for misconduct rather than serious misconduct, and that Ms Gray had also been terminated.[39]

[46] Accordingly, the Respondent submitted, the Applicant's application for a remedy should be dismissed.

Applicant's reply

[47] The Applicant contended in reply that the Respondent had conflated the concepts of confidentiality, failure to follow a lawful and reasonable direction, and the unauthorised disclosure of confidential information, and that in any event, the contact between the Applicant Ms Measures was incapable of constituting any one of them.

[48] Regarding the comment to Ms Measures on 25 May 2023, "*I hope your friend recovers from being molested*", the Applicant sought to distinguish between "*sarcasm and jocularity*".[40] The Applicant submitted that his statement to Ms Measures was an expression of derision towards Ms Gray and a disbelief of her sexual harassment disclosures.[41] Referring to *Ratchapol Pewsukngem v Choc Dee Thai Restaurant*,[42] the Applicant said that the comment does not meet the test of conduct that constitutes sexual harassment,[43] and therefore could not have breached the Respondent's Sexual Harassment Policy, because the comment was:

(a) Not sexualised;

(b) Not directed at Ms Measures or Ms Gray;

(c) Not a request for sexual favours from, or a sexual advance towards, Ms Measures or Ms Gray;

(d) Not conduct of a sexual nature as it did not request or require anything of a sexual nature from Ms Measures or Ms Gray;

(e) Not sexually suggestive towards Ms Measures or Ms Gray;

(f) Not intimating in any way that the Applicant was requiring, requesting or commenting upon Ms Measures or Ms Gray with any form of sexual intention.

[49] Notwithstanding that the Applicant submitted that his conduct had not breached the Respondent's Sexual Harassment Policy, the Applicant submitted that the Respondent failed to meaningfully train the Applicant in respect of, or bring to the Applicant's attention, the

Respondent's Sexual Harassment Policy or its Bullying and Harassment Policy. The Applicant submitted that the Respondent's claim that it had posted the policy on a notice board, and reliance on the one-hour induction of the Applicant when he commenced his employment, was insufficient to establish that the Applicant had been aware of the policies.[44]

[50] The Applicant contended that the Respondent had failed to address the legal tests concerning whether out-of-hours conduct could constitute a valid reason for dismissal.[45] Further, the Respondent had failed to take sufficient action to resolve the conflict between the Applicant and Ms Gray by way of counselling, mediation, warnings and reporting directions, and failed to investigate the events of 22 January 2023 or 31 March 2023.

[51] The Applicant submitted that these matters disentitled the Respondent from relying on any of the conduct it sought to justify its decision to dismiss the Applicant pursuant to s.387(a).[46]

[52] The Applicant submitted that it was not until the receipt of the Respondent's submissions in these proceedings that its reasons for dismissing the Applicant had been identified with any particularity, and that accordingly, there had been no notification of the reason for the Applicant's dismissal as required by s.387(b).

[53] The Applicant submitted that the Respondent had not provided the Applicant with an opportunity to respond because the Respondent had not notified the Applicant of the the reason for his dismissal before he was dismissed, nor did it bring to his attention the criteria it was going to use to determine whether or nor to dismiss him.[47] The Applicant submitted that, on the Respondent's evidence, no investigation had been carried out from 25 May 2023 or from 15 June 2023 to the Applicant's termination on 21 June 2023.[48] The Applicant submitted that without the Respondent having put a formal allegation to the Applicant (including the bases on which it proposed to make its decision), he had no meaningful opportunity to respond for the purposes of s.387(c) of the FW Act.[49]

CLOSING SUBMISSIONS

[54] Both parties requested the opportunity to file submissions following the conclusion of the hearing in this matter.

Applicant's case

Credibility of witnesses

[55] The Applicant submitted that the Applicant's oral evidence should be accepted because he was honest, consistent, and made the appropriate concessions when challenged, particularly in respect of the comment made to Ms Measures on 13 May 2023.[50] The Applicant submitted that the oral evidence of both Mr Hickey and Ms Measures was inconsistent and that they refused to make appropriate concessions.[51] The Applicant also submitted that Ms Horsfall gave evidence that was evasive, vague and ambiguous, and her views on the Applicant had been affected by gossip and reports that she had not read.[52]

Valid reason

[56] The Applicant submitted that the Respondent had failed to put the reasons for the Applicant's dismissal to him before such time as they sought to rely on them in these proceedings. The Applicant also submitted that I should draw a *Jones v Dunke*l inference that the Respondent's failure to call evidence from its employees (including Ms Gale, Ms O'Cass, Ms Bassick, and others) as well as from Ms Gray indicated that their evidence would not have assisted the Respondent's case.[53] The Applicant further submitted that the sum total of the written and oral evidence from the Respondent established that the reliance on the reasons for the Applicant's dismissal was unsustainable.[54]

[57] The Applicant submitted that the incident on 13 May 2023 was out of hours and that the Respondent had not identified the basis for the conduct to form a valid reason for the Applicant's dismissal.

[58] The Applicant contended that his messages to Ms Measures on 15 June 2023 did not contain confidential information, nor could they have constituted a breach of confidentiality as described by the Respondent's case. The Applicant noted that Mr Hickey had conceded that he had not raised the matter with the Applicant when they discussed it on 1 June 2023 nor after it had happened, nor had it been mentioned in the letter issued to the Applicant on 15 June 2023. Further, the Applicant submitted that at no point had the Applicant been lawfully and reasonably directed not to speak to Ms Gray (and that if he had, it would have made the performance of their work duties impossible), and that as a consequence, the Applicant had not failed to follow a 'lawful and reasonable direction' not to speak to Ms Gray, as described by the Respondent.

[59] The Applicant submitted that the Respondent had failed to establish that the Applicant was aware of or had received training regarding the Respondent's Sexual Harassment Policy and/or its Bullying and Harassment Policy. The Applicant pointed to the concessions made by Mr Hickey that he was unaware of the training provided to the Applicant in 2022,[55] and that the Applicant had not received further training following the two revisions to the Respondent's Sexual Harassment Policy since the Applicant commenced employment.[56] The Applicant submitted that the Respondent's policies did not specifically prohibit swearing in the workplace, and that the comments made to Ms Measures on 25 May 2023 did not constitute sexual harassment. The Applicant concluded that on these bases, the Applicant had either not been aware of the particulars of the Respondent's policies, or in the alternative, had not engaged in any conduct that breached those policies.

[60] The Applicant contended that the Respondent had failed to establish that it took the appropriate steps to ascertain employee fault and effectively manage conflict in the workplace.[57] The Applicant referred to the termination letter which said that "*At no time have you received a discipline in fact the Club has been fair to both parties and on each of the occasion you were brought in to discuss issues that had transpired,*"[58] and the concessions made by Mr Hickey that:

- Mr Hickey had also never investigated the complaints made by the Applicant about Ms Gray on 20 February 2023 and 24 February 2023;

- The Applicant had not been formally disciplined until the time of his dismissal;

- There was no written evidence that Ms Gray had ever been disciplined;
- Mr Hickey had determined that the complaints raised by Ms Gray against the Applicant had been unsubstantiated;
- Mr Hickey had not investigated the incidents on 22 January 2023, 31 March 2023, or the complaint made by Ms Measures.

[61] Accordingly, the Applicant submitted that there was no valid reason for the Applicant's termination.[59]

Notification of reason for dismissal and opportunity to respond

[62] The Applicant's submission, referring to the Respondent's documentary evidence, was that the Applicant was not notified of the reason for his dismissal before it was communicated to him, and took effect on, 21 June 2023.[60] Mr Hickey conceded that he had decided to dismiss the Applicant without having investigated the complaint made by Ms Measures and without having issued the Applicant with a warning indicating that his employment was at risk.[61] He also conceded that he had made the decision to terminate the Applicant, and drafted his termination letter, on 20 June 2023,[62] the day before the Applicant was terminated.[63]

[63] Accordingly, the Applicant submitted, the Respondent had failed to notify the Applicant of the reason for his dismissal.[64] Further, the Applicant submitted that the provision of an opportunity to respond (pursuant to s.387(c)) must be premised on the Respondent's notification of the reason for his dismissal and the identification of the criteria upon which its decision to dismiss the Applicant would be based.[65] The Applicant submitted that a deprivation of procedural fairness by failing to notify an employee of the reason for their dismissal or provide an opportunity to respond (including by the drawing of conclusions on insufficient evidence)[66] is sufficient to render an otherwise justified dismissal unfair.[67]

Size of the Respondent's enterprise and employment of dedicated human resource management specialists or expertise

[64] The Applicant noted that the Respondent is a business of considerable size and that it employs dedicated human resources staff, including Mr Hickey. Mr Hickey had made a number of concessions that his documentation and investigation procedures were deficient,[68] and the Applicant submitted that this indicated that the human resources practices of the Respondent were "abysmal".[69]

Harshness and other relevant matters

[65] The Applicant submitted that the Commission exercise its discretion to consider, in its determination of whether the Applicant's dismissal was fair, just and reasonable:

(a) The Applicant's age;

(b) His prospects of future employment;

(c) Particular economic and personal effects on the Applicant arising from the dismissal; and,

(d) Any other relevant matter.[70]

[66] The Applicant submitted that he had been a faithful employee of the Respondent for over a year, and that he had been selected for the VIP Team within the Respondent's business (which, if he had continued in his employment, would have resulted in his being paid at a Level 5 as opposed to a Level 3 while completing VIP Team duties).[71] The Applicant also submitted that he had been treated differently to Ms Gray in that she had not been disciplined or dismissed for swearing at or bullying him, making unsubstantiated complaints against him on 8 March 2023 or 2 April 2023, spreading sexualised rumours about him in the workplace between February 2023 to May 2023, and further promulgating the unsubstantiated complaints until at least 14 June 2023.[72]

[67] The Applicant submitted that the Respondent had failed to put on sufficient documentary evidence to establish the reason for Ms Gray's termination– and that the evidence was inconsistent to the extent that it impugned Mr Hickey's credibility.[73] The Applicant submitted that it was open to the Commission to find that the Applicant was treated differently to Ms Gray on these bases, as the reason for Ms Gray's dismissal is unknown.[74]

Remedy

[68] The Applicant submitted that he sought the primary remedy of reinstatement, and that the Respondent had not led any evidence from Mr Hickey capable of demonstrating that the reinstatement of the Applicant would be inappropriate, or that the Respondent had lost trust and confidence in the Applicant (per the Full Bench in *Nguyen v Vietnamese Community in Australia).*[75] The Applicant submitted that the size of the Respondent's organisation supported a finding that the Applicant could be reinstated to a position within it.[76] The Applicant said that he was *"an employee who takes responsibility for his actions."*[77] The Applicant's performance was not questioned, and it was submitted that he had been forthright, honest, consistent and cooperative in his dealings with the Respondent throughout his employment.

[69] The Applicant submitted that the "*personal preference*" of an employee should not automatically render the reinstatement of a terminated employee as inappropriate for the purposes of the Commission's assessment.[78] The Applicant indicated that in the event reinstatement was ordered by the Commission, it expected that the Respondent would take all reasonable steps to reintegrate the Applicant into its workplace.

Respondent's case

Credibility of witness evidence

[70] The Respondent submitted that its evidence should be preferred to the extent that it differed from that which had been provided by the Applicant, particularly with respect to:

(a) Mr Hickey's account of the meetings between Mr Hickey and the Applicant, supported by the contemporaneous notes of Mr Hickey;[79]

(b) That the evidence of Ms Horsfall,[80] Ms Measures,[81] and Mr Hickey[82] was consistent to the effect that the terms 'molest' or 'molested' were not of common parlance in the workplace;

(c) That it was not common for employees of the Respondent to swear at one another in the workplace;[83]

(d) That no rumours were spread in the workplace concerning the Applicant,[84] and Ms Measures statement indicating that she was unaware of any gossip or rumours concerning the Applicant in the workplace;[85]

(e) That the Applicant did not notify Mr Hickey of the rumours until lodging his formal grievance (being that they are not mentioned in any of Mr Hickey's contemporaneous notes, that Mr Hickey takes notes of meetings directly following their conclusion,[86] and that this evidence was unable to be contradicted by any contemporaneous notes of the Applicant's own);[87]

(f) That the Applicant made the comment to Ms Measures that she should '*go get molested like Kiara [Gray]*' at the party on 13 May 2023 (noting that the Applicant conceded that it was possible that he did make the comment during his oral evidence,[88] and that this was consistent with Ms Measures' statement that the Applicant had made the comment).[89]

<u>*Valid reason*</u>

[71] The Respondent submitted that the Applicant's employment was terminated for ongoing misconduct towards four of its female employees, which breached the Respondent's values, its Bullying and Harassment Policy, and its Sexual Harassment Policy. The Respondent submitted that the Applicant knew of the Bullying and Harassment Policy and that his employment contract required that he comply with that policy.[90]

[72] The Respondent submitted that the Applicant's conduct on 22 January 2023, 8 March 2023, 31 March 2023, 2 April 2023, 15 April 2023 and 25 May 2023 constituted repeated misconduct by the Applicant and that this formed a valid reason for his dismissal.[91] The Respondent referred to the Applicant's concessions regarding these incidents to the effect that:[92]

(a) The manner he spoke to Ms Gale on 22 January 2023 was not appropriate;[93]

(b) The Applicant was the first to swear at Ms O'Cass on 8 March 2023, and that Duty Managers had spoken to him about swearing;[94]

(c) The Applicant's comments about Ms Gray on 31 March 2023 were not appropriate;[95]

(d) The Applicant had been directed by the Respondent not to speak to Ms Gray[96] and failed to comply with this direction on 2 April 2023,[97] that the Applicant admitted that his

behaviour on 2 April 2023 was not appropriate and that he played a 'big role' in the issue at the workplace on that day;[98]

(e) The Applicant said that it "was possible" he had made the comment "*You're a bitch, why don't you go get molested like Kiara [Gray]"* to Ms Measures on 13 May 2023,[99] and agreed that it was not appropriate to call someone a bitch;[100]

(f) The Applicant said that it was not appropriate to make the comment "*why don't you go get molested",*[101] and agreed that he commonly uses the word "molest" or "molested";[102]

(g) The sarcastic comment the Applicant made to Ms Measures on 25 May 2023 regarding Ms Gray was not appropriate; [103] and

(h) Telling Ms Gray to "*piss off*" at the workplace on 10 June 2023 was not appropriate[104] and that he had initiated the incident between himself and Ms Gray,[105] and that Ms Bessick had told the Applicant they were "*over dealing with this*".[106]

[73] The Respondent submitted that the Applicant had been advised and instructed by Duty Managers on multiple occasions regarding his conduct,[107] and verbally warned by Ms Shaw on 22 January 2023.[108]

[74] The Respondent submitted that the admissions made by the Applicant are sufficient to conclude that the Applicant's misconduct factually occurred, and that the Applicant's conduct on 2 April 2023 and 10 June 2023 constituted bullying as per clause 5.2.1 of the Respondent's Bullying and Harassment Policy. The Policy states that the Respondent "*considers all forms of bullying and harassment as unacceptable behaviour that runs counter to [the Respondent's] aims and will not be tolerated*."[109] The Respondent also submits that the Applicant's comment to Ms Measures breached the Respondent's Sexual Harassment Policy as it was a '*sexually offensive joke'*, and constituted a breach of the Applicant's contract of employment, requiring him to "*exhibit a professional and courteous attitude when dealing with the [Respondent], its customers, employees, suppliers and other members of the public*". The Respondent submitted that the Applicant's comment to Ms Measures constituted a valid reason for termination.[110]

[75] In the alternative and if the Commission was not satisfied on these bases that the Applicant's termination was for a valid reason, the Respondent submits that the Applicant's message to Ms Measures on 15 June 2023 constituted a breach of confidentiality and a failure to follow a lawful and reasonable direction issued by the Respondent.[111]

Notification of valid reason

[76] The Respondent submitted that the Applicant was notified of the reasons for his termination by Mr Hickey at the termination meeting on 21 June 2023, where Mr Hickey said that the Applicant's employment was terminated because of the comments the Applicant made to Ms Measures, and his conduct towards Ms Gray.[112] The Respondent further submitted that the Applicant was notified of these reasons in writing by virtue of his termination letter provided the same day. The Applicant conceded that he knew why Mr Hickey was terminating his employment.[113]

Opportunity to respond

[77] The Respondent contended that the Applicant was notified of the complaint made against him on 30 May 2023, and again on 15 June 2023, and subsequently provided with an opportunity to respond on 1 June 2023 and 15 June 2023 respectively, as well as a further opportunity to respond on 21 June 2023. The Respondent submitted that the Applicant did not provide any reasons as to why his employment should not be terminated by the Respondent.

Any unreasonable refusal to provide a support person

[78] The Respondent submitted that the Applicant did not request to have a support person present during the outcome meeting.

Warnings about unsatisfactory performance

[79] The Respondent submitted that this was not a relevant consideration, as the Applicant's employment was terminated for misconduct.

Harshness and other relevant matters

[80] The Respondent relied on its submissions filed on 3 October 2023, and repeated its submissions that the Applicant had a comparatively short period of casual employment with the Respondent, and that he was involved in numerous conduct-based incidents for its duration, which were addressed by management on at least four occasions in relation to complaints made concerning him.[114]

Remedy

[81] The Respondent opposed that the Applicant be reinstated, submitting that the Respondent had lost trust and confidence in the Applicant and that he had continuously failed to comply with the Respondent's policies.[115] The Respondent referred to Ms Horsfall's evidence that the Applicant's "dramas" with Ms Gray impacted the Respondent's other employees at times at the workplace,[116] and that she would have concerns that other employees would be distressed were the Applicant reinstated.[117] Ms Measures gave evidence that the Applicant's conduct had affected multiple women in the workplace and that she would not feel comfortable with him returning to the workplace:[118]

[82] The Respondent submitted that the Applicant found it difficult to work with numerous female employees of the Respondent[119] and was spoken to by HR on four occasions regarding his conduct in the workplace.[120] The Respondent submitted that Duty Managers spent time speaking to the Applicant about his conduct and writing incident reports to be submitted to Mr Hickey.[121] The Applicant conceded that his misconduct had taken up the time of Duty Managers and HR staff members of the Respondent,[122] and agreed that managing his conduct had been disruptive to the Respondent.[123] Accordingly, the Respondent submitted that it would not be appropriate to reinstate the Applicant to his role.[124]

Credibility of witnesses

The Applicant

[83] I consider the Applicant to largely be an honest and reliable witness. I make this finding based on what the witness said including appropriate concessions that he made under cross examination, and his demeanour. However, from time to time I considered his evidence to be self-serving, defensive and or evasive. The concessions he did make were, on occasion, neither forthcoming nor voluntary, and deviated from his written evidence.

Mr Hickey

[84] I consider Mr Hickey to be an unreliable witness. Mr Hickey admitted to the existence of the inconsistencies between his written statements, the evidence of the Applicant, and his oral evidence. I make this finding based on what the witness said including numerous, significant concessions that he made under cross examination that expressly contradicted his previously filed witness statements and various inconsistencies between his written and oral evidence, and his demeanour.

Ms Measures

[85] I do not consider Ms Measures to be a hostile and unresponsive witness as submitted by the Applicant. To the contrary, I found her to be a reliable witness of credit. I make this finding based on what the witness said including appropriate concessions that she made under cross examination and her demeanour. Ms Measures conceded that she had been drinking, but had not been drunk, at the time of the 25 May Incident,[125] and that while it had been noisy, she had heard what the Applicant had said to her.[126] Ms Measures also conceded that she had been angry as a result of the Applicant's comments on 25 May and that this affected her memory of the exact words or phrases that he had used, but she maintained that the Applicant had said words to the effect of those written in her complaint statement.[127] I have also considered that her evidence regarding the 25 May Incident was consistent with the Applicant's own evidence that he did consider that Ms Gray was lying about being "molested"[128] and that he did speculate about who was right and who was wrong.[129] Ms Measures' credibility was attacked by the Applicant on the basis that her initial complaint document, her statement, and oral evidence were inconsistent. I do not accept this submission. Ms Measures made a brief but contemporaneous complaint which was provided to Mr Hickey and did not include any speech in the first person concerning the 25 May Incident. Her explanation for the lack of detail, which I accept, was that at the time of writing her complaint she was "angry and annoyed" and that she had been writing the complaint in the manager's office that was the subject of Ms Gray's sexual harassment allegations.[130] Nevertheless, this refers to "comments and jokes" about Ms Gray being molested again (using the plural rather than singular) which I consider to be a contemporaneous document supportive of her recollection of the two exchanges with the Applicant.

Ms Horsfall

[86] I consider Ms Horsfall to be an honest and reliable witness. I did not consider that her evidence was evasive, vague or ambiguous as submitted by the Applicant. I make this finding

based on what the witness said including appropriate concessions that she made under cross examination, and her demeanour.

Jones v Dunkel inference

[87] One issue raised by the Applicant that could have impacted upon the above decisions regarding preferred evidence and below decisions regarding factual findings was a submission raised by the Applicant regarding the rule in *Jones v Dunkel.*[131] The Applicant submitted that I should draw a *Jones v Dunke*l inference that the Respondent's failure to call evidence from its employees (including Ms Gale, Ms O'Cass, Ms Bassick, and others) as well as from Ms Gray indicated that their evidence would not have assisted the Respondent's case. Similarly, the Applicant did not call evidence from various employees, including Mr Everson, whose evidence may have been able to assist the Applicant's case concerning the conduct of Ms Gray and the complaints that the Applicant had raised against her.

[88] In *Xiu Zhen Huang v Rheem Australia Pty Ltd*[132] a Full Bench of the Commission summarised the rule in *Jones v Dunkel* in the following terms:

> "The rule in *Jones v. Dunkel* is a rule of commonsense and fairness in relation to the fact finding process. The rule was considered at length by a full bench of the Commission in *Tomayo v Alsco Linen Service Pty Ltd* and we respectfully endorse that analysis. The rule is breached by the unexplained failure of a party to call evidence on a fact in issue that the party might reasonably have been expected to call. It is most usually invoked in relation to the unexplained failure of a party to call a witness who is in that party's 'camp'. However, the rule also extends to an unexplained failure to tender documents within the party's control. A breach of the rule in *Jones v. Dunkel* may lead to the drawing of an adverse inference. The inference that may be drawn is ordinarily an inference that the uncalled evidence would not have helped the party's case: not an inference that the uncalled evidence would have been positively unfavourable to the party's case or positively favourable to the opposing party's case. A breach of the rule in *Jones v. Dunkel* may also result in a more ready acceptance of the opposing party's evidence on the fact in question. However, a breach of the rule does not automatically prevent a finding being made that is favourable to the party who has failed to call relevant evidence on the question: other evidence may properly support the finding notwithstanding such failure." [citation omitted] [133]

[89] The failure of a party to call a witness or produce documents 'may', not 'must', in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted a party's case. The Applicant did not take me to the particular facts in issue that it alleged that the evidence of various employees of the Respondent could attest to. The potential witnesses were witnesses to events that were largely not the subject of factual contest, in circumstances where the Applicant or witnesses for the Respondent had made appropriate admissions or concessions in evidence regarding relevant events, their conduct or the conduct that they witnessed or where evidence was led from both the Applicant and the Respondent on the events that they were party or witness to. Accordingly, I decline to draw an inference that their evidence would not have assisted the Respondent's case. In relation to Ms Gray, I note that neither the Applicant or the Respondent filed any evidence from her, nor sought an order from the Commission compelling her attendance. I do not draw any inference from the actions

of either party in regard to this. I do not draw any inference from the decision of the Applicant and Respondent not to call evidence regarding whether rumours were circulating regarding the Applicant from February 2023. I accept that it was the Applicant's honest belief that this was occurring and that this influenced his conduct.

CONSIDERATION

Has the Applicant been dismissed?

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

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

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

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

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

[93] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[94] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.386 of the FW Act.

Initial matters

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

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

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

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

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

Was the application made within the period required?

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

[97] It is not disputed and I find that the Applicant was dismissed from his employment on 21 June 2023 and made the application on 10 August 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

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

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

Minimum employment period

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

[100] It was not in dispute and I find that the Applicant was an employee, who commenced their employment with the Respondent on 27 April 2022 and was dismissed on 21 June 2023, a period in excess of 6 months.

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

[102] It was not in dispute and I find that the Applicant was a casual employee employed on a regular and systematic basis and had a reasonable expectation of continuing employment with the Respondent on a regular and systematic basis.

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

Modern award coverage

[104] It was not in dispute and I find that, at the time of dismissal, the Applicant was covered by an award, being the *Registered and Licensed Clubs Award 2020*.

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

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

[106] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time.

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

Was the dismissal a case of genuine redundancy?

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

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

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

Was the dismissal harsh, unjust or unreasonable?

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

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the FWC considers relevant.

[112] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[134]

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

Valid reason

[114] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[135] and should not be "capricious, fanciful, spiteful or prejudiced."[136] However,

the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[137]

[115] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and that it justified termination.[138]

[116] As will be developed below, the reasons relied upon for the dismissal of the Applicant have evolved over time, including during the course of these proceedings. As per the comments of the Full Bench in *Newton v Toll Transport Pty Ltd* (*Newton*):[139]

> "… In determining whether there was a valid reason for the dismissal the Commission is not confined to the reason advanced by the employer (either at the time of dismissal or during the course of the subsequent hearing). A valid reason for dismissal can be any valid reason underpinned by the evidence provided to the Commission."

[117] As per the Full Bench (majority) reasoning in *APS Group (Placements) Pty Ltd v Stephen O'Loughlin:*[140]

> "Section 387(a) of the FW Act requires FWA to consider "whether there was a valid reason for the dismissal". This language directs attention to whatever reason or reasons for dismissal emerge from the evidence and are relied upon by the employer. The tribunal is not confined to a consideration only of the reason or reasons given by the employer at the time of the dismissal. An employer is entitled at the hearing of an application for an unfair dismissal remedy to rely upon whatever reason(s) the employer wishes to rely upon at that time, albeit that in relation to any reason not relied upon at the time of dismissal the employer will have to contend with the consequences of not giving the employee an opportunity to respond to such reason (see s.387(b) and (c) of the FW Act)."

Did the conduct occur?

[118] Per the Full Bench in *King v Freshmore (Vic) Pty Ltd*:[141]

> "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."[142]

[119] I find that, as per *Newton*, the relevant test for whether a valid reason existed to dismiss an employee is objective, and that the Commission is not confined to considering only the reasons expressed by an employer to an employee at the time of his dismissal. In reaching my conclusions on this matter, I will consider all material relied on by the parties as of 7 November 2023, when closing submissions were filed by the parties. The Respondent's position at hearing (which was different to its position at the time of dismissal) was that it relied on the following incidents to constitute a valid reason for the Applicant's dismissal:

(a) Verbal altercation with Ms Gale within earshot of customers on 22 January 2023 ('**22 January Incident**');[143]

(b) Swearing at Ms O'Cass on 8 March 2023 ('**8 March Incident'**);[144]

(c) Making derisive or accusatory or comments to Ms Whiting about Ms Gray concerning Mr Ashburner's lunch order on 31 March 2023 (**'31 March Incident'**);[145]

(d) Repeatedly shouting "*get out*" at Ms Gray in the Gaudi Bar on 2 April 2023; ('**2 April Incident'**);[146]

(e) Comment to Ms Measures concerning Ms Gray at an outside-of-work function on 13 May 2023 ('**13 May Incident'**);[147]

(f) Comment to Ms Measures concerning Ms Gray while at work on 25 May 2023 ('**25 May Incident'**);[148]

(g) Swearing at Ms Gray in the Gaudi Bar on 10 June 2023 ('**10 June Incident'**);[149]

(h) Sending a Facebook message to Ms Measures on 15 June 2023 (**'15 June Incident'**).[150]

Background to Incidents

[120] Whilst the relationship between Ms Gray and the Applicant had soured by the time of his dismissal, at one point in time in January 2023, the relationship was sufficiently trusting that Ms Gray would regularly tell the applicant details about her sex life[151]. The Applicant gave evidence that he did not want to know these details and was polite but disengaged in those discussions[152]. Nevertheless, it is plain that Ms Gray entrusted the Applicant with confidences regarding her personal life and her sex life. Ms Gray also trusted the Applicant sufficiently at various points in time to invite him to socialise with her outside of work[153] and to tell him that she had been sexually harassed by a colleague including having sexual advances and comments of a sexual nature made to her and being touched in a sexual way.[154]

[121] On 11 February 2023, as set out above at [4], Mr Ashburner reluctantly attended a night out with Ms Gray and some other colleagues. Following the events of that evening, the relationship between the Applicant and Ms Gray deteriorated markedly. The Applicant believed that Ms Gray and another colleague, Ms O'Cass, were spreading false rumours about him and was aggrieved by that conduct[155]. He was also aggrieved by Ms Gray making false allegations about him swearing at her in April 2023 and about shoulder barging both herself and Ms O'Cass on 8 March 2023. The Applicant, Ms Gray and/or Ms O'Cass had several altercations in the workplace between February 2023 and June 2023 when he was dismissed. The Applicant gave evidence that on 22 and 24 February 2023 he complained to Mr Hickey regarding the conduct of Ms Gray and Ms O'Cass but that he did not feel like Mr Hickey took the complaints seriously.[156] Mr Hickey contends that he took the following steps to deal with the complaints of the Applicant:

- Had a discussion with Ms O'Cass on 22 February 2023, regarding the incident on 11 February 2023;

- Had a discussion with Ms Gray on 23 February 2023, regarding the incident on 11 February 2023;

- From on or about April 2023, endeavoured to roster Ms Gray and Mr Ashburner on separate shifts.

[122] I note that Mr Hickey was on leave from 20 March 2023 until 11 April 2023.

FINDINGS

[123] I make the following findings on the basis of the evidence in these proceedings and on the balance of probabilities.

Incidents between 22 January 2023 and 2 April 2023

[124] The Applicant gave evidence that he engaged in the following conduct, and in relation to that conduct, agreed that his conduct was not appropriate:

(a) The 22 January Incident (involvement in a verbal altercation with Ms Gale, within earshot of customers);[157]

(b) The 8 March Incident (swearing at Ms O'Cass);[158]

(c) The 31 March Incident (making derisive or accusatory or comments to Ms Whiting about Ms Gray concerning the Applicant's lunch order); and,[159]

(d) 2 April Incident (Repeatedly shouting "*get out*" at Ms Gray in the Gaudi Bar area).[160]

[125] Given that the incidents above were not contested, I find that they occurred as per the recollection of the Applicant.

13 May Incident

[126] One of the reasons for dismissal relied upon by the Respondent in both its submissions in chief filed 3 October 2023[161] and its closing submissions filed 7 November 2023[162] was an out of hours incident that occurred on 13 May 2023 at a work friend's birthday party held on a cruise ship on Sydney Harbour, attended by several staff of the Respondent. Ms Measures gave evidence that on that occasion the Applicant said to her words to the effect of "*you're a bitch like Kiara, why don't you go and get molested like her?".* Ms Measures was offended and hurt by this comment and had not previously been aware that anything of that nature had affected Ms Gray. Nor had she ever heard someone use the word "*molest*" at the premises of the Respondent, nor heard it used when referring to alleged inappropriate touching. In his filed statement the Applicant stated that he did recall having a conversation with Ms Measures but could not recall the details of that conversation as he had been drinking heavily. The Applicant ultimately conceded, when pressed, that it was possible that he did make the comment during his oral evidence,[163] and that this was consistent with Ms Measures' statement that the Applicant had made the comment).[164] Given the Applicant's concessions and alcohol affected memory, I find that this interaction occurred as per the recollection of Ms Measures.

25 May Incident

[127] Both the Applicant and the Respondent led evidence regarding a conversation involving Ms Measures and the Applicant on 25 May 2023. The Applicant's evidence was that, whilst at work, in a conversation with several colleagues including Ms Measures, he said in a sarcastic tone, about Ms Gray words to the effect of "*I hope your friend is recovering from getting molested*"[165]. I find that this was a reference to the sexual harassment disclosures that Ms Gray had made to the Applicant in or around January 2023.[166] Ms Measures told the Applicant not to joke about such matters.

[128] Ms Measures' evidence was in similar terms, being that the Applicant said words to the effect of *"I hope your friend who got molested is okay."* Ms Measures also gave evidence that after she stated that his comment was inappropriate the Applicant said words to the effect of *"Well, she is a liar and she was never molested, she would have made the whole thing up"*. The Applicant denied making a statement to the effect that Ms Gray was a liar and was never molested[167] but did give evidence that it was his view that Ms Gray was lying about the alleged sexual harassment.[168] Ms Measures was offended by what the Applicant said and walked away from him.[169] Ms Measures' evidence was that other staff members were around when the Applicant made the comments above, but that she was unaware of whether they heard them or not.[170] Ms Measures denied that the conversation was a general conversation amongst a group, and also denied that anyone had brought up the duty manager subject to the allegations of sexual harassment by Ms Gray.[171] Ms Measures approached the manager on duty and asked to make a complaint, and she was told she could write a statement.[172] The statement is annexed to Ms Measures' statement[173] and also appears annexed to Mr Hickey's statement.

[129] In relation to the evidence of Ms Measures and the Applicant, I consider that whilst the accounts of this discussion vary, including regarding who was present and whether the Applicant called Ms Gray a liar, the accounts are broadly consistent in relation to the first part of the conversation. It is not surprising that witnesses' recollections of these events will differ given the time that has passed since they occurred. However, where the recollections of Ms Measures and the Applicant differ regarding the 25 May Incident, I prefer the evidence of Ms Measures and refer to my comments at [85] above. Accordingly, I find that this exchange occurred in the terms and context that she describes in her evidence.

[130] I also accept the evidence of Ms Measures that, despite being Ms Gray's friend, she first became aware of allegations that Ms Gray had been sexually harassed when the Applicant said to Ms Measures on 13 May 2023 words to the effect of "*You're a bitch, why don't you go get molested like Kiara [Gra*y]". In other words, Ms Gray had not chosen to share this private and sensitive information with her friend, and to the extent that any rumours were circulating in the workplace, those rumours had not reached Ms Measures.

The 10 June Incident.

[131] It was not in dispute that on 10 June 2023, while working in the Gaudi Bar, that the Applicant had an altercation with Ms Gray where he told her to "*Piss off*" when he saw her lingering at the bar in circumstances where she was not working in the area and was talking about non-work-related matters. Two duty managers had instructed the Applicant that he was

not to allow staff to linger at the bar under any circumstances.[174] The Applicant swore at Ms Gray when he was unable to immediately contact the duty manager to ask Ms Gray to move along. Ms Gray did not report to the Applicant.

[132] In short, after the Applicant approached Ms Gray and asked if she needed anything. Ms Gray said "*no*", to which the Applicant said, "*Piss off*". Ms Gray retorted with "*Fuck off*". A contemporaneous email sent by Ms Bassick records her view, as expressed to the Applicant, that he should have delivered his concerns differently or walked away. Whilst the Applicant originally gave evidence that it was common for employees to swear at each other in the workplace he conceded during the hearing that whilst swearing in the workplace was common, swearing at someone was not. Indeed, he had been counselled about the manner in which he spoke to his colleagues in both January and March of 2023. Ms Measures and Ms Horsfall gave evidence, which I accept, that it was not common for employees to swear at each other in the workplace. I find that the Applicant did swear at Ms Gray, that this constituted verbal abuse and that swearing at colleagues was not common in the workplace of the Respondent.

15 June Incident

[133] The Applicant corresponded with Ms Measures on 15 June 2023 via Facebook Messenger.[175] The message was as follows:

> "Today I got a letter from Shane saying that my comments towards you are being investigated and that it is ongoing. It says they will make a decision about it on Wednesday. I already got a warning about this when it happened, so I thought that I got the warning and it was over. I also had vip training with Elaine today which they cancelled so I think they are going to sack me. I'm not trying to pressure you, but if you don't think I deserve to be sacked please let Shane know – I am afraid that I will be sacked on Wednesday."

[134] The letter provided to the Applicant on 30 May 2023 reads as follows:

> "Dear Scott,
>
> I recently received a letter regarding alleged comments made by yourself to another team member.
>
> I will remain behind on Thursday night 1st June and catch up with you at 6:00pm when you commence work.
>
> Scott, I ask that this not to be spoken about to other team members nor should you make comments to the person that made the comments to [sic]".[176]

[135] Given the message in evidence and that there was no dispute about this matter, I find that the Applicant engaged in the conduct alleged.

Did the conduct justify termination?

[136] The Commission's task is to determine, on an objective basis and based on the evidence before it, whether there was a valid reason to dismiss an employee. I will first turn to consider two matters that I do not consider constituted a valid reason for dismissal, either alone or as part of a course of conduct.

13 May Incident – Out of hours conduct

[137] I have found that the 13 May Incident occurred as per the evidence of Ms Measures on the balance of probabilities. The circumstances in which out-of-hours conduct may constitute a valid reason for dismissal, per the Full Bench in *Trains v Bobrenitsky (Bobrenitsky)*[177] citing both *Rose v Telstra*[178] and *Newton*[179] are limited:

- "the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

> In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee…It is axiomatic that for conduct to indicate a rejection or repudiation of the employment contract, the out of hours conduct must be sufficiently connected to the employee's employment. Not every connection between out of hours conduct and employment, will constitute a valid reason for dismissal."

[138] The party on 13 May 2023, though attended by the Applicant, Ms Measures, and some other employees of the Respondent, was not an official function organised by the Respondent. It occurred away from the Respondent's premises, and neither Ms Measures nor the Applicant were performing work for the benefit of the Respondent at the time. As I have found, the comment made by the Applicant to Ms Measures was twofold, it insulted Ms Measures by calling her a "*bitch*" and also concerned Ms Gray, their colleague and Ms Measures' friend. The Applicant, Ms Measures and Ms Gray were known to each other because they worked together.

[139] However and as per *Bobrenitsky*, the existence of a connection between the incident and the employment is insufficient to constitute a valid reason in and of itself. I consider that these circumstances fall short of those contemplated in *Bobrenitsky*. There was no evidence before me that the comments of the Applicant, being a casual bar attendant, quality assurer and cashier, on 13 May 2023 became public knowledge or damaged the Respondent's reputation. They were expressed at a private non-work related function and were not in and of themselves work related. Whilst I accept that they had an impact on a fellow employee of the Respondent, Ms Measures, I do not consider that they had any effect on the Respondent's interests, nor was any evidence led to support such a proposition. I find that:

- the conduct, viewed objectively, was not likely to cause serious damage to the relationship between the employer and the employee;

- nor did the conduct damage the Respondent's interests;
- nor was the conduct incompatible with the Applicant's duty as an employee of the Respondent.

[140] I find that the 13 May Incident did not constitute a valid reason for the Applicant's dismissal.

Facebook Message

Breach of confidentiality

[141] The Respondent submitted that the Facebook message sent by Mr Ashburner constituted a deliberate and unauthorised disclosure of confidential information,[180] and that this was a well-settled basis for the valid reason for termination of employment.[181] The Respondent did not contend on what basis it was said that the message contained confidential information or make any submissions about what obligations regarding confidential information that the Applicant was said to have breached. Nor did the Respondent lead any evidence as to the basis on which it was said that any disclosure was said to be "deliberate or unauthorised". On its face the message does not appear to contain any confidential information as it is normally understood, such as trade secrets or commercially sensitive information. I do not consider the 15 June 2023 Facebook message could be properly described as the "*deliberate, unauthorised disclosure by an employee of confidential information*".

Failure to follow a lawful and reasonable direction

[142] The Respondent also submitted that the Facebook message constituted a failure to follow a lawful and reasonable direction not to speak to Ms Measures as communicated by way of the 30 May 2023 letter.

[143] I accept the Applicant's evidence that the Applicant told Mr Hickey during the meeting on 1 June 2023 that he was going to apologise to Ms Measures and that Mr Hickey did not tell the Applicant in that meeting that he could not speak to, or specifically apologise to, Ms Measures.[182] I accept that the Applicant understood he was not to speak to Ms Measures or anyone else about the subject of the 30 May 2023 letter only between 30 May 2023 and 1 June 2023,[183] and that he thought that the matter had been finalised with a warning following the 1 June 2023 meeting.[184] There is no evidence before the Commission that the Applicant spoke to Ms Measures during this period. The Applicant told Mr Hickey that he had apologised to Ms Measures once he had done so, and Mr Hickey did not tell the Applicant that this was in breach of any direction that the Applicant not speak to Ms Measures.[185] Mr Hickey agreed that the 30 May 2023 letter that he wrote did not state that the Applicant was not to communicate with Ms Measures.[186]

[144] I find that the Applicant did verbally apologise to Ms Measures between 3 to 5 June 2023,[187] and that he contacted her via Facebook message on 15 June 2023. However, I find that the direction to the Applicant by way of the 30 May 2023 letter was insufficiently specific to constitute a general direction that the Applicant was not to speak to Ms Measures at all.

[145] Given my findings regarding the Applicant's conduct in sending the Facebook message to Ms Measures, I do not consider that sending the Facebook message constituted a valid reason for dismissal.

January to June Incidents

[146] Having made findings as to whether the alleged conduct by the Applicant between January 2023 and June 2023 occurred, it is necessary to consider whether that justifies the Applicant's dismissal. For the purposes of considering whether there was a valid reason to dismiss the Applicant, I will consider the following incidents:

(a) The 22 January Incident (altercation with Ms Gale, within earshot of customers);

(b) The 8 March Incident (swearing at Ms O'Cass);

(c) The 31 March Incident (making derisive or accusatory or comments to Ms Whiting about Ms Gray);

(d) The 2 April Incident (repeatedly shouting "*get out*" at Ms Gray in the Gaudi Bar);

(e) The 25 May Incident (making the comment *"I hope your friend who got molested is okay,"* and saying words to the effect of *"Well, she is a liar and she was never molested, she would have made the whole thing up,"* in relation to Ms Gray to Ms Measures);

(f) The 10 June Incident (swearing at Ms Gray on 10 June 2023).

Did the conduct breach the Respondent's policies?

[147] One relevant consideration in determining whether the conduct justified the dismissal will be whether the conduct breached the Respondent's policies.

Bullying & Harassment Policy

[148] The Respondent submitted that the 2 April Incident and the 10 June Incident constituted bullying pursuant to clause 5.2.1 of the Respondent's Bullying & Harassment Policy, extracted as follows (reproduced as written):

> "**5.2.1 Bullying**
>
> Bullying is any behaviour that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee(s) to whom behaviour is directed, and which creates a risk to health and safety. In essence, it is any action designed to create an unpleasant or hostile work environment. The following are examples of 'bullying':
>
> - verbal abuse, including yelling or screaming;

- Use of profanities directed at another person;
- inappropriate or unwelcome practical jokes;
- behaviour that humiliates, intimidates, belittles or degrades;
- covert behaviour that is designed to undermine work performance or to cause personal distress;
- behaviour that excludes or isolates employees; and
- actual or threatened physical intimidation or violence."

[149] Clause 3 of the Respondent's Bullying & Harassment Policy states as follows (reproduced as written):

> "SMRLC considers all forms of bullying and harassment as unacceptable behaviour that runs counter to SMRLC's aims and will not be tolerated."

[150] The Applicant submits that the Respondent did not take sufficient steps to bring the terms of its Bullying & Harassment Policy to the attention of the Applicant. Mr Hickey had conceded that he was unaware of the training provided to the Applicant in 2022,[188] and the Applicant gave evidence that he had not received any specific training at all in respect of the policies.[189] The Applicant submitted that the Respondent's policies did not specifically prohibit swearing in the workplace. In those circumstances, the Applicant contends that the Respondent cannot rely on a purported breach of those policies by the Applicant to justify his dismissal.

[151] I find that the Applicant's conduct was prohibited by clause 5.2.1 of the Respondent's Bullying & Harassment Policy in relation to:

- the 22 January Incident and 2 April Incident, in that these incidents constituted "*verbal abuse, including yelling and screaming*"; and,
- the 8 March Incident and the 10 June Incident, constituting "*use of profanities directed at another person*".

[152] Regarding the Applicant's submission that the 8 March and 10 June Incidents were not caught by the Respondent's Bullying & Harassment policy which does not specifically prohibit swearing, I consider that on each of these occasions, the Applicant was not just swearing in the workplace, he was swearing at his colleagues, sometimes in front of other colleagues.

[153] Further, I find that the 31 March Incident consisted of "*covert behaviour that is designed to undermine work performance or to cause personal distress*", pursuant to clause 5.2.1 of the Bullying & Harassment Policy. I also find that the 25 May Incident constituted "*behaviour that humiliates, intimidates, belittles or degrades*", and "*covert behaviour that is designed to undermine work performance or to cause personal distress*".

Sexual Harassment Policy

[154] In relation to the 25 May Incident, the Respondent submitted that: "*the comment made by the Applicant to Ms Measures was a breach of the Sexual Harassment Policy as it was a sexually offensive joke*".

[155] Clause 1.3 of the Respondent's Sexual Harassment policy states as follows (reproduced as written):

> "**1.3. Verbal sexual harassment include:**
>
> 1. Sexual or suggestive remarks including:
>   a) Requests for sexual favors
>   b) Inferences for sexual favors
> 2. Persistent questions about someone's private life
> 3. Persistent requests for dates, especially after prior refusal
> 4. Sexually humiliating someone
> 5. Spreading sexual rumors
> 6. Sexually offensive jokes
> 7. Suggestive comments about someone else's appearance
> 8. The use of sexual language which is not suitable in the workplace
> 9. Sexual name calling"

[156] Clause 1 of the Respondent's Sexual Harassment Policy states as follows (reproduced as written):

> "St Mary's Rugby League Club is committed to ensuring all its employees enjoy a workplace free of harassment and discrimination. Employees have a right to enjoy a safe workplace, in which we treat each other and our customers with respect.
>
> The introduction of this policy provides a benchmark for acceptable behavior in the workplace. Where harassment of this nature occurs, prompt action will be taken. This action will aim at stopping the situation and may include disciplinary action, termination of your employment or legal proceedings."

[157] The Applicant submits that the Respondent did not take sufficient steps to make the Applicant aware of the terms of its Sexual Harassment Policy. As with the Bullying & Harassment Policy, Mr Hickey conceded that he was unaware of the training provided to the Applicant in 2022,[190] and that the Applicant had not received further training following the two

revisions to the Respondent's Sexual Harassment Policy since the Applicant commenced employment.[191] The Applicant gave evidence that he had not received any specific training at all in respect of the Sexual Harassment Policy.[192] The Applicant submitted that the 25 May Incident did not constitute sexual harassment as it did not involve a sexual comment directed at Ms Measures, but was an expression of the Applicant's derision towards Ms Gray. The Applicant contended that the 25 May Incident was, accordingly, incapable of constituting either a breach of the Respondent's Sexual Harassment Policy or sexual harassment more generally.

[158] I reject this submission. The public disclosure and derision of Ms Gray's private disclosure of sexual harassment in the workplace, by the Applicant to Ms Measures, is not automatically justified because he disliked Ms Gray or did not believe her, nor is it appropriate in the workplace because it was said "*sarcastically*". Having found that the Applicant's use of words to the effect of "*I hope your friend is recovering from getting molested*"[193] was a reference to the sexual harassment disclosures that Ms Gray had made to the Applicant in or around January 2023, I find that the 25 May Incident constituted "*spreading sexual rumours*", the making of "*sexually offensive jokes*" and "*the use of sexual language which is not suitable in the workplace*" for the purposes of the Respondent's Sexual Harassment Policy.

[159] I consider that the Respondent did not make the terms of its Bullying & Harassment Policy and its Sexual Harassment Policy known to the Applicant, particularly given the concessions made by Mr Hickey to that end. There is no evidence before the Commission to establish that the Respondent made any efforts to ensure the Applicant actually read or understood these policies.[194] As the Commission found in *Condello v Fresh Cheese Co (Aust) Pty Ltd*:[195]

> "A company cannot simply produce policies and procedures and expect to rely on them to defend a claim if there is no evidence to support that its employees have been made aware of those documents, trained in the content of the documents, and provided with access to those documents. The onus is on the employer to adequately operationalise their policies and procedures if they seek to rely on them to defend an unfair dismissal application."

[160] The Applicant conceded that he was aware of a policy maintained by the Respondent that concerned bullying, and that he understood what bullying was.[196] However, even if the Applicant was completely unaware of the content of the Respondent's policies prohibiting bullying and sexual harassment, I do not consider this to be sufficient to find that this conduct was not a valid reason for his dismissal considering the seriousness of the conduct. Per *O'Keefe v Good Guys*,[197] even if insulting conduct is not expressly prohibited by an employer's policy, common sense dictates a basic standard of appropriate workplace conduct.

[161] In *Little v Credit Corp Group Ltd,* this Commission found:[198]

> "Even if the respondent had no policies or a Code of Conduct directly addressing the applicant's actions, it would be of no consequence. One hardly needs written policies or codes of conduct to understand and appreciate that, firstly, the kind of sexual comments made about the new employee were grossly offensive and disgusting and were more than likely to cause hurt and humiliation."

[162] On the occasions described at [124](a) – (c), the Applicant admitted that he was told by managers that his behaviour was inappropriate, and on each occasion described at [124](a) – (d), the Applicant gave evidence that he himself considered his behaviour to have been inappropriate. I have considered the contemporaneous notes in Mr Hickey's evidence, including with respect to the 10 June Incident where Ms Bassick indicated that the Applicant should have handled his concerns differently or walked away, and that this was explained to the Applicant by a duty manager. Ms Bassick's note also indicates that both Ms Gray and the Applicant were told that the duty managers were sick of having to deal with the matter. I note the Applicant conceded that this was said to him but denied that it was said on the evening of 10 June 2023.[199] I consider that in the circumstances, the Applicant was sufficiently aware of the standard of conduct expected of him by the Respondent, because his conduct had required management on at least three occasions before his dismissal.

[163] I have considered Mr Ashburner's evidence in relation to the 8 March, 31 March, 2 April and 10 June Incidents concerning Ms Gray, which is partially supported by documentary evidence in Mr Hickey's statement.[200] Mr Ashburner sought to explain his conduct in respect of the 2 April Incident by relying on his awareness of a general and unwritten rule that only staff members rostered on the gaming floor could utilise the Gaudi Bar coffee machines for personal use (and that Ms Gray was not rostered on the gaming floor on this particular day, but had been using the coffee machine).[201] Mr Ashburner also sought to explain his conduct during the 10 June Incident by referring to the request by a duty manager on shift to keep non-rostered staff members from loitering in the Gaudi Bar.[202] I have considered Mr Ashburner's explanations against his evidence that Ms Gray did not report to him, nor did he have the authority to issue directions to her.[203] I consider that even if he did have that authority, the conduct that he has accepted he engaged in on these occasions was not appropriate workplace conduct.

[164] On two occasions, being the 8 March Incident and 10 June Incident, the Applicant swore at a colleague. The evidence established,[204] and the Applicant ultimately conceded,[205] that swearing at someone in the workplace was not common-place. I consider that, in the context of this workplace and the strained relationship between the Applicant and Ms Gray and Ms O'Cass, that this conduct was not appropriate or acceptable workplace conduct.

[165] The Applicant, when disclosing and referring on 25 May 2023 to the confidences that Ms Gray had shared with him regarding being sexually harassed, by making sarcastic comments about Ms Gray being molested, both disclosed, discussed and downplayed sexual harassment allegations made by one colleague about another colleague to other employees. In doing so, he betrayed one colleagues trust and potentially damaged the reputation of that colleague, in stating that she was a liar and making the allegations up. He also potentially damaged the reputation of the Duty Manager who was the subject of the complaints, who was entitled to expect that the allegations would be kept confidential and not gossiped about by his colleagues. I further find on the balance of probabilities, given the evidence of Ms Horsfall, Ms Measures and Mr Hickey that the terms "molest" or "molested" were not commonly used in the workplace. Even if I am wrong on this, and this language was commonly used in the workplace this does not make statements like this reasonable or appropriate in the workplace, especially when referring to someone having allegedly been sexually harassed within that workplace.

[166] Per the Full Bench's decision in *Queensland Rail (t/a Queensland Rail) v Rainbow*,[206] there is a broad discretion as to the Commission's approach to determining whether termination is justified where a number of reasons or incidents are relevant to that assessment. [207] In *Pearson v Linfox Australia Pty Ltd,*[208] (as confirmed by the Full Bench on appeal),[209] a number of instances were found, in aggregate, to constitute a valid reason in circumstances where any one of those instances may not have justified termination on their own.[210] Further, in *Stodart v The Employer,*[211] the Full Bench confirmed that a finding of valid reason based on a pattern of misconduct is not required to be premised on first finding that any one instance of conduct was in and of itself capable of constituting a valid reason.[212]

[167] Relevantly, in *Dickinson v Calstores Pty Ltd*,[213] the Commission considered whether a number of admitted breaches of policy could constitute a valid reason for dismissal:

> "It might be said that taken individually, each of these incidents might not be regarded as particularly serious — minor indiscretions — and certainly not, on their own, a sufficient basis to constitute a valid reason for dismissal. However, each of the examples above cannot be disaggregated from a consistent pattern of behaviour which was confrontationist, argumentative and insubordinate. It included behaviour, particularly in counselling sessions, that ill behoved any employee; let alone one who paraded himself as an exemplary one. Overall, given all of the circumstances, I consider that the respondent was entirely justified in its decision to terminate the applicant's employment. Moreover, there was not a skerrick of contrition for his conduct; simply a farrago of implausible and nonsensical explanations and self righteous counter allegations."[214]

[168] In *Toll Transport and Toll Priority v Joseph Johnpulle*,[215] the Full Bench found that a pattern of previous misconduct may not be relied upon to justify termination where that misconduct has failed to be addressed by an employer before the employee was dismissed.[216]

[169] Per the Full Bench in *Newton*, when discussing an analogous argument as to condonement in the context of valid reason:

> "Contrary to the summation in Conicella, the Full Bench in Johnpulle was not stating a decision rule that past (condoned) misconduct cannot constitute a valid reason for dismissal. Properly understood, Johnpulle is authority for the proposition that the attitude of the employer to such misconduct — that is, at the time the employer did not think it sufficiently serious to warrant summary dismissal — is a significant consideration, relevant to whether such misconduct constitute a valid reason for dismissal. However, it is not determinative of the question.
>
> If condonation was determinative it would be akin to adopting a subjective test to the question of whether there was a valid reason for the dismissal; that is, one would approach the issue solely from the perspective of the employer. Such an approach is contrary to principle. As we have mentioned, the Commission is required to conduct an objective analysis of all relevant facts in determining — on the basis of the evidence in the proceedings before it — whether there was a valid reason to dismiss."

[170] Accordingly, although the question of whether an employer considered the reason to justify dismissal at the time is relevant to the validity of the reason for dismissal, it is not in and of itself determinative of whether a valid reason to dismiss existed at all.

[171] The Respondent clearly did not consider at the time that any of the individual incidents justified dismissal. However, on each occasion except 2 April 2023, the Applicant accepts that a manager or managers spoke to him about his conduct and why it was unacceptable or inappropriate, and communicated to the Applicant to the effect that he was not to repeat the conduct. I find that the Applicant made repeated representations that reflected that he understood that his conduct was inappropriate. Whilst I consider that there were deficiencies present in the Respondent's handling of the conflict in the workplace, the complaints that the Applicant says he raised, and their reliance on behavioural policies, I find that, apart from the incident on 2 April 2023, the Respondent did address each incident of inappropriate conduct as it arose, and that the inappropriate conduct by the Applicant was not attributable to the Respondent's failure to manage the conflict between the Applicant and Ms Gray.

[172] I consider that the conduct of the Applicant represents a pattern of behaviour that justified his dismissal. Although not every incident referred to sexual matters, each instance of the Applicant's conduct was directed at a female member of staff and was likely to offend, annoy or cause hurt. The fact that the Applicant apologised to Ms Gray or Ms O'Cass is immaterial to the fact that, having done so, the Applicant continued to engage in the same kind of conduct that was, invariably, either noticed by a manager or brought to their attention by a member of staff. Workers are entitled to expect, and are expected to demonstrate, basic levels of appropriate behaviour and conduct in all workplaces.

[173] I find that the course of conduct engaged in by the Applicant in the 22 January Incident, 8 March Incident, 31 March Incident, 2 April Incident, 25 May Incident, and the 10 June Incident constituted a sound, defensible and well-founded reason to dismiss the Applicant, and that the Respondent's decision to dismiss the Applicant was a proportionate response to the gravity of the Applicant's conduct.

Was the Applicant notified of the valid reason?

[174] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[217]

[175] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal:

- Before the decision is made to terminate their employment,[218] and
- In explicit[219] and plain and clear terms.[220]

[176] The Respondent relies upon the alleged conduct of the Applicant to justify his dismissal. At various times the conduct relied upon has been expressed differently to the Applicant and the Commission. I have made conclusions regarding the incidents that constituted a valid reason

for the Applicant's dismissal above at [173]. I will now turn to consider whether the Applicant was notified of those reasons.

[177] The Commission is not constrained to consider only the reasons identified at the time of dismissal, but in circumstances where different or additional reasons are relied upon, the Respondent will have to "*contend with the consequences of not giving the employee an opportunity to respond to such reason…*"[221]

[178] As stated above, the reasons of the Respondent for the dismissal appear to have evolved over time. The letter provided to the Applicant on 30 May 2023 read as follows:

> "Dear Scott,
>
> I recently received a letter regarding alleged comments made by yourself to another team member. I will remain behind on Thursday night 1st June and catch up with you at 6:00pm when you commence work.
>
> Scott, I ask that this not be spoken about to other team members not should you made comments to the person that you made the comments to."

[179] The letter provided to the Applicant on 15 June 2023 read as follows:

> "Recently I had a discussion with you in regard to comments made to another employee on 25 May 2023, this investigation is still ongoing. On Saturday 10th June 2023 you had an altercation with an employee which is now under investigation.
>
> I would like to meet with you on Wednesday 21st June 2023 to discuss the outcome of these investigations."

[180] After the Applicant received the 15 June 2023 letter, he wrote a letter of his own providing his version of the events concerning Ms Gray and Ms Measures from February 2023 to date. The termination letter he received from the Respondent dated 20 June 2023 and provided to the Applicant on 21 June 2023 provides some response to the matters traversed in the Applicant's letter and reads as follows (reproduced as written):

> "Your employment is governed by your employment contract Clause 8 Termination of Employment 8.2d engaging unlawful discriminatory, harassing, bullying or violent conduct HR-P-12 Sexual Harassment Policy, HR-P-32 Bullying & Harassment Policy.
>
> I refer to your letter left in Human Resources Monday 19th June 2023 and address some of these issues.
>
> You reference through your letter to being disciplined. At no time have you received a discipline in fact the Club has been fair to both parties and on each of the occasion you were brought in to discuss issues that had transpired.

1. First incident and bringing it into the club – This was an outside incident between yourself and 3 others, however this has influenced the incidents and behaviours of those involved within the club.

2. Should barge – This was investigated and it was determined by the manager that this was not a shoulder barge. Hence no further action to be taken.

3. Gaudi Bar Kitchen – Upon investigation it was established that you did not swear. Hence no further action taken.

4. Gaudi Bar – on the 10th June 2023 both parties have admitted what was said to each other and this has been investigated thoroughly.

5. Demi Comment – it has been determined that the behaviour displayed toward the other employee is not acceptable and in keeping with the values of the Club.

I wish to inform you that as of today 21st June 2023, your employment with the Club shall cease immediately."

[181] In the Employer's response to unfair dismissal application filed in the Commission on 7 August 2023, the following summary of the reasons for dismissal were advanced (reproduced as written):

"The Applicant's employment was terminated on 21 June 2023 for misconduct. The Applicant engaged in misconduct specifically:

- Breaching the Club's code of conduct namely telling an employee to "*piss off*";

- Sexual harassment by telling an employee "*you're acting like Kiara, why don't you go get molested like her too*". Making jokes and comments about Kiara being molested;

- Spreading rumours and defaming an employee; and

- Putting the health and safety of employees at serious and imminent risk.

The Applicant was not unfairly dismissed. The Applicant was terminated due to his repeated misconduct. The Applicant made sexually inappropriate and disrespectful comments to another employee of the Respondent. This misconduct posed a risk to the health and safety of others. Ther termination was not harsh, unjust or unreasonable."

[182] In submissions filed on 3 October 2023 the Respondent submitted that the Applicant was terminated for:

- Ongoing workplace conflict;

- Breaching the Respondent's Sexual Harassment Policy; and

- Breaching the Respondent's Bullying and Harassment Policy.

[183] In addition, the Respondent submitted that the Applicant engaged in ongoing, repeated conduct of a similar nature that was inappropriate to Ms Gray and other employees of the Respondent, relying on the incidents outlined at [36] and [37] above.

[184] In submissions filed on 7 November 2023 the Respondent submitted that the Applicant was terminated for his ongoing misconduct towards four different female employees which was said to breach the Respondent's values, Bullying and Harassment Policy and Sexual Harassment Policy. The conduct that was said to constitute the inappropriate and repeated misconduct providing a valid reason for the Applicant's dismissal also included the Applicant's Facebook message to Ms Measures, which the Respondent submitted constituted a failure to follow a lawful and reasonable direction and a breach of confidentiality.

[185] During the hearing, Mr Hickey gave evidence that one of the reasons for the dismissal was the 13 May Incident involving Ms Measures. The notes from the meetings between Mr Hickey and the Applicant do not shed much light on whether the 13 May Incident was conveyed in that meeting as a reason for the dismissal[222] although the Respondent now contends that this was a reason for the dismissal. Given I have found that the 13 May Incident did not constitute a valid reason for the dismissal of the Applicant, I do not consider it relevant to my consideration of whether the Applicant was notified of the reason for his dismissal pursuant to s.387(b).

Submissions

[186] The Applicant submitted that he was not notified of the valid reason and not provided with procedural fairness on the basis that:

- He was not actually provided with a clear and unambiguous reason for his dismissal before the decision was made to terminate his employment (on 20 June 2023) and/or before the dismissal (on 21 June 2023) nor provided an opportunity to respond (show cause);

- It was only during the hearing of this matter, via submissions, that the Respondent articulated its purported reason/s for dismissal;

- That the Respondent made the decision to dismiss the Applicant without giving him any warning that his employment was at risk prior to the dismissal meeting; and

- At all material times, the Respondent's written evidence demonstrated that there was no notification of the reason for the Applicant's dismissal prior to the Respondent dismissing the Applicant.

[187] The Respondent, in its closing submissions filed on 7 November 2023, relies upon conduct alleged to have occurred on 22 January 2023, 8 March 2023, 31 March 2023, 2 April 2023, 15 May 2023, 25 May 2023 and 10 June 2023 as providing a valid reason for the Applicant's dismissal.[223]

[188] The Respondent submitted that the Applicant was notified of the valid reason on the basis that:

- The Applicant was notified of the reasons verbally in explicit and clear terms in the outcome meeting held on 21 June 2023 before the Club informed the Applicant that they would be terminating his employment. It was submitted that this was supported by the meeting notes which refer to inappropriate and offensive comments made to Ms Measures and ongoing inappropriate conduct towards Ms Gray.

- This notification was before the decision was made to terminate and in explicit and clear terms. [15]

- The Applicant was also notified of the reasons in writing in the letter provided to him on 21 June 2023.[224]

Evidence

[189] The Applicant gave evidence that he attended a meeting with Mr Hickey and "Cathy" on 21 June 2023. Mr Hickey did all of the talking for the Respondent. Mr Hickey referred back to the events of 11 February 2023 and discussed his attempts to roster the Applicant and Ms Gray separately and stated that he had asked Ms Gray to apologise to the Applicant. The Applicant gave evidence that he had again raised his concerns regarding Ms Gray's conduct towards him. Mr Hickey then briefly spoke about the 10 June Incident, saying that both the Applicant and Ms Gray were accountable and that the comments were unacceptable, also stating that the comments made by the Applicant to Ms Measures were unacceptable. Mr Hickey then verbally relayed that the comments to Ms Gray were a reason for the dismissal[225] before providing him with a letter of termination.

[190] Mr Hickey's written evidence was that he explained the purpose of the meeting to the Applicant and also said that the meeting was to discuss what was said to Ms Measures and that this was not acceptable, before terminating his employment. Mr Hickey's evidence to the effect that the dismissal was partially as a result of the 10 June Incident is corroborated by his contemporaneous notes. Mr Hickey also referred to what had occurred with Ms Gray since 11 February 2023. Mr Hickey largely agreed with the evidence of the Applicant regarding the meeting held on 21 June 2023.

[191] In his oral evidence, Mr Hickey agreed that he made the decision to dismiss the Applicant without undertaking an investigation into Ms Measures' complaint[226] and without giving the Applicant any warning that his employment was at risk[227]. He further agreed that the decision to dismiss had been made no later than 20 June 2023, that the letter of dismissal was drafted on 20 June 2023, and that he dismissed the Applicant the following day on 21 June 2023.

[192] The dismissal letter referred to the 15 June 2023 letter, the employment contract and various policies before referring to the letter that the Applicant had given to Mr Hickey on 19 June 2023. The dismissal letter then referred to various incidents and recited the outcomes of each incident of conduct, as extracted at [180] above. The letter then refers to the Gaudi Bar incident of 10 June 2023, referring to admissions made and a "thorough investigation" and the

"Demi Comment" (which I understood to be a reference to the 25 May Incident), stating that it had been determined that the behaviour displayed was not acceptable, nor in keeping with the values of the Respondent. Neither the letter of 15 June 2023 or 20 June 2023 referred to any allegation or finding that the Applicant engaged in misconduct.

Findings

[193] As can be seen from the above summary the communications to the Applicant and the Commission regarding the Respondent's reasons for dismissal has not been transparent or consistent.

[194] I find, having regard to the evidence of Mr Ashburner[228] and the evidence of Mr Hickey, including his contemporaneous notes, the letter dated 15 June 2023 and the letter of dismissal dated 21 June 2023, that the valid reasons communicated to the Applicant for the dismissal were the 25 May Incident and the 10 June Incident. The Applicant was not notified of any other reasons for his dismissal. While other previous conduct was referred to in the 21 June 2023 meeting, I find that this was responsive to the Applicant's letter and/or his application for orders to stop bullying, and was more akin to an explanation of the Respondent's management of the conduct of the Applicant and his colleagues as opposed to constituting a notification that these matters were a reason for his dismissal.

[195] Further, I find that:

- Neither the 30 May 2023 letter or the 15 June 2023 letter (being those notifications provided to the Applicant before the decision was made to terminate his employment) specified in explicit and plain and clear terms what the conduct being investigated was other than broad statements regarding "comments made to another employee on 25 May 2023" and an "altercation with an employee" on 10 June 2023;

- Neither the 30 May 2023 letter or the 15 June 2023 letter gave the Applicant any warning that his employment was at risk or that his conduct constituted misconduct; and

- The Applicant was not told in the meeting of 1 June 2023 or 15 June 2023 that his employment was at risk.

[196] The evidence discloses that the decision to dismiss the Applicant was made before the 21 June 2023 meeting. There is a lack of specificity regarding the conduct being investigated in the 30 May 2023 letter and the 15 June 2023 letter, and during the 1 June 2023 and 15 June 2023 meetings (which were the only relevant events before the dismissal decision was made on 20 June 2023). Further, given that I have found that there was a valid reason to dismiss the Applicant based on his conduct on 22 January 2023, 8 March 2023, 31 March 2023 and 2 April 2023, and that these incidents were not explicitly or plainly relied upon by the Respondent or notified to the Applicant at the time, I find that in all the circumstances, the Applicant was not notified of the reason for his dismissal in explicit and plain and clear terms.

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

[197] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[229]

[198] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.[230] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[231]

Submissions

[199] The Applicant submitted that he was not given an opportunity to respond to any valid reason because:

- The Applicant had to guess the reason for his dismissal;
- The Respondent failed to give the Applicant an opportunity to respond, as once it finalised its purported "investigation" it failed to put any formal allegation to the Applicant in order for him to respond;
- it did not identify and explicitly bring to the Applicant's attention a reason for his dismissal prior to dismissing him;
- it did not bring to his attention the specific criteria that it was going to rely on to determine whether to dismiss or not; and,
- It failed to give the Applicant an opportunity to show cause as to why his employment ought not to be terminated and then dismissed the Applicant without providing any clear, unambiguous or particularised reason for the dismissal.

[200] The Respondent submitted that the Applicant did have an opportunity to respond to any valid reason related to the Applicant's capacity or conduct because the Applicant:

- Was provided notice of the complaint against him in writing on 30 May 2023;
- Was provided with an opportunity to provide a response to the allegations on 1 June 2023 and 15 June 2023; and
- Was given an opportunity to respond to the reasons for his dismissal on 21 June 2023 and on that occasion did not provide any reasons as to why the Respondent should not terminate his position, instead relying on his view that the matter had been dealt with despite receiving a letter prior saying the investigation was ongoing.

[201] As outlined previously at [172], I have found that the following matters constituted a valid reason for the Applicant's dismissal:

(a) The 22 January Incident (altercation with Ms Gale, within earshot of customers);

(b) The 8 March Incident (swearing at Ms O'Cass);

(c) The 31 March Incident (making derisive or accusatory or comments to Ms Whiting about Ms Gray);

(d) The 2 April Incident (repeatedly shouting "*get out*" at Ms Gray in the Gaudi Bar);

(e) The 25 May Incident (making the comment *"I hope your friend who got molested is okay,"* and saying words to the effect of *"Well, she is a liar and she was never molested, she would have made the whole thing up,"* in relation to Ms Gray to Ms Measures);

(f) The 10 June Incident (swearing at Ms Gray on 10 June 2023).

Evidence

[202] An opportunity to respond to individual incidents of misconduct occurring months or years before the dismissal at the time the incidents occur does not constitute an opportunity to respond to a reason for dismissal consisting of multiple incidents considered collectively.[232] I accept that discussions were held with the Applicant at the time of many of the incidents that the Respondent now relies upon to dismiss him. However, I do not consider that these discussions provided the Applicant with an opportunity to respond to a reason for his dismissal.

[203] The evidence in this matter does not disclose that the 30 May 2023 letter or the 15 June 2023 letter specified in explicit and plain and clear terms what the conduct being investigated was other than broad statements regarding "*comments made to another employee on 25 May 2023*" and an "*altercation with an employee*" on 10 June 2023, and did not warn the Applicant that his employment was at risk. These documents did not refer to all of the conduct that the Respondent now alleges constituted a valid reason for the Applicant's dismissal, nor that I have found constituted a valid reason for dismissal. Nor did these documents allege that the Applicant had engaged in misconduct or breached his contract of employment nor any policies of the Respondent.

[204] The various accounts of the meetings of 1 June 2023 and 15 June 2023 given by the Applicant and Mr Hickey, and contemporaneous records of these meetings, do not evidence that the Applicant was told that his employment was at risk, nor do they traverse or clearly ask for a response to matters other than, at most, the 11 June Incident and the 25 May Incident. While the Applicant may have been afforded an opportunity to respond in respect of the 13 May Incident, as I have outlined at [137] to [140] above, this incident did not constitute a valid reason for the Applicant's dismissal. Accordingly, it is to be disregarded for the purposes of the following consideration of s.387(b) of the FW Act.

[205] As previously outlined, Mr Hickey gave evidence, which I accept given the corroborating evidence, that the decision to dismiss the Applicant was made before the 21 June 2023 meeting. Mr Hickey agreed that the Respondent failed to give the Applicant an

opportunity to respond.[233] I accept the evidence of the Applicant regarding the meeting of 21 June 2023.

Findings

[206] I find that:

- The Applicant did not have an opportunity to respond to any valid reason in the meeting of 21 June 2023 as the decision to dismiss him had already been made;

- The Respondent failed to put any formal allegation to the Applicant in order for him to respond in the letters dated 1 June 2023 and 15 June 2023 and the related meeting prior to his dismissal, other than vague assertions regarding several instances of conduct;

- The Applicant was not provided with any evidence obtained during the investigation into his conduct for him to consider and reply to prior to his dismissal;

- Prior to the dismissal meeting, the Applicant was not warned that his employment was at risk and given an opportunity to show cause as to why he should not be terminated;

- At no point was the Applicant advised that any matters other than the 11 June Incident and the 25 May Incident were being investigated or considered as possible reasons for his dismissal despite the Respondent now alleging that numerous other instances of conduct constituted a valid reason for dismissal in this matter; and

- The Applicant was not given any notice that it was alleged that his conduct constituted misconduct or that it constituted a breach of his contract of employment or any policies of the Respondent, let alone advised what specific policy or contractual terms he was alleged to have breached, despite the dismissal letter referring to these documents and the Respondent relying on breaches of these obligations in these proceedings.

[207] Having regard to the matters referred to above, I find that the Applicant was not given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

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

[208] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. Both parties accepted that this was not relevant to the factual circumstances before me and was effectively a neutral consideration. I accept these submissions.

Was the Applicant warned about unsatisfactory performance before the dismissal?

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

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

[210] Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.[234] The Applicant submitted that St Marys is a business of considerable size and employs dedicated human resources staff. The Respondent contended that the human resources function followed a thorough process and afforded the Applicant full procedural fairness. I have considered these procedures below in relation to s387(h).

[211] However, neither party submitted that the size of the Respondent's enterprise was likely to impair the Respondent's ability to follow fair procedures in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.[235]

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

[212] Neither the Applicant or the Respondent submitted that there was an absence of dedicated Human Resource management specialists or expertise in the Respondent's enterprise and I find accordingly.

What other matters are relevant?

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

Submissions

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

- the Applicant's age, future employment prospects and any economic and personal effect of the dismissal on him;

- Where the Respondent had neither notified the Applicant for the reason for his dismissal nor provided him with an opportunity to respond, the Applicant's dismissal had been completely devoid of procedural fairness and "a fair go all round";

- The Applicant had been a faithful employee of the Respondent for over a year, and had performed well for the duration of his employment with the Respondent, indicated by the Applicant having been selected for VIP team training (which was remunerated at a higher level than the Applicant's regular rate of pay per shift);

- The Applicant had been treated differently to Ms Gray, whose behaviour was not investigated or disciplined despite her having sworn at the Applicant, made false complaints against him, allegedly engaged in the spreading of sexualised rumours about the Applicant, and had discussed the false complaints against the Applicant with colleagues; and,

- The Respondent's failure to properly address, investigate, or issue disciplinary action in respect of the conduct directed at the Applicant from February 2023 to June 2023, contributed to the circumstances giving rise to the Applicant's conduct leading up to his dismissal in June 2023.

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

- The Applicant's future employment prospects and current economic circumstances noting that Sydney is a highly populated area with significant job opportunities, particularly within the hospitality industry, the Applicant was competent in his role and that it would not be difficult to secure employment in the current job market, and economic environment, where the unemployment rate is also significantly low;

- The Applicant's work performance or history (including his short tenure as a casual, numerous incidents during his employment which were disruptive to the Respondent's business and verbal warnings given on 22 January 2023, 8 and 31 March 2023);

- Procedural fairness having been afforded to the Applicant as he was informed of the allegations against him and he was given an opportunity to respond;

- The Applicant lodging an antibullying application four months after alleged bullying occurred in an opportunistic and defensive response to a complaint against him;

- The Applicant's breach of confidentiality; and

- Comparable treatment of Ms Gray who was also terminated for misconduct.

[216] I do not have any evidence before me to suggest that the Applicant lodged an antibullying application in the Commission in an opportunistic and defensive response to a complaint against him and I do not make any finding that this occurred. I have previously found that he did not breach confidentiality or disclose confidential information as alleged by the Respondent.

[217] The Applicant submits that the Applicant has been treated differently to Ms Gray regarding disciplinary action during his employment. As has previously been observed by the Australian Industrial Relations Commission:[236]

> "…the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable… In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination

> are in truth properly comparable: the Commission must ensure that it is comparing 'apples with apples'. There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. … Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an alleged comparable case."

[218] I do not have any evidence before me to suggest that the Applicant and Ms Gray were treated differently at the time of dismissal. I do not make any finding that this occurred. Both the Applicant and Ms Gray were dismissed on the same day. Mr Hickey gave evidence that Ms Gray's dismissal, like the Applicant's was as a result of her comments. I infer this to be a reference to the events of 11 June 2023. Assuming, without deciding, that differential treatment between Ms Gray and the Applicant during their employment is relevant, I do not have sufficient evidence before me to make a finding that the Applicant and Ms Gray were treated differently during their employment. Mr Hickey gave evidence that he spoke to Ms Gray regarding the 11 February incident and her conduct in the workplace and gave conflicting evidence regarding whether he took disciplinary action against Ms Gray prior to her dismissal.[237] No evidence is before me regarding any considerations that are subjective to the circumstances of Ms Gray that may have caused the Respondent to treat her in a particular way. Similarly, the Applicant was either verbally counselled or warned on numerous occasions regarding his conduct (much of which he accepted was inappropriate).

[219] I have factored into my consideration that the Applicant had been out of work and had only recently been able to find casual employment at the time of the hearing of this matter despite his extensive attempts to obtain other employment. I am satisfied that the negative economic effects of the dismissal on him were significant. I have also considered his age and that he had been a casual employee of the Respondent for over a year. The Respondent acknowledged that he was competent in performing his duties and he had recently been selected for training up to work shifts in the VIP area. These factors weigh in favour of a finding that the dismissal was harsh, unjust and or unreasonable. By contrast, I have also taken into account that the Applicant was repeatedly reminded to act in a professional manner, counselled or verbally warned regarding his inappropriate conduct in the workplace. This weighs against a finding that the dismissal was harsh, unjust and or unreasonable.

[220] However, I consider that the Respondent's failure to manage the escalating tension between Ms Gray and the Applicant had a role to play in the final altercation between the pair that led to the Applicant's dismissal. The enmity between the pair had not been managed, no mediation had been conducted and no active attempts, other than rostering them on separate shifts, had been undertaken to assist the two employees to overcome their differences and work together respectfully and safely. In my view, this contributed to the circumstances of the ongoing dispute between the Applicant and Ms Gray.

[221] The Applicant contends that his dismissal was completely devoid of procedural fairness and "a fair go all round". Deprivation of procedural fairness may render a dismissal unfair even where circumstances otherwise justify dismissal.[238] I have previously found that he was not notified of the reason for his dismissal nor given a proper opportunity to respond. However, the procedural fairness deficiencies go well beyond these matters. Whilst the Applicant had intuited that his employment was at risk he was not explicitly told this until his dismissal meeting (after

a decision to end his employment had already been made), he was not provided with appropriate particulars of the allegations against him either in meetings or correspondence (including that it was being considered that he had engaged in misconduct or had breached policies and his contract – let alone the relevant provisions of those documents). The Respondent's investigations also were deficient with Mr Hickey accepting that no investigation had been conducted into the incidents on 22 January 2023, 31 March 2023, or the out-of-hours incident on 13 May 2023, and that he had only met with Ms Measures once to confirm that her written statement was true. The Respondent is a business of considerable size and employs dedicated human resources staff. It did not put into evidence any policy which dealt with the procedures to be adopted where conduct issues arise and are being investigated. The procedures that it adopted were deficient, ad hoc, lacked transparency and lacking in procedural fairness. This weighs in favour of a finding that the dismissal was harsh, unjust and/or unreasonable.

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

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

[223] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal.[239]

[224] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh, unjust and/or unreasonable, and therefore unfair. Whilst there was a valid reason for the dismissal, having taken the significant procedural fairness deficiencies and other factors into account, I am satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Conclusion

[225] For the reasons provided, the Applicant's dismissal was unfair.

Remedy

[226] I have not reached any conclusion as to what remedy (if any) should be ordered in this matter. I am concerned that the parties (and particularly the Respondent) have not adequately addressed the question of remedy in their submissions. In particular, I have identified that the Respondent's submissions lack any consideration of those matters that the Commission is required to consider if it forms a view that reinstatement is inappropriate and compensation should be awarded, being the matters specified in s 392 of the FW Act.

[227] I will separately issue directions dealing with the procedural steps to be followed by the parties on the question of remedy.

DEPUTY PRESIDENT

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<PR770767>

Appearances:

Ms L Tacey on behalf of the Applicant

Ms N Shaw on behalf of the Respondent

Hearing details:

18 October 2023
Sydney

[1] *Statement of Scott Ashburner dated 9 September 2023* (***Ashburner***) [3].

[2] *Ashburner* [53].

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

[4] Ibid.

[5] *Applicant's outline of submissions on permission dated 15 September 2023* [6]-[7].

[6] Per *Fair Work Act 2009 (Cth)* (***FW Act***) s.596(2)(a).

[7] Per *FW Act* s.596(2)(b).

[8] Per *FW Act* s.596(2)(c).

[9] *FW Act* s.596(2)(a)-(c).

[10] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 Print S5897 [73].

[11] *Wadey v Y.M.C.A. Canberra* [1996] IRCA 568 cited in *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [85].

[12] *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156.

[13] *Gera v Commonwealth Bank* [2010] FMCA 205 [82].

[14] *Applicant's outline of submissions dated 12 September 2023 ('**AS**')* [64].

[15] *AS* [67].

[16] *AS* [65].

[17] *AS* [66].

[18] *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512.

[19] *Shorten v Australian Meat Holdings* (1996) 70 IR 360, 376; citing *Slifka v J W Sanders Pty Ltd* (1996) 67 IR 316, 327

[20] *AS* [74]-[75].

[21] *AS* [76].

[22] *Respondent's outline of submissions dated 3 October* 2023 ('***RS'***) [2.3].

[23] *Statement of Ms Demi-Lee Measures dated 3 October 2023 ('**Measures**')* [14].

[24] *Measures* [27]-[30].

[25] *RS* [2.5]-[2.6].

[26] [2014] FWC 3670 [62].

[27] *RS* [2.7].

[28] [2014] FWCFB 8278.

[29] *RS* [2.8].

[30] *P7680* (AIRCFB, Ross VP, Drake DP, Palmer C, 24 December 1997).

[31] *RS* [2.9]-[2.10].

[32] *RS* [2.11].

[33] *RS* [2.12].

[34] [2019] FWC 606.

[35] [1931] HCA 2.

[36] *RS* [2.15]-[2.18].

[37] *RS* [2.22]-[2.24].

[38] *RS* [2.29]-[2.31].

[39] *RS* [2.32]-[2.41].

[40] *Applicant's outline of submissions in reply dated 10 October 2023 (**AS-R**)* [12].

[41] *AS-R* [18].

[42] *AS-R* [19], [2023] FWC 2493 [154]-[155].

[43] *AS-R* [20].

[44] *AS-R* [32].

[45]*AS-R* [23].

[46] *AS-R* [30].

[47] *AS-R* [36]-[37].

[48] *AS-R* [37].

[49] *AS-R* [41].

[50] *Applicant's closing submissions dated 7 November 2023* ('***ACS***') [1]-[3], PN371 – PN380.

[51] *ACS* [4]-[8].

[52] *ACS* [9], PN738 – PN739, PN757 – PN762.

[53] *ACS* [12]-[14].

[54] *ACS* [15].

[55] PN1127 – PN1130.

[56] PN1131 – PN1136.

[57] *ACS* [52]-[53], *Lumley v Bremick Pty Ltd Australia t/a Bremick Fasteners [2014] FWCFB 8278.*

[58] *ACS* [54], *Ashburner* **SA-6.**

[59] *ACS* [73].

[60] *ACS* [75].

[61] PN1058.

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[62] PN1057.

[63] PN852.

[64] *ACS* [78].

[65] *ACS* [80] referring to *Previsic v Australian Quarantine Inspection Services* (AIRC, Holmes C, 6 October 1998); see also *Andrew Hinchen v Moonee Valley Racing Club* [2016] FWC 2176.

[66] *Gera v Commonwealth Bank* [2010] FMCA 205 at 82.

[67] *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156.

[68] PN909, PN918 – PN920, PN917, PN915, PN1007 - PN1016; PN1021 - PN1027 ; PN1033 - PN1055.

[69] ACS [92].

[70] *Nazar Lazar v Inghams Enterprises Pty Ltd* [2013] FWC 3447, 46.

[71] *ACS* [94].

[72] *ACS* [95].

[73] *Statement of Mr Shane Hickey dated 3 October 2023 ('**Hickey**')* [53], Annexure (**t**).

[74] *ACS* [97].

[75] [2014] FWCFB 7198 at [27].

[76] *ACS* [101].

[77] *ACS* [102].

[78] *ACS* [104].

[79] *Respondent's closing submissions dated 7 November 2023* ('***RCS'***), [1.8].

[80] PN736.

[81] *Measures* [42].

[82] *Hickey* [61].

[83] *Hickey* [69], *Measures* [44].

[84] PN756, PN741.

[85] *Measures* [43].

[86] PN1192.

[87].PN187.

[88] PN378T.

[89] *Measures* [14].

[90] *RCS* [2.2], PN99, PN101.

[91] *RCS* [2.3].

[92] *RCS* [2.4].

[93] PN271.

[94] PN197 - PN198.

[95] PN310.

[96] PN366.

[97] PN367.

[98] PN369.

[99] PN370.

[100] PN378.

[101] PN379.

[102] PN380.

[103] PN376.

[104] PN402 – PN403.

[105] PN408.

[106] PN415.

[107] *RCS* [2.5], PN583.

[108] PN470.

[109] *RCS* [2.8]-[2.9], Hickey (**c**)

[110] *RCS* [2.10].

[111] *RCS* [2.11]-[2.12].

[112] *RCS* [2.14]-[2.15].

[113] PN450.

[114] *RCS* [2.26]-[2.28].

[115] *RCS* [3.1] –[3.2].

[116] *RCS* [3.3], PN752.

[117] *RCS* [3.4], PN753.

[118] PN1420.

[119] Being Ms Measures, Ms Tolmie, Ms Gray, and Ms O'Cass, per *RCS* [3.4] – [3.6].

[120] *RCS* [3.7].

[121] *RCS* [3.8].

[122] *RCS* [3.9].

[123] *RCS* [3.10].

[124] *RCS* [3.12].

[125] PN1387 – PN1388.

[126] PN1402 – PN1407.

[127] PN1413 – PN1415.

[128] *Statement of Mr Scott Ashburner in reply dated 9 October 2023 (**Ashburner, reply**)* [33-35], PN167.

[129] PN163.

[130] PN1356 - PN1358.

[131] [1959] HCA 8; (1959) 101 CLR 298.

[132] PR954993, 9 February 2005 per Lawler VP, Leary DP and Deegan C.

[133] Ibid [33].

[134] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

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

[136] Ibid.

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

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

[139] [2021] FWCFB 3457 (*Newton*).

[140] [2011] FWAFB 523.

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

[142] Ibid [23]-[24].

[143] *RCS* [2.3, 2.4h)].

[144] *RCS* [2.3, 2.4i)].

[145] *RCS* [2.3, 2.4j)].

[146] *RCS* [2.3, 2.4k)].

[147] *RCS* [2.3, 2.4l) – 2.4m)].

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[148] *RCS* [2.3, 2.4n)].

[149] *RCS* [2.4o), 2.6, 2.8].

[150] *RCS* [2.11].

[151] *Ashburner* [6] –[7].

[152] Ibid.

[153] *Ashburner* [9] – [15].

[154] *Ashburner* [7], PN129 – PN131, PN146 - PN157.

[155] *Ashburner* [17] – [18].

[156] *Ashburner* [19] – [23].

[157] PN263 – PN273.

[158] PN282 - PN286.

[159] *Ashburner reply* [14]-[15], PN307 - PN335.

[160] *Ashburner reply* [33], PN336 - PN370. The original handwritten complaint by Ms Gray alleged that Mr Ashburner had repeatedly shouted at Ms Gray to '*get the fuck out of the bar'*. Ms Bronwyn Harrison was interviewed by Mr Hickey in regards to the complaint, and no notes were taken of the interview. According to Mr Hickey's oral evidence, Ms Harrison had not heard Mr Ashburner swear at Ms Gray but is also deaf in one ear and may not have been able to hear the content of the exchange in any event.

[161] *RS* [2.4 – 2.7].

[162] *RCS* [1.8g), 2.3, 2.4l)].

[163] PN378.

[164] *Measures* [14].

[165] *Ashburner* [35].

[166] *Ashburner* [7], PN129 – PN131, PN146 - PN157.

[167] *Ashburner, reply* [31].

[168] *Ashburner, reply* [34]-[35].

[169] *Measures* [29].

[170] *Measures* [30].

[171] *Measures* [46].

[172] *Measures* [31]-[32].

[173] *Measures* [33], Annexure (**A**).

[174] *Ashburner* [42].

[175] *Measures* [38], Annexure (**B**).

[176] *Hickey* [47], Annexure (**O**).

[177] [2022] FWCFB 32 [140]-[141].

[178] Print Q9292, [1998] AIRC 1592 ("***Rose***").

[179] [149]-[150].

[180] *RS* [2.15, 2.17].

[181] *RS* [2.17], *RCS* [2.11] – [2.12].

[182] PN230 - PN236, PN926 – PN927.

[183] PN209 – PN219.

[184] *Measures* Annexure (**B**), PN237 – PN244.

[185] PN928 – PN933.

[186] PN934 – PN936.

[187] *Ashburner* [41], *Measures* [35].

[188] PN1127 – PN1130.

[189] PN615 – PN616.

[190] PN1127 – PN1130.

[191] PN1131 – PN1136.

[192] PN615 – PN616.

[193] *Ashburner* [35].

[194] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 [32], citing *Budlong v NCR Australia Pty Limited* [2006] NSWIRComm 288 and *Queensland Rail v Wake*, PR974391, 19 October 2006.

[195] [2018] FWC 2025 [79].

[196] PN95 – PN102.

[197] [2011] FWA [42]:

[198] [2013] FWC 9642.

[199] PN415 – PN416.

[200] *Hickey* Annexure (**q**).

[201] *Ashburner reply* [13].

[202] *Ashburner* [42]-[45].

[203] PN353, PN391.

[204] *Hickey* [69], *Measures* [44], PN742.

[205] PN402 – PN403.

[206] [2022] FWCFB 147.

[207] Ibid [41].

[208] [2014] FWC 446 (*Pearson 1*).

[209] [2014] FWCFB 1870.

[210] *Pearson 1* [51].

[211] [2022] FWCFB 88.

[212] Ibid [29].

[213] [2011] FWA 6858.

[214] Ibid [120].

[215] [2016] FWCFB 108.

[216] Ibid [15].

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

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

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

[220] Ibid.

[221] *APS Group Placements Pty Ltd v O'Loughlin* [2011] FWAFB 5230, [51] per majority.

[222] *Hickey,* Annexures R and T.

[223] *RCS* [2.1]-[2.9].

[224] *Hickey* [53], attachments (**T**) and (**U**).

[225] *Ashburner* [51].

[226] PN1045 - 1056.

[227] PN1058.

[228] *Ashburner* [36-41], [47], [50-52].

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

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

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

[232] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [24].

[233] PN1059.

[234] *Jetstar v Meetson-Lemkes* [2013] FWCFB 9075, [68].

[235] *AOS* [41], [67].

[236] *Sexton v Pacific National (ACT) Pty Ltd* PR931440 (AIRC, Lawler VP, 14 May 2003), [36].

[237] PN1110 - PN1125.

[238] *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156

[239] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].