DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Peter Lainas
v
AMSPEC Australia Pty Ltd
(U2023/6590)

DEPUTY PRESIDENT O'NEILL MELBOURNE, 7 FEBRUARY 2024

Application for an unfair dismissal remedy

Introduction

[1] On 19 July 2023, Mr Peter Lainas made an application to the Commission for an unfair dismissal remedy. The Applicant commenced employment with the Respondent on 22 September 2021. He contends that he was unfairly dismissed by AMSPEC Australia Pty Ltd (the Respondent) from his role as a wharf operator, effective 30 June 2023.

[2] After taking into account the views of the parties, I conducted a hearing as the most effective and efficient way to resolve the matter. Both parties were granted permission to be legally represented.

[3] A person has been unfairly dismissed if the Commission is satisfied that the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy.[1] There is no dispute between the parties and I am satisfied that Mr Lainas was a person protected from unfair dismissal, that the Small Business Fair Dismissal Code did not apply, that this was not a case involving genuine redundancy and that the application was made within the period required.

[4] The Applicant seeks reinstatement with associated orders for lost wages and continuity of service.[2] The Respondent submits that reinstatement is inappropriate given the Applicant's dishonest and culminative conduct. It submits that any remedy ought to be limited to compensation only, which also must factor in the Applicant's misconduct.[3]

Witnesses

[5] In addition to his own evidence, the Applicant called evidence from another wharf attendant, Mr Joshua Gardener in support of his application. At the Applicant's request, two other persons were directed to attend and give evidence in the matter:

- Mr Stan Wielgus (who was not ultimately required to give evidence); and
- Mr Chris Hastie, wharf attendant and friend of the Applicant.

[6] The Respondent led evidence from:

- Ms Aina Lim, Regional Human Resources Manager;
- Mr Danny Castro, Transition and Implementation Manager/Terminal Operations Supervisor;
- Mr Oliver Worth, Executive Vice President;
- Ms Jenna Robertson, initially Administration and Resource Coordinator, then promoted to Human Resources Manager in August 2023; and
- Mr Marcelo Neiva, Health, Safety, Environment and Quality Manager.

[7] In relation to some issues there is conflicting evidence as to what occurred and in some cases, no corroborating documents or other witness evidence. In determining what occurred, I have, as discussed below, found it necessary to prefer the evidence of one witness over another. Other than where there is corroborative evidence, I have generally preferred the evidence of other witnesses over that of the Applicant. I did not find the Applicant to be an impressive witness. Whilst that, in itself, does not necessarily mean that his evidence is untruthful, in cross-examination he was extremely reluctant to acknowledge any mistakes on his part or make any concessions of any kind unless there was incontrovertible documentary evidence. He was unable to recall various matters put to him in cross-examination, along with answering questions with 'maybe', rather than making any concessions. He often answered questions with questions or with a sarcastic and belligerent tone and attitude. The following two examples, the first relating to child support deductions, and the second an email the Applicant sent, are illustrative:

PN564

You expected that that would happen when you changed employment to AmSpec, didn't you?---I didn't notify child support that I changed companies.

PN565

Were you required to?---Maybe.

PN566

Should you have?---Maybe.

PN567

Would it have been the right thing to do?---Maybe.

PN568

Did you not want to?---No.

PN569

You didn't want to pay child support?---$1,500 a month? No.

And:

PN455

The company had suggested to you, 'Well, look, perhaps we can give you an increase in pay', and you were responding to it?---Well, I've got to reply, don't I?

PN456

But it just – answer the question first and then perhaps you can justify it. Is that what you were doing?---I was asking a question.

PN457

Were you responding to a company's offer to increase pay in this email?---Repeat the question, please.

PN458

Were you responding to the company offer to increase pay?---There was no increase in pay by the company.

PN459

Then what are you talking about?---They were talking about it. It's been in talks for ages. Nothing was actually done.

PN460

Can I suggest to you that there was an increase of pay and you're referring to it as 'so-called' because you're being sarcastic, because you didn't like what had been offered?---What was offered?

PN461

I'm just putting that as a suggestion to you, Mr Lainas. Do you agree or not agree?---I do not agree.

PN462

When a company offers you a pay increase do you think calling it a slap in the face is a strong response from you?---I wouldn't quite call it a strong response.

PN463

You wouldn't? If someone slaps you in the face, that's a strong thing to do, isn't it?---Are we being violent here? Is this physical?

PN464

Well, you're using an analogy here in this email - - -?---There's a lot of analogies that they're – because we're not using like - - -

PN465

Sorry, Mr Lainas, I just want to be specific about this. Just have a look at that first sentence of the email. You're the one who uses the phrase 'a slap in the face'?---Yes.

PN466

What you're intending to convey to the company is you're insulted by the increase in pay that's been offered. Correct?---Yes, it was. Yes.

PN467

> It's so insulting it's like a slap in the face. Yes?---A slap could be soft, a slap could be hard. So what was the pay rise?
>
> PN468
>
> Do you consider that a considerate and respectful response?---I didn't swear, it's formal.[4]

[8] Whilst it is understandable that witnesses find being cross-examined challenging, the Applicant was clearly struggling at times to contain his emotions. His tone and body language during re-examination by his counsel was dramatically different, and in addition to affecting the credibility of his evidence, his demeanour as a witness was also consistent with the tenor of some of the matters put against him.

[9] In contrast, I found the other witnesses to be credible, forthright and genuine, and their evidence to be consistent and often corroborated by other witnesses or documentary material. For example, Ms Robertson made significant concessions, including that aspects of the process followed were not fair. Mr Neiva and Mr Castro were similarly calm and measured in their evidence, with detailed recollections of relevant events. I do so even though Mr Castro's evidence on one matter – whether he referred to anyone as 'champ' – was inconsistent with one email. I also found Mr Worth and Ms Lim to be credible and truthful witnesses.

Was the dismissal harsh, unjust or unreasonable?

[10] In considering whether Mr Lainas' dismissal was harsh, unjust and/or unreasonable, I am required to take into account the matters specified in section 387(a) to (h) of the *Fair Work Act 2009* (Cth) (the **FW Act**).

Valid reason (s.387(a))

[11] The employer must have had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.[5] In order to be "valid", the reason for the dismissal should be "sound, defensible or well founded" and should not be "capricious, fanciful, spiteful or prejudiced."[6]

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

[13] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason. The employer bears the evidentiary onus of proving that the conduct on which it relies, took place.

Was there a valid reason for Mr Lainas' dismissal?

Allegations at the time of dismissal

[14] On 29 June 2023, the Applicant was provided a show cause letter which stated that the Company had serious concerns with respect to the Applicant's recent conduct, alleging that:

(a) On or about 4 May 2022, the Applicant stated to the Payroll and Resources Coordinator that the Company could "go fuck themselves" because Services Australia had directed the Respondent to deduct child support payments from his salary (**Allegation 1**);

(b) On 26 June 2023, in an email to his Operations Supervisor, the Applicant stated that "[i]f the pay rise includes surveying for an extra $5, well you can tell the Company to stick it" (**Allegation 2**);

(c) On 27 June 2023, the Applicant was confrontational and displayed aggressive behaviour towards HSEQ Manager including stating that the Company could "go fuck themselves – while showing the middle finger to the air" (**Allegation 3**); and

(d) The Respondent had been informed by a number of staff that he had acted in an aggressive manner towards them at the workplace.[7] (**Allegation 4**)

[15] The show cause letter required the Applicant to provide a response to the allegations by 4:00pm the next day. The Applicant provided written responses to the above allegations on 29 June 2023 and requested further particulars on the fourth allegation. The next day the Respondent terminated the Applicant's employment, effective immediately.

[16] The issuing of the show cause letter followed an email sent by Mr Jones to Ms Robertson, Ms Lim, Mr Neiva and Mr Worth forwarding the email referred to in Allegation 2. The email sought advice on how to proceed, and included "*I have also been informed that Peter has been talking to the full timers around not doing extra shifts to cause demurrage. This is hearsay of course unless we hear it straight from him*." Mr Worth directed that he be taken off shift immediately pending investigation.[8]

Allegation 1 – 4 May 2022

[17] This allegation relates to a conversation between the Applicant and Ms Robertson which occurred in May 2022, more than a year earlier. There is no dispute that a conversation took place between the parties, however the content of the conversation is disputed.

[18] Ms Robertson states that the Applicant forwarded an email to her on 4 May 2022, outlining issues with annual and sick leave. She said that she found this email to be very aggressive and demanding, as Mr Lainas had capitalised the sentence "WE ARE SHIFTWORKERS" which she interpreted to be yelling.[9] When it was put to the Applicant that email communications that use uppercase is the equivalent of yelling, Mr Lainas responded that he was not aware that this was the case and that he was just trying to "highlight" something.[10] Ms Robertson's evidence is that during one of several telephone conversations with the Applicant that day and following an issue being raised by the Applicant about the deduction of child support from his pay, Mr Lainas stated that the company could "*go fuck themselves.*"

[19] The Applicant denies this allegation.[11] His evidence was that he was never rude or aggressive during the conversation and never swore at Jenna.[12] Mr Lainas stated in cross-examination that he did not remember the contents of the conversation, but remembered that there were three short phone calls.[13] Mr Lainas conceded in cross examination that he was annoyed about the pay issue.[14] Much is made of Mr Lainas' comparison of swearing "at" people and swearing generally. In cross examination, Mr Lainas was at pains to establish that he did not swear "at" Jenna but conceded that he may have 'let the F word go', but that it was not directed at her.[15]

[20] The Applicant's evidence is that he was never advised at the time, by Jenna or any other member of the company, that there had been concerns raised in relation to the conversation,[16] and that this allegation was only addressed via a verbal warning on or around November 2022, which was some 6 months later. Mr Castro, a Terminal Operations Supervisor of the Respondent, states that he raised this alleged incident with Mr Lainas shortly after it occurred, however, given that Mr Lainas had acknowledged that he had done the wrong thing, Mr Castro did not consider further action was needed and he considered it to be resolved.[17] On Mr Lainas' own evidence, he was advised by Connor Chalmers that someone had upset Jenna that day.[18] Although Mr Chalmers did not say who or what it was, Mr Lainas inferred that it might have been him that offended Ms Robertson and contacted Ms Robertson via email stating that "*I wasn't having a go at you. Please don't think that."*[19]

[21] Ms Robertson's evidence is consistent with Mr Castro's evidence that the Applicant had approached him complaining that child support was being taken from his pay and said "*Fucking AmSpec is taking my money and paying child support without my authorisation*". [20] In cross-examination the Applicant could not recall this conversation but agreed that he did not want to pay the required amount of child support.[21]

[22] I prefer Ms Robertson's and Mr Castro's evidence and find that in the telephone call with Ms Robertson in an angry and raised voice, Mr Lainas said "AmSpec can go fuck themselves". I also accept Ms Robertson's evidence that in another call that day regarding leave, the Applicant spoke in a rude and aggressive tone and that she felt intimidated by him.

[23] However, the Respondent cannot rely on this as a fresh allegation of misconduct, as it had previously been dealt with, and at the time the Respondent did not consider it to be serious enough to warrant any disciplinary action being taken.

Allegation 2 and 3 – 26-27 June 2023

[24] On 26 June 2023, Mr Lainas forwarded an email to Mr Jones as follows:

> *Hey Allan,*
>
> *If the pay rise includes surveying for an extra $5, well you can tell the company to stick it.*
>
> *We are way behind the 8 ball.*[22]

[25] The Applicant acknowledges sending this email,[23] but says that his behaviour should be viewed in a context where the Respondent had failed to respond to his enquiries and complaints regarding safety measures and pay rate issues.[24]

[26] The incident on 27 June 2023 involved a site visit by Mr Neiva where a conversation took place regarding the use of Fuel System Icing Inhibitor (FSII) on the Jetty. During this conversation, the Applicant raised whether employees would be paid more for dosing of FSII. Mr Neiva submits that this conversation quickly heightened with Mr Lianas becoming angrier. Mr Neiva states that it became a conversation centred around general underlying pay issues, including that the company required employees to complete extra duties with no increase in payment.[25] Mr Lainas then stated words to the effect *if the company thinks we are going to accept $5 an hour more then they can go fuck themselves, whilst showing the middle finger*.[26] Mr Neiva stated that he barely spoke at all throughout the conversation and that the Applicant was intimidating.[27] He states that Mr Lainas' face looked angry and his neck muscles and veins were bulging.[28] The Applicant denies that he was confrontational or aggressive towards him,[29] however admits that he told the company to go fuck themselves and did put his hand and finger to the air.[30] I accept Mr Neiva's account of what occurred and Mr Lainas' demeanour.

[27] The Applicant submits that his behaviour was consistent with that of other employees and had been accepted by the Respondent over an extended period of time.[31] He conceded in cross examination that he understood that the policies and employment contract applied to him and that these were the standard expected of him.[32] As above, the Applicant states that his conduct should be viewed in the context of an employee who had made countless requests for pay information and raised safety concerns, but failed to receive an adequate response from the employer. The Respondent conceded that there may have been long delays in responding to the Applicant's questions, but that responses had been provided on 1 February 2023.[33]

[28] The Respondent's failure to respond to legitimate queries about the entitlements of its employees promptly and comprehensively warrants significant criticism. However, it does not excuse intimidating and aggressive behaviour by the Applicant. I find allegation 3 to be made out.

Allegation 4

[29] This allegation refers to the Applicant acting in an aggressive manner towards staff at the workplace. The Respondent advised in their show cause letter that they were still investigating "*those matters*."

[30] In response to the Show Cause letter, the Respondent requested particulars of the "*exact allegations and those claiming them against"* him. The Respondent failed to provide any further particulars and did not advise the Applicant of the outcome of any investigation, prior to his termination on 30 June 2023. Given the lack of detail and the failure of the Respondent to provide adequate information after the Applicant had requested further particulars, I am not satisfied that this allegation was a valid reason for dismissal.

[31] I am not satisfied that allegations 1 or 2 constitute a valid reason for dismissal. I am satisfied that allegation 3 is a valid reason for dismissal, albeit not justifying summary dismissal

for serious misconduct. However, there is further context that casts the behaviour in a somewhat different light.

November 2022 verbal warning

[32] As noted above, the show cause letter states that the Applicant was issued a warning for using derogative and belitting language towards co-workers on 9 November 2022. No particulars of this incident were detailed in the show cause letter, however the evidence details an incident on the jetty when another employee, Shaun Cobby, had, according to the Applicant, manoeuvred an overhead crane load weighing approximately 25kgs over the heads of 2 ship crew employees who were standing immediately below (**Shaun Cobby incident**). The Applicant alleges that he "*reacted to an immediate risk to the health and safety of employees who were immediately below the equipment and yelled at him to move the equipment out of harms way*." He states that the language he used was no different to that normally used on the Jetty.

[33] I do not find it necessary to traverse the allegations in relation to this incident given they were dealt with by a verbal warning on 9 November 2022. Both parties accept that a meeting took place between the Applicant and Allan Jones in relation to both the Shaun Cobby incident and the conversation with Ms Robertson in May 2022.

[34] On 9 November 2022, the Applicant was issued a verbal warning at a meeting with his then manager, Mr Jones and Mr Wielgus as the Applicant's witness. The Applicant recorded it covertly and produced it under an order to do so.[34]

[35] The discussion lasts approximately 30 minutes and provides an insight into the Applicant's attitudes and behaviour. It is also an insight into the Applicant's then manager's approach.

[36] Mr Jones explains that the meeting is because of a 'few incidents' put forward by Human Resources following complaints by some employees that Mr Lainas speaks to some people aggressively and that '*a couple of people, have [been] a little bit scared about when you're around them'*. Mr Lainas' response is highly defensive and argumentative. In reference to the earlier incident in May 2022 regarding Ms Robertson, he says:

> *"OK with Jenna, right. They should have brought that up at the time. OK, not fucking four months, five months later. OK, so that's bullshit, you can strike that one off. So, Jenna can go and get fucked, OK? I'm not the only one that's fucking spoken to like that. Like she needs to do her fucking job."*

[37] About an employee called Josh, Mr Lainas says:

> *"And we know about Josh, Josh has been written off by the crew, right? We're not gonna do anything for fucking Josh anymore. We've done [*sic*] fucking above and beyond for fucking Josh to keep his fucking job here, so you can go and get fucked. And if you don't like how I'm talking now, you can report that one too. But this is, I'm not swearing at you, I'm swearing in general."*

[38] The conversation is replete with similar examples, where Mr Lainas describes newer and younger employees who have complained as "*fucking little babies*" who are '*whinging'* and '*can't handle a bit of lip'*, and that Mr Jones should tell them to "*harden the fuck up'*.

[39] Mr Jones repeatedly says that these are not isolated incidents, and that it was about how he speaks to people. Mr Lainas' response was *"I understand that. But the thing is, people, that's how I am. Because I'm passionate about my job and I'm passionate about my team, if these little fucking weasels can't handle it how I speak. They shouldn't be here."*

[40] Mr Jones says that he thinks very highly of the Applicant, that HR had wanted a written warning to be issued, but that he disagreed a written warning was warranted because "*I know how you are*". He said that only a verbal warning was being issued, which would be filed but that "*there has to be 3 written warnings on the same matter*" before any action is taken and reiterated that this was just a verbal warning. Later in the discussion, after what appears to be Mr Jones handing the Applicant a document and Mr Lainas saying he would not read it, and would "*put it in the shredder, fucking bullshit*", Mr Jones repeated that "*it's a verbal warning and I know it won't happen again….. Warning. That's it. And then written warnings for three on the same thing within three months. Otherwise they go away. Yep, but again, I don't want you to have a written warning, I don't think we need to go any further than we have today*."

[41] Mr Jones also said that he had previously discussed the issue of how Mr Lainas speaks to people during his performance appraisal, and Mr Lainas had agreed to '*work on it'*.

[42] Mr Lainas' behaviour in the meeting was appalling. His tone was aggressive for much of the discussion, often interrupting Mr Jones. Rather than being open to hearing (not for the first time) that other employees found him to be aggressive and intimidating, his approach was to attack the complainants and entirely dismiss the complaints against him. His attitude was that he spoke the way he did because he was passionate, and that those around him should simply accept this.

[43] I have a deal of sympathy for Mr Jones in that it would not have been easy to confront Mr Lainas given his behaviour. However, he did Mr Lainas no favour at all by not immediately calling out his behaviour and making it clear that if he continued to behave in that way, ultimately his job would be at risk. Instead, Mr Jones essentially conveyed that he was issuing the warning reluctantly. Critically, he repeatedly conveyed that the warning was insignificant, and unless 3 written warnings for the same behaviour were issued within 3 months, it would 'go away'. That was not only inaccurate, but it enabled Mr Lainas to conclude that it was a minor matter, that his behaviour was essentially being tolerated.

[44] I find Mr Lainas' behaviour during the meeting as a valid reason for dismissal.

Cumulative conduct

[45] At the hearing, the Respondent also relied on a history of alleged insubordinate conduct during the Applicant's employment, as cumulatively amounting to serious misconduct and a valid reason for dismissal. It submits that in addition to allegations 2 and 3, the Applicant engaged in various insubordination and dishonest conduct. The Respondent submits that

although no single incident would justify dismissal, the repeated minor infractions cumulatively amount to serious misconduct.[35]

[46] Much of the conduct relied upon is rude and dismissive emails and conversations involving the Applicant. The Applicant either conceded they occurred or 'maybe' did or could not recall, but emphasised that his swearing was not directed at the individual. On one or two occasions he acknowledged in cross-examination that his emails were not considerate and respectful. I prefer the Respondent's witnesses' evidence and find that they did occur.

[47] Another allegation was that on 20 June 2022, the Applicant left work early but claimed full time hours. Mr Lainas states that he works a 12-hour shift with an unpaid meal break of 30 minutes and did so in the day in question. During cross examination, Mr Lainas conceded that the amount of hours claimed was inconsistent with the entry and exit times recorded by the company and that 'maybe he was sick'. He conceded that this might put the company's integrity with its client Viva, into question.[36] In cross-examination, Mr Lainas refused to admit that it was dishonest to claim for hours that were not worked, stating "*considering the amount of hours I put into that place – if you're only going by leaving work for one hour or half an hour, something like that, considering how much I've put into that place, no*," and that this 'maybe' an honest way of dealing with things."[37]

[48] Whilst I accept Mr Lainas' evidence that he regularly presented early for his shifts, I find that on 20 June 2022, Mr Lainas did incorrectly submit a timesheet and claim for hours that he did not work. This is a further valid reason for dismissal.

[49] The Respondent also drew attention to clause 14.1 of the Applicant's Contract of Employment which provides:

> *14.1 Behaviour or conduct that interferes with the efficient performance of work or threatens the safety of others or the harmonious nature of the Company's workplace relations is unacceptable. Unacceptable behaviour includes the following:*
>
> *…*
>
> *(b) fighting or use of abusive or obscene language;*
>
> *(c) indecent or obscene conduct or harassment of any form;*
>
> *…*
>
> *14.2 Unacceptable Behaviour (as outlined in clause 14.1) or other similar conduct may result in disciplinary action or the termination of employment.*[38]

[50] The Respondent also relies on the letter of offer which provides that the Applicant must comply with any written policy.[39] The company policies include the HR Policy, Procedure Manual and Bullying & Harassment Policy. The Respondent submits that Mr Lainas was aware of the policies as he completed his induction training on 28 September 2021, which included reviewing the HR Policy and Procedure Manual, Code of Conduct and HR Manual,[40] and that his conduct was in breach of his employment contract and the associated policies.

Dishonesty and Covert recordings

[51] The Respondent also relies on an allegation of the Applicant's general dishonesty and the covert recordings taken by the Applicant, as a valid reason for dismissal.

[52] The Respondent relies on 3 incidences of general dishonesty by the Applicant:

(a) During the investigation, the Applicant denied the conversation with Mr Neiva on 27 June 2023, which he now admits; and

(b) In his response letter dated 29 June 2023, he denied Allegation 1 and denied any form of disciplinary action; and

(c) The Applicant now admits lying to the company about sleeping on the job on or around 31 May 2023.[41]

[53] I do not find that the first two incidents involved the Applicant behaving dishonestly. Whilst the Respondent emphasised that Mr Lainas refuted all three of the allegations in his response letter on 29 June 2023 and subsequently admitted to Allegation 2 and 3,[42] I place little weight on this concession, given the breadth and lack of specificity of the allegations in the show cause letter. In refuting the allegations, it is not clear that Mr Lainas was denying every aspect of each allegation, especially in the context where a response was required within 24 hours.

[54] The third incident took place on 31 May 2023 where Mr Hastie was caught sleeping on the job. The Applicant sent an email to his colleagues and management implying that he was the individual who was sleeping stating "*Sorry team. I let you down. It won't happen again*."[43] In cross examination, the Applicant admitted that he sent the email and had lied about being the individual sleeping on the job, to take "*the brunt of it"* and "*take the heat off"* his mate.[44] In cross examination, Mr Lainas stated "*I took the brunt, because that's the person that I am. That's my character."*[45] From the Applicant's perspective, he appears to believe that, at best, misleading statements to his employer is acceptable when done for what he considers a greater moral or ethical purpose. It is not, and was unacceptable conduct.

[55] The second issue is the covert recordings by the Applicant of three conversations. One was the discussion on 9 November where he was issued a verbal warning, the second was a 'mediation' discussion between the Applicant, Mr Jones, and another employee, Mr Cobby, and the third was the telephone call advising he was suspended on 29 June 2023.

[56] The Applicant relies on the Decision in *Classic Ceramic (Importers) Pty Ltd v Mary Heywood*,[46] which provides:

> *While I accept that surreptitiously recording workplace conversations with management may provide a valid reason for dismissal, I do not accept that such conduct would amount to serious misconduct in every case. There would generally need to be some additional element such as a direction to an employee not to record without consent, a policy governing recording at work, some contractual requirement that no consensual recordings not be made or an inquiry of the employer whether the employee*

> *is recording, an indication that no recording is occurring, but the recording proceeds, nevertheless.*
>
> *It is accepted that surreptitiously recording workplace conversations is usually inappropriate because it is unfair to other unsuspecting participants in such conversations who might, armed with the knowledge that the conversation is being recorded, otherwise have adopted a more circumspect language and tone and perhaps also not opined on particular matters. I also accept, as Colman DP observed in Tawanda Gadzikwa v Australian Government Department of Human Services that "once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This is potentially corrosive of a healthy and productive workplace environment". Such conduct may also be destructive of trust and confidence, the absence of which from an employment relationship will usually sound the death knell of that relationship.*
>
> *In some cases, such conduct may be contrary to an employee's contractual duty of good faith which would be a valid reason for dismissal, but this will not be so in every case. There may be persuasive reasons why a secret recording was justified, or the recording may be necessary to protect a particularly important interest.*

[57] The Applicant submits that these secret recordings are not a valid reason to summarily dismiss him, noting they were taken in the context of disciplinary meetings and in the absence of any specific policy that it was unacceptable to do so.

[58] The Respondent submits that the covert recordings were highly inappropriate as the individuals were not aware that they were being recorded and had no opportunity to choose their words carefully or be guarded about revealing confidences or sensitive information.[47]

[59] As held in *Gadzikwa v Australian Government Department of Human Services*,[48] once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This has the potential to lead to the corrosion of a healthy and productive workplace environment, especially when the Applicant stated in cross examination that he did not think that there was anything wrong with secretly recording the conversations and that he would do it again.[49] It is also illuminating that even though the Applicant was recording the discussion and had at least the opportunity to moderate his language, he either did not do so, or did so and his conduct could have been even more intemperate.

[60] I consider that the covert recording of, at least, the verbal warning discussion was highly inappropriate, and constitutes a valid reason for dismissal. It is also highly relevant to the question of whether reinstatement is an appropriate remedy. On his own evidence, the Applicant had a good relationship with Mr Jones (indeed he relies on the 'jovial and friendly' communication with him to explain one of the inappropriate emails he sent to him[50]) and he had Mr Wielgus present as his witness. There was therefore no reasonable justification to record the discussion. Any remaining concern about what was to occur during that meeting could have been addressed by advising Mr Jones and Mr Wielgus that he was recording the discussion.

Summary

[61] Considering all these matters, I am satisfied that the Respondent had multiple valid reasons for the Applicant's dismissal. The most significant of these is his conduct during the verbal warning meeting (including the conduct referred to in the discussion), the covert recordings and his abusive, rude and aggressive emails and communication with Mr Castro, Mr Jones and Mr Nieva.

[62] To be clear, I accept Mr Lainas' evidence, corroborated by Mr Gardner and which is not disputed by the Respondent's witnesses, that swearing at the workplace is commonplace. However, the problem is not that Mr Lainas used bad language. The problem is his aggression directed at several co-workers (albeit not to their face) and several managers on multiple occasions. This weighs against a finding that the dismissal was unfair.

Notification of reason (s.387(b)) – Opportunity to respond (s.387(c))

[63] In *Wright v Telstra Corporation Limited*,[51] the Commission set out the following with respect to procedural fairness:

> "[86] The relevant principle of procedural fairness is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. Previous decisions of the Commission in this regard have made it clear that the doctrine of procedural fairness dictates that a respondent should notify an applicant of its reasons for terminating the applicant's employment:
>
> - prior to the decision to terminate;
> - in explicit terms; and
> - in plain and clear terms."

[64] According to the termination letter sent to the Applicant on 30 June 2023, the reasons for dismissal were provided to the Applicant in the show cause letter on 29 June 2023. Mr Lainas contends that he was not afforded procedural fairness because he was summarily dismissed on the grounds of serious misconduct without the Respondent taking reasonable steps to investigate the allegations of misconduct and providing him with a fair opportunity to respond.[52] This is said to be because following receipt of the show cause letter, the Respondent was on notice that the Applicant refuted the allegations, that the fourth allegation was inadequate to enable a response and because the Respondent was aware that the first allegation related to an incident in 2022 and had not been raised with the Applicant at that time.[53] It is further submitted that the Respondent was aware that the Applicant disputed the May 2022 incident, and no further enquiry was made by the Respondent, thus denying the Applicant procedural fairness.

[65] The Respondent denies that the Applicant was not afforded procedural fairness. It submits that Mr Lainas was informed of the allegations against him by the show cause letter and that he was given an opportunity to respond (including the offer to meet in person), but his response was ultimately rejected.

[66] In cross-examination, Ms Robertson (the current HR manager) conceded (appropriately in my view) that the show cause letter did not disclose all of the particulars relied on by the Respondent and that that was unfair to Mr Lainas.[54] She further conceded that the fact that the Applicant was not given formal warnings about his conduct at the appropriate times was also unfair,[55] that there had been a failure on the Respondent to exercise fairness, that the company had not been considerate and sensitive in dealing with the matter and that the allegations fell short because there was no diligence in ensuring that Mr Lainas had sufficient information to provide a response.[56]

[67] What became apparent throughout Mr Worth's cross examination is that he had no interest in a fair process to the Applicant. He would decide whether he wanted Mr Lainas within his organisation, regardless of whether he had all relevant information at hand. For example, when it was put to Mr Worth in cross-examination that it would be fair if an employee is behaving in a concerning way that they be given the opportunity to address those issue, Mr Worth responded "*No I disagree. They would be given the opportunity to explain why they participated in such behaviour and then from there I personally would make a decision if I want this individual within my culture."* [57]

[68] Further and prior to the show cause letter, the Applicant was called by Ms Robertson and Ms Lim and told that he was suspended from employment. At no point in the telephone call did Ms Robertson or Ms Lim explain why Mr Lainas was suspended.[58]

[69] Additionally, the reasons relied on by the Respondent at the hearing, namely the dishonest conduct and cumulative minor incidents were not put to the Applicant prior to his dismissal. In some cases they could not have been, as the Respondent only became aware of them after the dismissal.

[70] I am satisfied that prior to the dismissal the Applicant was not notified in plain and explicit terms, of the reason for his dismissal and was not given an opportunity to respond. The allegations in the show cause letter were brief and unspecific, spanned back to May 2022 and included allegations that had previously been dealt with and/or accepted. Further, the Applicant was given grossly inadequate time to respond. This weighs in favour of a finding that the dismissal was unfair.

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

[71] There is no positive obligation on an employer to offer an employee the opportunity to have a support person attend, for example, a disciplinary meeting. However, in this case, the Respondent did not even hold a meeting with Mr Lainas. It simply telephoned him without any advance notice and told him his employment had been suspended, that a letter would be sent to him straight after the call and that he had to respond the next day. [59] The show cause letter was sent, the Applicant provided a response, and his employment was then terminated the next day. Mr Lainas never had an opportunity to seek to have a support person present. Whilst I do not find that there was an unreasonable refusal to allow a support person, I have taken these circumstances into consideration in relation to s.387(h) below.

Warnings of unsatisfactory performance (s.387I)

[72] As the Applicant was not dismissed for unsatisfactory performance, this consideration is not relevant in this case.

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

[73] AmSpec is a national organisation with human resources expertise that it made use of. I have treated this as a consideration that weighs in favour of a finding that the dismissal was unfair. I do so because of the very significant deficiencies in procedural fairness in relation to the steps taken to dismiss the Applicant, and more broadly in relation to the Respondent's ongoing failures to adequately address Mr Lainas' unacceptable conduct which ultimately led to his dismissal.

Other relevant matters

[74] Section 387(h) of the FW Act provides the Commission with a broad scope to consider any other matters it considers relevant. I have taken into consideration that the Applicant has been unable to secure a permanent position since his dismissal. The most significant factor under s387(h) that I have given weight to in favour of a finding that the dismissal was unfair, is that Mr Lainas was never clearly told that his behaviour was unacceptable, and that his employment would be at risk if he did not change. To the contrary, at the verbal warning discussion, he was told by Mr Jones that he would face no action unless he was given three written warnings on the same matter. Mr Lainas reasonably came away from that meeting without any concern that his employment was in jeopardy unless he modified his behaviour. In many circumstances, an employee does not need to be told that aggressive, rude and abusive behaviour is inappropriate. However, where they are, in effect, told the opposite, this is not necessarily the case.

[75] I accept Mr Lainas' evidence that he had never been warned that the conduct he engaged in was regarded by the Respondent as constituting serious misconduct or could result in the termination of his employment. He submits that swearing and similar language was common among the employees and accepted and condoned by the Respondent.[60] Whilst Ms Lim initially stated that Mr Lainas had been constantly given verbal warnings or discussions with managers over his behaviour, she then conceded that the only warning was the verbal warning on 9 November 2022.[61]

[76] I have also taken into consideration that the Respondent did not consider any alternative to termination. Indeed, Mr Worth made it clear in his evidence that he was unhappy with some aspects of the senior management approach taken before he took up his position, was keen to change the workplace culture and no longer tolerate behaviour that had been tolerated in the past. Whilst he agreed that it would not be fair to dismiss someone without an investigation, the investigation in relation to Mr Lainas comprised no more than issuing him with the show cause letter, giving him one day to respond, and then making the decision to dismiss him upon receiving his response.[62] Mr Lainas had no real opportunity to have a support person present. In response to whether the company was obliged to provide the details of allegation 4, as requested by Mr Lainas, Mr Worth's evidence was that "*with a serious case of gross misconduct, I didn't feel like I needed to*."[63] In circumstances where, essentially, under Mr Worth's leadership the Respondent changed the rules about what behaviour is unacceptable and

that change was not communicated to employees, a final written warning would have been more appropriate.

[77] Whilst not excusing the Applicant's behaviour, I also consider it relevant and have taken into account that the Respondent did not respond in a timely or clear way about the numerous legitimate queries raised about the wages and conditions of employment, including how the loaded rate was made up. These are fundamental matters that the employees, including Mr Lainas, were entitled to receive prompt and comprehensive answers to, but did not.

[78] The Applicant submits that the suspicion that he had been talking to others about not doing extra shifts to cause demurrage was a factor in the Respondent's decision to dismiss him. This is based on the email from Mr Jones on 28 June 2023 described in paragraph [16] and a second email from Mr Jones to Mr Worth and Ms Robertson on 29 June where he reports that several employees 'are conspiring together to not do extra shifts to sabotage the contract and cause demurrage.' He goes on to say that this '*is mainly driven by Peter Lainas and Chris Hastie based off their thoughts around being paid incorrectly. Unsure what steps can be taken to stop this from happening or even if a letter can be sent out to the team around the issues this will cause and repercussions that will come from it. Hoping once the news around Peter gets out there, the rest of the team will realise that these behaviours will not be tolerated*."[64]

[79] Mr Worth and Ms Robertson both acknowledged that it was a significant and very expensive matter for the business, but as no one wanted to come forward there was not much the company could do, and denied that it was part of the reason for the decision to dismiss the Applicant.[65]

[80] The author of the emails, Mr Jones, was not called to give evidence. Whilst the proximity of the timing of his emails to the suspension and dismissal of the Applicant suggests the issues were related, I am not prepared to draw any adverse inference as Mr Jones' absence was explained that he was on leave for his wedding. In the circumstances and in light of the *Briginshaw* principles,[66] I am not prepared to find that this issue was a driving factor in the dismissal of Mr Lainas.

Conclusion

[81] I have made findings in relation to each matter specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable. Having considered each of the matters, I am satisfied that the Applicant was unfairly dismissed and that the dismissal was harsh, unjust and/or unreasonable.

Remedy

[82] Having found that the Applicant has been unfairly dismissed, I now turn to the issue of an appropriate remedy.

[83] The Applicant seeks to be reinstated with associated orders for lost wages and continuity of service.[67] The Respondent submits that reinstatement should not be ordered because it has lost trust and confidence in the Applicant.

[84] The Applicant has had total gross earnings of $10,760.35 since his dismissal.

Consideration

[85] The Applicant submits that he should be reinstated to the position he occupied at the time of his dismissal. He submits that the allegations relate to interactions with some managers, and that he has had limited interaction with management during his employment. Mr Neiva is based in Perth; the Operations Manager, Mr Pillinger, has resigned from this role and is now a work colleague; he has limited interactions with Ms Robertson, and the Applicant has not met the new Operations Manager.[68] Essentially, the Applicant relies on the fact that the individuals who have given evidence that they do not wish to work with the Applicant, have very limited interaction with him.

[86] The Respondent submits, that it would be inappropriate to reinstate the Applicant as there has been a complete breakdown in the relationship between Mr Lainas and the Respondent and that the Respondent had lost trust in the Applicant.[69] The question is whether the loss of trust and confidence claimed is soundly and rationally based.[70] A finding of a loss of trust and confidence must be made on an objectively reasonable and rational basis.

[87] The Respondent submits that it has little or no confidence that the Applicant, if reinstated, will perform his role effectively in light of his continuing conduct. The Applicant conceded that there is a "very low level of trust between the parties at this point in time", and that this is clear from Mr Lainas' evidence and indeed how Mr Worth has indicated he views matters.[71] Furthermore, both Ms Robertson and Mr Neiva have stated that they do not want to work with the Applicant again.

[88] Reinstatement is the primary remedy for unfair dismissal. In *Ngyuen v Vietnamese Community in Australia*[72] a Full Bench of the Commission said (citations omitted):

> "Subsection 390(3) underscores the primacy of reinstatement as a remedy for an unfair dismissal as the discretion to order a remedy of compensation may only be exercised if the Commission is satisfied that reinstatement is 'inappropriate'. Further, one of the objects of Part 3-2 of Chapter 3, in which the unfair dismissal provisions appear, is "to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement". We would observe that to describe reinstatement as the 'primary remedy', is to simply recognise that reinstatement is the first, perhaps even the foremost, remedy under the Act. The relevant question in determining whether to grant the remedy of reinstatement of an employee in relation to a dismissal that is found to have been 'unfair' is whether reinstatement is appropriate in the particular case."

[89] In *Britax Rainsfords Pty Ltd v Jones*[73] a Full Bench considered matters which it felt may be taken into account in considering reinstatement of an employee. These are:

> "…the practicality of reinstatement, the availability of an appropriate position, the terms of which are "no less favourable than those on which the employee was employed immediately before the termination"; the employee's ability to perform the duties

> required on an ongoing basis; and, the effect of reinstatement on the ongoing relationship between the employee and employer.[74]

[90] In *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191-192, the Full Court of the Industrial Relations Court said:

> "... we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.
>
> At the same time, it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee's employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Division 3 of Part VIA of the Act.
>
> If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of loss of confidence in the employee.
>
> Each case must be decided on its own merits."

[91] In *Nguyen* the Full Bench summarised the approach required as follows:

> "[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:
>
> - Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
>
> - Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
>
> - An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee.

> The onus of establishing a loss of trust and confidence rests on the party making the assertion.
>
> - The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
>
> - The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.
>
> [28] Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."

[92] Applying the above approach to the circumstances in this case, I have concluded that reinstatement is not an appropriate remedy. Balanced against the remedial benefit of reinstatement and my finding that Mr Lainas has been unfairly dismissed, I have taken into consideration my finding that there were valid reasons for the Applicant's dismissal, including his evidence during the hearing and his demeanour during the hearing.

[93] If reinstated, the Applicant would continue to have some contact with management, including Ms Robertson and Mr Neiva. Mr Worth remains the Vice-President. The lack of acknowledgment from Mr Lainas that, with the benefit of hindsight, he recognises that his behaviour has been inappropriate and his continued focus on distinguishing between swearing *at* and *to* people without recognising that it is not his use of bad language but his aggressive approach and reactions, does not give me confidence he would not continue to behave in the same or similar manner in the future. Indeed, even at the time of the hearing, Mr Lainas maintained that when he swears it is up to those he is speaking to, to decide whether it is disrespectful, and that it is not his fault if people feel uncomfortable with him.[75] Mr Lainas also maintained that he had not done anything wrong, including that he had not belittled anyone.[76]

[94] It is no answer that Mr Lainas may have limited contact with the specific individuals Mr Lainas has, to date, behaved inappropriately towards. Absent a sufficient degree of confidence that Mr Lainas would not act in a similar way, any level of contact is problematic. Further, I am not confident that Mr Lainas would not behave in a similar way towards other individuals.

[95] A further compelling consideration weighing against reinstatement is his evidence that he would continue to covertly record conversations if he felt it necessary. Given that, co-workers and managers could not be confident if he returned to work that their conversations with him would not be secretly recorded, at least in the absence of any specific direction or policy for him not to do so.

[96] I am satisfied that the Respondent's loss of trust and confidence is well-placed and rational.

Compensation

[97] I am satisfied that it is appropriate in all the circumstances to make an order for payment of compensation. In assessing the amount, I am required by s 392(2) of the FW Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of this subsection. I have applied the methodology in *Sprigg v Paul's Licensed Festival Supermarket*[77] as set out below:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination.
Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 5: Apply the legislative cap on compensation.

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

[98] This consideration involves an assessment of what would have been likely to happen had Mr Lainas not been dismissed. It involves an element of speculation.

[99] Mr Lainas submits that he would have remained in employment indefinitely but for the dismissal, contending that he had addressed his behaviour for 7 months, and so could reasonably be expected to have diligently applied himself to ensure he did not cross the line again.

[100] However, it is not the case that after not being warned about his behaviour in November 2022, he appreciated the need to change and there were no further incidents. He engaged in unacceptable behaviour just over six months later, in June 2023 with respect to Mr Nieva. It is possible that having had his employment terminated, Mr Lainas would now appreciate that the 'rules' have changed and would not engage in any aggressive or abusive language or other misconduct again. However, I do not consider this probable. My assessment is that, despite stating that '*now that I have been made aware of the sensitivities of my employer, I will conduct myself appropriately'*,[78] Mr Lainas would at some point become frustrated and angry and lash out at a manager or other person. My assessment includes my observations of Mr Lainas during the hearing including his great reluctance to acknowledge that he had behaved inappropriately. This includes his evidence that he would again covertly record workplace conversations and that it '*doesn't hurt anyone if they don't know about it'*.[79] Also included in my assessment is the related attitude he expressed at various times that he had an '*unorthodox'* rather than '*aggressive'* way of communicating with people.[80]

[101] I find on the balance of probabilities that if Mr Lainas had not been dismissed, he would have remained employed for a further period of five months. During this period Mr Lainas would have continued to receive his normal salary which was a loaded rate of $112,200 per annum ($9,350 per month). Mr Lainas received additional remuneration for overtime. His average earnings including overtime during March – May 2023 was an average of $12,167 per month. In June, no overtime was worked, so his monthly remuneration would have been $9,350. Based on this evidence, I have assumed that these are typical earnings, with one month in four involving no overtime. This leads to an average monthly remuneration of $11,462.75 (9 months @ $12,167 + 3 months @ $9,350 divided by 12). On this basis, the remuneration Mr Lainas would have received, or would have been likely to receive, if he had not been dismissed is $57,313.75 (5 x $11,462.75).

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

[102] I accept Mr Lainas' evidence that since his dismissal he has earned $10,760.35 as a casual construction employee. I do not consider it necessary to make any further adjustment for any further income reasonably likely to be earned. This reduces the amount of compensation to $46,553.40.

Viability (s 392(2)(a))

[103] No submission was made on behalf of the Respondent that any particular amount of compensation would affect the viability of AmSpec's business, and I make no adjustment on this account.

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

[104] My view is that Mr Lainas' period of service with the Respondent (20 months) does not warrant any adjustment to the amount of compensation.

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

[105] I am satisfied that Mr Lainas has acted reasonably to mitigate the loss suffered by him because of the dismissal and I do not consider it appropriate to reduce the compensation on this account.

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

[106] It is necessary to consider whether to discount the remaining amount for any positive or negative contingencies. In all the circumstances, my view is that it is not necessary to do so.

[107] I have determined to order compensation as a gross amount, with any required taxation to be dealt with by the parties.

Misconduct (s 392(3))

[108] I have found that Mr Lainas did engage in misconduct on multiple occasions, repeatedly behaving aggressively and speaking abusively to numerous managers, and that the Respondent had a valid reason for dismissing him.

[109] I consider that a significant reduction in compensation should be made on this basis. Whilst I have found that he was unfairly dismissed, and that it was not made clear to him that his conduct was unacceptable and put his employment at risk, Mr Lainas' behaviour on multiple occasions was entirely unacceptable, and whilst the Respondent is accountable for not having addressed the behaviour earlier, on no basis could Mr Lainas have reasonably thought it was acceptable or appropriate to be rude, aggressive, intimidatory and abusive to his colleagues or management. In all the circumstances, I consider 30% to be an appropriate amount to reduce the compensation on account of misconduct. This reduces the compensation to $32,587.38.

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

[110] The amount of $32,587.38 is less than half the amount of the high income threshold and less than the remuneration Mr Lainas was entitled to in his employment with AmSpec during the 26 weeks immediately before his dismissal. There is no basis to reduce the amount of compensation because of s 392(5) of the FW Act.

Conclusion on compensation

[111] I am satisfied that the application of the *Sprigg*[81] formula does not result in an amount that is clearly excessive or clearly inadequate.

[112] I consider that an order for compensation in the sum of $32,587.38 (less taxation as required by law) in favour of Mr Lainas is appropriate in this case. An order will be made to that effect.

DEPUTY PRESIDENT

Appearances:
S Zeitz of Zeitz Workplace Lawyers, with permission on behalf of the Applicant.
A Manos of Counsel for HR Legal, with permission on behalf of the Respondent.

Hearing details:
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[1] *Fair Work Act 2009* (Cth) ("FW Act"), s.385.

[2] Applicant's Outline of Submissions at [62], HB pg. 30.

[3] Respondent's Outline of Submissions at [26], HB pg. 26.

[4] See also for example Transcript PN154-177; PN300-319

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

[6] Ibid.

[7] Witness Statement of Peter Lainas, Hearing Book ("HB") pg.93-94.

[8] Exhibit A5.

[9] Witness Statement of Ms Robertson, HB pg.183.

[10] Transcript PN643-644.

[11] Applicant's Outline of Submissions, HB pg.20.

[12] Transcript PN859, PN874-877.

[13] Transcript PN808-809, PN816.

[14] Transcript PN865-868.

[15] Transcript PN883-889.

[16] Witness Statement of Mr Lainas, HB pg.41, Transcript PN836.—PN838

[17] Witness Statement of Mr Castro, HB pg.164.

[18] Transcript PN936-947.

[19] Witness Statement of Ms Robertson, HB pg.186.

[20] Witness Statement of Mr Castro, HB pg.163.

[21] Transcript PN569.

[22] Exhibit R4.

[23] Witness Statement of Mr Lainas, HB pg.44.

[24] Applicant's Outline of Submissions, HB pgs.30-31.

[25] Witness Statement of Mr Neiva, HB pg.284.

[26] Ibid.

[27] Witness Statement of Mr Neiva, HB pg.285.

[28] Ibid.

[29] Witness Statement of Mr Lainas, HB pg.45.

[30] Ibid, HB pg.46.

[31] Applicant's Outline of Submissions at [39], HB pg. 27.

[32] Transcript PN430-443.

[33] Witness Statement of Ms Robertson, HB pg.181.

[34] Exhibit MFI-1 - Transcript of the recording .

[35] *Connor v Grundy Television Pty Ltd* [2005] VSC 466 at [49].

[36] Transcript PN610-625.

[37] Transcript PN 607-609.

[38] Witness Statement of Mr Lainas, HB pg.57.

[39] Witness Statement of Mr Lainas, HB pg.51

[40] Witness Statement of Ms Robertson, HB pg.179.

[41] Transcript PN626-630.

[42] Witness Statement of Ms Lim, HB pg.155.

[43] Witness Statement of Ms Robertson, Exhibit JR-14, HB pg. 258.

[44] Transcript PN626-631.

[45] Transcript PN626.

[46] [2023] FWC 1511 at [21-23].

[47] *Gadzikwa v Australian Government Department of Human Services* [2018] FWC 4878.

[48] Ibid.

[49] Transcript PN1024-1042.

[50] Witness Statement of Mr Lainas at [35], HB pg.44.

[51] PR929340.

[52] Applicant's Outline of Submissions at [33], HB pg.26

[53] Ibid.

[54] Transcript PN1913

[55] Transcript PN1915.

[56] Transcript PN1924-1926.

[57] Transcript PN2235.

[58] Transcript PN1967-1969.

[59] Transcript PN1901-1902.

[60] Applicant's Outline of Submissions at [16], HB pg.21.

[61] Transcript PN2720-2735.

[62] Transcript PN2238-2243.

[63] Transcript PN2279.

[64] Exhibit R4, R5.

[65] Transcript PN1675-1683, PN2029.

[66] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[67] Applicant's Outline of Submissions at [62], Hearing Book ("HB") pg. 30.

[68] Applicant's Outline of Submissions, HB pg.30-31.

[69] *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 ('*Perkins'*), cited in *Nguyen v IGA Distribution (Vic) Pty Ltd* [2011] FWA 3354 at [40].

[70] *Perkins*.

[71] Transcript PN3211.

[72] [2014] FWCFB 7198 at [10] ("*Nguyen*").

[73] (2001) 109 IR 38.

[74] Ibid at [43].

[75] Transcript PN545, 1318.

[76] See for example, Transcript PN1005-1013, PN1106-1109.

[77] (1998) 88 IR 21.

[78] Witness Statement of Mr Lainas at [59], HB pg.48.

[79] Transcript PN 1024-1042.

[80] Transcript PN1023.

[81] *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21.