



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Weiliang Pan

v

Planet Building Products Pty Ltd

(U2023/8946)

DEPUTY PRESIDENT O'KEEFFE

PERTH, 8 JANUARY 2024

Application for relief from unfair dismissal - Applicant not unfairly dismissed - Application dismissed.

[1] On 17 September 2023, Weiliang Pan (the Applicant) made an application to the Fair Work Commission (FWC) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Planet Building Products Pty Ltd (the Respondent). For the reasons set out below, I find that the Applicant was not unfairly dismissed.

Background

[2] The Applicant commenced employment with the Respondent in November 2013 and at the time of dismissal was employed as a full time storeperson. While the parties disagree as to the specifics of what was said and what actions were taken by the relevant individuals, it is agreed that a series of events took place on 30 August 2023 which resulted in the end of the Applicant's employment with the Respondent.

[3] It is common ground between the parties that the Applicant made a complaint on that day about the actions of one of his co-workers and as a result of this complaint, the Respondent conducted a toolbox meeting. It appears that discussions in that meeting resulted in a heated exchange between the Applicant and the senior manager of the Respondent and the result of this exchange was that the Applicant left the workplace and sat in his vehicle. Soon after leaving the workplace the Applicant re-entered it and went to the Respondent's office and sales room and another heated discussion took place. At the conclusion of this incident the Applicant left the workplace and did not return.

[4] There was some correspondence between the parties in the days and weeks following the ending of the Applicant's employment, but the parties were unable to resolve the issues between them, which resulted in the Applicant applying for an unfair dismissal remedy.

Permission to appear

[5] The Applicant represented himself.

[6] The Respondent was represented by the Master Builders Association (WA Branch). As the MBA (WA Branch) is an organisation of employers not registered under the Registered Organisations Act, then under s 596(4)(b)(ii) of the Fair Work Act leave to be represented was not required.

Has the Applicant been dismissed?

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

[8] 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.

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

[10] There was no dispute and I find that the Applicant was an employee of the Respondent and his employment was terminated at the initiative of the Respondent.

[11] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[12] 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?

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

[14] It is not disputed and I find that the Applicant was dismissed from his employment on 30 August 2023 and made the application on 17 September 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?

[15] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Minimum employment period

[16] 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. The relevant minimum employment period is therefore six months.

[17] I am satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of more than six months.

Applicant's annual rate of earnings

[18] It was not disputed that for the purposes of this calculation, at the time of dismissal, the sum of the Applicant's annual rate of earnings was no more than \$81,900. There are no other amounts to be worked out in accordance with regulation 3.05 of the *Fair Work Regulations 2009*. As such, I am satisfied that the Applicant's annual rate of, was less than the high income threshold of \$167,500 per annum.

[19] 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?

[20] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

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

[22] 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?

[23] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[24] 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.

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

[26] 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?

[27] 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.

[28] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.¹

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

Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?

[30] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”² and should not be “capricious, fanciful, spiteful or prejudiced.”³ 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.⁴

[31] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁵ “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.”⁶

Submissions and Evidence

[32] The Applicant submitted that there was no valid reason for the dismissal related to his conduct, as he denies engaging in any of the forms of misconduct that were alleged by the Respondent, and he submits that some of these claims of misconduct were fabricated. The Applicant also submitted that the misconduct allegations against him changed over time. Specifically, the Applicant submits that the following allegations were made against him by the Respondent:

- (a) On the day of his termination, being 30 August 2023, the Applicant submits that the Respondent gave the following reasons for termination:
 - (i) the Applicant was uncooperative; and
 - (ii) the Applicant was unable to do his job; and
 - (iii) the Applicant was a “terrible person.”
- (b) In an email received on 5 September 2023, the Applicant submits that the Respondent gave the following reasons for termination:

- (i) serious damage to Company assets, reputation and customer satisfaction; and
 - (ii) inappropriate behaviours.
- (c) In its Form F3 response, the Applicant submitted that the Respondent gave the following reasons for termination:
- (i) trespassing on Company property; and
 - (ii) harassing female staff members by carrying out unlawful video recording; and
 - (iii) purposely damaging Company vehicles on numerous occasions; and
 - (iv) purposely driving a Company forklift into walls; and
 - (v) purposely disposing of brand-new packaging rolls to deal corners; and
 - (vi) being abusive to co-workers, including making threats to fight them.

[33] The Applicant submitted that the reasons for termination set out in the email of 5 September 2023 were devoid of specifics regarding the alleged misconduct and were in any case not mentioned on the day of his termination. Further, the Applicant submitted that on the day he was terminated he was publicly humiliated and forced to leave the premises without any opportunity to discuss the situation in which he found himself, and this lack of opportunity contributed to the unfairness of the termination.

[34] With respect to the allegations of misconduct made in the Respondent's Form F3, the Applicant submitted that firstly, in terms of the allegation of trespass, he had re-entered the workplace to confirm that he had not voluntarily resigned. He further submitted that as he believed that the Respondent was treating his position as having resigned, he began to record his interactions to protect his rights. The Applicant submitted that the other allegations in the Form F3 were fabricated.

[35] In his reply submissions, the Applicant submits that the witnesses for the Respondent generally agreed that at the toolbox meeting, the Applicant challenged the management style of Mr Yunfeng (George) Yang (Mr Yang) and that, other than Mr Yang, they stated that Mr Yang had shouted at him. He submitted that Mr Yang's behaviour towards him reflected Mr Yang's anger and was humiliating. It was for this reason that he had left the premises but he maintained in the reply submissions that he had not resigned and rather that Mr Yang had terminated him at that point.

[36] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's conduct because he had engaged in a number of instances of misconduct on 30 August 2023. Specifically, the Respondent submitted that the Applicant had:

- (a) behaved aggressively and filmed, confronted, shouted at and threatened other employees; and
- (b) refused to leave the workplace when asked numerous times to do so; and
- (c) aggressively confronted the Respondent's owner Mr George Yang (Mr Yang); and
- (d) rushed and shouted through the show room, upsetting customers.

[37] The Respondent further submitted that, to the extent that it had not informed the Applicant in clear terms why he was being terminated, this was due to the demeanour and aggression of the Applicant. The Respondent submitted that given the Applicant's behaviour, it had made a judgment that having the Applicant at the workplace was a safety concern and had thus decided to terminate him without having him return to the workplace.

[38] In closing submissions during the hearing, the Respondent further submitted that the actions of the Applicant when he returned to the workplace were pre-meditated in that he had the opportunity, while seated in his car, to consider carefully how he might proceed. The Respondent further submitted that while there may have been some issues with process in terms of the way the Applicant's termination had been handled, these were perhaps understandable given the size of the business. The Respondent also drew my attention to the fact that it had not exercised its right to withhold entitlements such as long service leave despite the Applicant engaging in gross misconduct.

[39] The Applicant's evidence in his witness statement was that the incident that led to his termination began when he reported to his supervisor, Ms Vun Yee Thien (Ms Thien), that the telephone of another employee had been left unattended on a forklift with music playing loudly. Ms Thien had then escalated this issue to Mr Yang, the Respondent's Director. The Applicant stated that the employee who owned the phone, Mr Matt Andrews (Mr Andrews) had then become agitated and confronted him, claiming that the Applicant was targeting him.

[40] Following this incident, the Applicant's evidence was that Mr Yang had called a toolbox meeting of warehouse staff, including Ms Thien. At that meeting, Mr Yang asked the Applicant and Mr Andrews to explain their respective versions of events. The Applicant's further evidence was that he had then asked Mr Yang about the correct procedure for dealing with the telephone left on the forklift, but Mr Yang had then accused him of being uncooperative. The Applicant's evidence was that he had then stated that there were no clear guidelines for employee behaviour.

[41] The Applicant stated that Mr Yang had then begun a personal attack on him, including telling him to shut up. The Applicant's evidence was that he had then told Mr Yang to shut up and Mr Yang had responded by saying:

"You fucking idiot, you can't do your job, what's the reason you stay here, get out of here, go home."

[42] The Applicant claimed that Mr Jarrod Clark (Mr Clark) had then told him that as he had been told to leave private premises he was obliged to leave. The Applicant's evidence was that he felt he had no choice but to leave the premises and he did so, saying "I'm done." As he was walking away, the Applicant's evidence was that Mr Yang had yelled for everyone to hear that he was a "terrible person" and that he was "hopeless". The Applicant claimed that as he was sitting in his car outside of the building, he could hear Mr Yang telling people that the Applicant was a "jobless man".

[43] The Applicant's evidence was that following this, at 10:43 am, he called Ms. Thien to clarify his situation. Ms Thien said that everyone had heard that the Applicant had resigned. The Applicant says that at this point, Mr. Yang took the phone away and told him to make a claim with Fair Work and then hung up. The Applicant's further evidence is that he thought it was unfair to be falsely accused of voluntarily resigning after being expelled. As such, in order to protect his rights, he states that he walked into the office to try to record Ms. Thien confirming his employment status, and he stated to Ms Thien that he was recording their conversation and questioned whether he was fired.

[44] The Applicant's evidence is that subsequently, four or five male employees pushed him to the ground from behind and snatched his phone and then someone hit him on the back of the neck. The Applicant states that he then took back his phone and left. Thereafter, the Applicant claims that he felt short of breath and had hypertension symptoms. As such, he immediately called his wife for help. The Applicant states that his wife called the police and she arrived at the Respondent's premises almost at the same time as the police. One of the police officers advised the Applicant that Mr. Yang could not restore the surveillance video and would not accuse anyone. The officer said that the employees inside said that the Applicant was rolling on the ground myself, and the Applicant's evidence is that he replied that they had pushed him down with force. One of the police officers checked the Applicant's neck and told him to go to the hospital if necessary and told him to go to the nearby police station to make a statement. The Applicant's evidence is that because he did not want to wait in the police station for 3-4 hours, he did not make a statement and went home.

[45] The Applicant states that thereafter, there was a phone call to his wife advising that the email dated 5 September 2023 had been sent, and the email itself, but no further contact from the Respondent. Under cross examination, the Applicant was asked why he had not, in his originating application, provided any details about what happened when he had re-entered the workplace, or even mention that he had done so. The Applicant's explanation of this gap in his description of events was that he wanted to be succinct and thought that the relevant information for the application was that which pertained to the toolbox meeting, as he argued that this was when he had been terminated. The Applicant was further questioned about why he had not included any information about re-entering the workplace in his initial submissions made to the FWC. The Applicant stated that he had not thought that it was appropriate to raise what had happened after he had initially left the workplace, as in his submission, he was "expelled" from the workplace and therefore already terminated at the point where he re-entered.

[46] The issue of the Applicant appearing to want to avoid the events that occurred when he re-entered the workplace was raised with him again in cross-examination, when he was asked by the Respondent why he had not included in his witness statement anything about the interactions he had with Ms Thien and Mr Yang when he returned to the workplace. The Applicant responded that he "just didn't, for no reason". He also claimed that in his witness statement he did not say that he did not interact with Ms Thien and Mr Yang.

[47] When questioned by the Respondent about the conduct of the toolbox meeting, the Applicant conceded that he had interrupted Mr Andrews on a number of occasions when Mr Andrews was attempting to explain what had happened that had upset the Applicant. The Applicant further conceded that he had challenged the management of Mr Yang when it was his turn to explain his position. The Applicant also conceded that he had said that he had "been waiting for this for a long time" but then later in cross-examination claimed that he had not said this and that it was just an exaggeration and then later again, in response to my questioning, conceded that he did say those words.

[48] The Applicant initially conceded that he had advised the Respondent that he was quitting by saying "I'm done", albeit that he had done so after Mr Yang had yelled and swore at him and told him to leave. Later, in response to my questions, he sought to portray what he had said

as being a response to being told to leave and a way of responding to being terminated. With respect to the conduct of the meeting, the Applicant stated that, contrary to Mr Yang's evidence he was not ranting and was calm and speaking normally throughout the process.

[49] The Applicant denied that he had been thinking about leaving for a long time and claimed that his comment about waiting a long time was a heat of the moment comment. In response to my questions however, the Applicant admitted that he had told other employees that he did not like the Respondent and that he wanted to leave.

[50] When questioned by the Respondent about what happened when he returned to the workplace, the Applicant did not accept that it had been his intention to cause trouble, or that he had been aggressive or acted in a threatening manner, albeit that he did concede that videoing Ms Thien and Mr Yang had been a mistake. He maintained that he wanted to ensure that the ending of his employment was acknowledged to have been at Mr Yang's initiative and that he had not resigned voluntarily. The Applicant denied that he had placed his phone in Ms Thien's face and stated that he had held the phone at hip level and had been some distance from Ms Thien. He further denied that he had been shouting, albeit that he conceded in response to my question that he had been speaking more loudly than usual.

[51] The Applicant maintained under cross-examination that he had been pushed to the ground by four or five male employees, but he was unable to identify any of these people. When pressed about this issue and who he saw when he looked around, the Applicant was only able to identify three people. Contrary to the evidence of other witnesses, the Applicant stated in response to my question about where he had been pushed that he was still near the front counter, rather than in the tool shop.

[52] As the Applicant had conceded that the Respondent had reached out to him via his wife and offered an opportunity to discuss his work situation after the events of 30 August 2023, I asked the Applicant why he had not taken that opportunity. The Applicant responded that he and his wife had been unwell on the day of the meeting but had not proposed an alternative date. The Applicant also stated that he did not believe Mr Yang was genuine and that he had lost trust in Mr Yang.

[53] The evidence of Mr Yang for the Respondent was that due to the Applicant's nature and attitude, he had to conduct four toolbox meetings for Planet Plasterboard staff members in the previous two years, and all four were about the arguments that the Applicant had with his colleagues. Apart from these four toolbox meetings it was Mr Yang's evidence that there were no other toolbox meetings conducted in the last ten years.

[54] Mr Yang stated that at around 10:00 am on the 30th of August 2023, Ms Thien had approached him to conduct a toolbox meeting regarding the warehouse, as the Applicant had a conflict with Mr Andrews. Mr Yang's evidence was that, as usual, he asked both parties for their accounts. Mr Andrews had, despite several interruptions from the Applicant, explained his situation, mentioning that he left his mobile on the forklift with music playing while he went for a coffee. He also stated that the Applicant could have spoken to him directly, advising him not to leave the phone on the forklift with music if he found it bothersome.

[55] Once Mr Andrews had finished, Mr Yang's evidence is that he turned to the Applicant, asking for his version of events, and the Applicant asserted that Mr Andrews had left the phone on the forklift, playing loud music, while the forklift was unattended, preventing others from using it. Mr Andrews then countered, saying, "I just went for a coffee, and the music was not loud." Mr Yang's evidence is that at this point, the Applicant became visibly agitated, waving his hands and exclaiming, "It has happened many times." The Applicant had then pointed at Mr Andrews and said, "it's not your fault." Mr Yang says that the Applicant then turned to him and said "George, it's your fault. Where is your procedure for this?"

[56] Mr Yang's evidence is that he then responded, "what procedure are you talking about?" but that the Applicant seemed highly frustrated, stating, "I've been waiting for this day for too long. I don't want to work for you anymore. No one likes you, George." Mr Yang states that at this point, he advised the Applicant that if he had decided not to work for him anymore, he could pack up and leave immediately. Mr Yang's evidence is that there was then a ten minute period of argument before the Applicant walked to his car.

[57] Mr Yang's further evidence is that after approximately 20 minutes, he went to the Respondent's showroom and saw the Applicant confronting Ms Thien at the counter. Mr Yang states that he was aware that Ms Thien was pregnant and was concerned about the aggression being displayed by the Applicant. As such, his evidence is that he felt obliged to intervene. Mr Yang states that he told the Applicant to leave but that the Applicant had turned on his camera, asking if he had been fired and, despite being instructed to go home, continued filming despite being again asked to leave and act like an adult.

[58] Mr Yang's evidence is that the Applicant continued to resist leaving the premises and brought his camera close to Mr Yang to the point where it was nearly touching his face. Mr Yang states that he had to step backward at this point to avoid physical interaction and did not announce his intention to terminate the Applicant's contract because he felt under duress and thought he could be in physical danger given the Applicant's increased aggression and harassment. Mr Yang's further evidence is that the Applicant's behaviour was then reported to the police, and Mr Carl Wu (Mr Wu) intervened and separated himself and the Applicant.

[59] Mr Yang states that the Applicant then moved away from the front counter and went to the tool shop. At this point Mr Benjamin Sharp (Mr Sharp) walked in and told the Applicant to leave. Notwithstanding this request, Mr Yang states that the Applicant then made his way further into the tool shop. Mr Sharp then made his way in front of the Applicant with his arms open and to block the Applicant from proceeding further. Mr Yang's evidence is that, at this point, the Applicant fell to the ground but subsequently got up and ran off. Mr Yang's evidence is that at this point the police arrived and advised the Applicant to leave the premises.

[60] Mr Yang's evidence is that on the night of 30 August 2023 the Applicant sent an email to accounts@planetplasterboard.com.au, a shared email box for all order, sale, and account-related matters. In this email, the Applicant claimed that Mr Yang had dismissed him. Mr Yang states that this email was forwarded to him on 4 September 2023, and he then asked Ms Thien to calculate the Applicant's entitlements and inform him via email of his termination due to serious misconduct. Mr Yang's evidence is that no reply was received to this email.

[61] Under cross examination Mr Yang conceded that he had been angry during the toolbox meeting and conceded that it was inappropriate to swear at employees. Mr Yang further conceded that he had asked the Applicant to leave the workplace after the toolbox meeting, albeit that this was because the Applicant had resigned.

[62] In response to my question about his evidence that he did not tell the Applicant he was fired when the Applicant returned to the workplace on 30 August 2023 because of his fear of being assaulted, Mr Yang's response was that the Applicant was forcing him to walk backwards, was agitated and Mr Yang feared based on previous experience that the Applicant would become more aggressive. Regarding the Applicant's claim that he had been pushed to the ground, Mr Yang's response to my question was that he had seen the Applicant fall to the ground and that the Applicant had not been pushed. Further, the only people in the vicinity of the Applicant, who was in Mr Yang's evidence in the tool shop when he fell, were Mr Sharp and Mr Yang.

[63] It was the evidence of Mr Yang that he had not processed the Applicant's termination payments at the time that he reached out to the Applicant's wife. When I questioned why this was, Mr Yang explained that he did not really want to summarily terminate the Applicant and that he was waiting for the Applicant to respond to the correspondence that had been sent to him.

[64] The evidence of Ms Thien is that an altercation occurred between the Applicant and Mr Andrews when the Applicant raised a complaint about Mr Andrews' personal mobile phone being left unattended on a forklift with loud music playing. Ms Thien attests that she contacted Mr Yang, to conduct a toolbox meeting with all warehouse staff to address potential issues. Ms Thien states that both Mr Andrews and the Applicant were given an opportunity to explain the incident. She further states that after Mr Andrews provided his explanation, the Applicant expressed his frustration, blaming Mr Yang for not establishing protocols for such unacceptable behaviours, claiming it had occurred multiple times.

[65] Ms Thien's further evidence is that the Applicant told Mr Yang "I have been waiting for this moment for so long; that's why I don't want to work for you. Stop pretending to be nice!" Ms Thien states that Mr Yang then replied to the Applicant that if this was the case, there was no need for further conversations and Mr Yang instructed the Applicant to pack his belongings and leave. Ms Thien's evidence is that the Applicant was very upset, and yelled at Mr Yang, resulting in a heated exchange and, despite Mr Yang's repeated requests for the Applicant to leave, the Applicant refused to do so for some time, although he did eventually leave and headed towards his car.

[66] Ms Thien's evidence was that approximately 10 minutes later, the Applicant entered the office/showroom while recording her without her consent using his mobile phone. Ms Thien states that the Applicant insisted that she approach his camera, and asked in a provocative manner, "Are you firing me?" It is the evidence of Ms Thien that at this point she maintained her position, and urged the Applicant to leave professionally, despite being terrified and traumatised and concerned for the wellbeing of her baby as she was pregnant.

[67] Ms Thien's evidence goes on to state that Mr Yang then entered the office and cut in between the Applicant and herself and the Applicant turned the camera towards Mr Yang,

repeating the same question about being fired. Ms Thien states that despite Mr Yang's instructions to the Applicant to leave, the Applicant persisted with his questioning. Ms Thien's evidence is that while the Applicant was filming Mr Yang, Mr Yang kept stepping backwards to get himself away from the Applicant's phone but the Applicant kept moving towards Mr Yang. Ms Thien states that she believed that the Applicant was going to start a physical fight with Mr Yang and that she heard people saying, 'call the police, call the police'. Ms Thien further states that she was shocked at the Applicant's aggressive behaviour and instructed Mr Wu to separate them, and also told Mr Ronny Phua (Mr Phua) to get Mr Sharp back to the office to prevent a possible physical interaction.

[68] Ms Thien's evidence is that Mr Sharp told the Applicant to leave, but the Applicant instead ran into the tool shop. Ms Thien states that Mr Sharp followed the Applicant and kept asking him to leave, but the Applicant did not leave and instead fell to the floor. Ms Thien's further evidence is that Mr Sharp and Mr Yang continued to tell the Applicant to leave which after some time he did. In response to my question, Ms Thien explained that she had not seen the Applicant fall to the ground but she was aware that the falling incident had occurred in the tool shop.

[69] The evidence of Mr Sharp is that while the toolbox meeting was taking place in the warehouse, he was in the office approximately 10 metres away, serving a customer and he could hear a commotion through the wall. Mr Sharp states that initially, he did not take a lot of notice about the noise as his attention was on the customer, but that the customer appeared to be distracted by the noise and shouting. Mr Sharp further states that after some time and much shouting, the Applicant appeared to leave the warehouse, but a short time later the Applicant came in the front door still shouting towards Ms Thien with his camera phone pointed at her and yelling "am I fired", "are you firing me".

[70] Mr Sharp's further evidence is that at this point, Mr Yang entered the area and engaged with the Applicant. Mr Sharp states that he was still talking to the customer but due to the volume of the Applicant's voice they could not hear each other talk. Mr Sharp further states that he ended up yelling to the customer "let's go talk outside", which they then did, however the customer did not want to come back inside and left without making any further purchases.

[71] Mr Sharp's evidence goes on to state that as the customer was just leaving, Mr Phua stuck his head out of the door and said, "Ben come, come" and made a motion with his fist which Mr Sharp took to indicate fighting/punching. Mr Sharp states that upon re-entering the building he saw that the Applicant and Mr Yang were about three to four feet apart facing one another, with Mr Wu in between them facing Mr Yang creating a physical barrier with his arms. Mr Sharp further states that the Applicant had his arms extended in front of his face, holding a mobile phone with both hands, which he presumed was recording Mr Yang. Mr Sharp states that he walked up to the group and when he got within a couple of metres, he had his right arm extended forward towards the front door and his left hand extended out straight in an effort to usher the Applicant the exit, and he said words to the effect of "it's time to leave, enough is enough. It's time to leave."

[72] Mr Sharp's evidence is that at this time the Applicant was still pursuing Mr Yang around the shop and yelling in an aggressive tone and when the Applicant turned his head slightly and saw Mr Sharp standing next to him, Mr Sharp put his right hand over the Applicant's forearm

as if to say “put your phone down and leave”. Mr Sharp states that the amount of force he used was minute, not even enough to move the Applicant’s hands down one centimetre, but at this point the Applicant stepped back into him, and his upper back/ shoulders made contact with Mr Sharp’s forearm. Following this contact, it is Mr Sharp’s evidence that the Applicant turned and ran at full speed down one of the aisles further into the shop, stopping after approximately 10 metres and then just staring at the back wall. Mr Sharp states that he followed the Applicant, and he thought that the Applicant he was surprised to see him following him and that when the Applicant saw him, he started to turn towards Mr Sharp and Mr Sharp stopped the Applicant’s arm from turning toward him as he did not wish to have the camera thrust in his face.

[73] Mr Sharp states that at this point the Applicant laid down on the ground and Mr Sharp knelt down next to the Applicant with one knee on the ground and said words to the effect of “get up” and “this is enough”. Mr Sharp’s evidence is that the Applicant lay down of his own accord and was not pushed nor did he did not trip. Mr Sharp states that a few seconds later, Mr Yang appeared next to him and knelt down beside him and while he cannot recall the exact words, the Applicant and Mr Yang were continuing to yell at each other. At this point, Mr Sharp’s evidence is that Mr Wu approached him from behind and grabbed both of his arms and while he did not resist Mr Wu, he did turn around to look at Mr Wu and said “what are you doing”. Mr Sharp states that Mr Wu told him not to hit the Applicant or to hurt him but that he told Mr Wu that this was not his intention but rather he simply wanted the Applicant to get up and leave. At this point, Mr Sharp states that the Applicant picked himself up off the floor and then ran towards the front door. Mr Sharp’s evidence is that he followed the Applicant out at a brisk walk, and he noted that the Applicant ran straight to his car and got in the driver’s seat. Mr Sharp states that he then knocked on the Applicant’s car window and motioned to roll the window down so that they could talk, but as the Applicant ignored him and started making a phone call, he walked back into the office.

[74] In response to my question at hearing, Mr Sharp confirmed that he had seen the Applicant lay down on the ground in the tool shop and that he had lain down of his own accord. It was Mr Sharp’s further evidence that due to the limited space in the tool shop, it would have been physically impossible for four or five people to have been present and pushed the Applicant.

[75] The evidence of Mr Hayden Cheng (Mr Cheng) is that the Applicant had been displaying a poor attitude towards the Respondent and Mr Yang for some time and would often complain about his co-workers and management. Mr Cheng also states that the Applicant would deliberately try to create trouble amongst his co-workers.

[76] In respect of the events of 30 August 2023, Mr Cheng’s further evidence is that he attended the toolbox meeting conducted by Mr Yang. Mr Cheng states that at the meeting, Mr Yang asked the Applicant and Mr Andrews to explain what had happened and that Mr Andrews had told his version of events, albeit that he was interrupted a few times by the Applicant, who had to be asked by Mr Yang to stop interrupting. Mr Cheng states that when Mr Andrews finished his explanation, the Applicant began ranting about many unrelated subjects and blaming Mr Andrews for his phone being placed on the forklift with music on too often. Mr Cheng’s evidence is that the Applicant then began blaming Mr Yang, stating “it’s your fault, George. No one likes you, George. I don’t want to work for you. I’ve been waiting for this day for so long.”

[77] Mr Cheng states that at this point Mr Yang had told the Applicant that if he wanted to quit, he can leave but the Applicant refused to leave, and Mr Yang then raised his voice and told the Applicant again to leave. Mr Cheng's evidence is that Mr Yang was clearly angry but that this was out of character for Mr Yang. Mr Cheng's evidence is that the Applicant then left the warehouse and went to his car, but some twenty minutes later, Mr Cheng saw the Applicant walking towards the office.

[78] Mr Cheng states that at this point he got off his forklift and approached the Applicant, speaking in Chinese. Mr Cheng's evidence is that the conversation went as follows:

Mr Cheng: "David, have a good talk to the boss. You can continue working here."

The Applicant: "No chance of talking to him nicely"

Mr Cheng: "It's okay, then let's just forget it. Let's part on good terms."

The Applicant: "How can it be okay? I'm not done with him."

[79] Mr Cheng's evidence is that the Applicant then walked into the office and soon after he heard a loud noise coming from the office. Mr Cheng states that through the office window he saw the applicant putting his phone to Mr Yang's face shouting "Am I fired?" and "Did you fire me?" Mr Cheng further states that Mr Yang asked the Applicant to leave with his fingers pointing to the door but the Applicant refused to leave and kept running around with his camera on and that the altercation lasted for over ten minutes.

[80] Under cross-examination, Mr Cheng conceded that Mr Yang had been angry during the toolbox meeting. In response to my question, he stated that the Applicant had indicated he was unhappy with the Respondent because he complained about "everything" and did so on most occasions when Mr Cheng spoke to him.

Consideration

[81] In analysing the sequence of events that resulted in the ending of the Applicant's employment, I find that there are a number of issues to be considered, albeit that ultimately there may only be one particular incident that is determinative of the fairness or otherwise of the termination. As far as the evidence presented to the Commission, I note that the evidence of the Applicant often directly contradicts the evidence of the witnesses for the Respondent. However, the evidence of the various witnesses for the Respondent tends to be very consistent save for minor details that I do not find to be such that they devalue that evidence. Where the evidence of the Applicant varies from that of the Respondent's witnesses and the evidence of all of the Respondent's witnesses is consistent, I have preferred the evidence of the Respondent's witnesses. Further, I found the Applicant to be a somewhat evasive and occasionally argumentative witness and I have detailed above an occasion where his testimony varied over the course of his evidence. As such, I find as follows.

[82] In the first instance, there is the background to the toolbox meeting held on 30 August 2023. I find, based on the various comments attributed to the Applicant and his own admission

that he had spoken to other employees about not liking the Respondent Company and wanting to leave, that the Applicant was a disgruntled employee. Further, I find that the issue over which he had made a complaint was somewhat trivial in nature. As such, I find that the Applicant approached the toolbox meeting in a frame of mind that was not conducive to a calm and rational discussion of an issue, but rather one where he was more interested in an argument.

[83] I further find that the Applicant was disruptive in the toolbox meeting and used his time to speak as an opportunity to vent his frustrations about the Respondent and the management of Mr Yang. Such a course of action was ill-considered and likely to provoke a response, which it did. Mr Yang became angry with the Applicant, and this resulted in a heated exchange. The Applicant submits that this exchange resulted in his termination by Mr Yang. The Respondent submits that the Applicant resigned. I will deal with these two contentions separately.

[84] In considering whether the Respondent terminated the Applicant at this point, the evidence is somewhat unclear. The Applicant provided some limited evidence in support of this proposition. He claimed that Mr Yang had said to him:

*“You f**ing idiot, you can’t do your job, what’s the reason you stay here, get out of here, go home!”⁷*

The evidence of the Respondent’s witnesses does not provide any specifics of the altercation between Mr Yang and the Applicant at the toolbox meeting but focusses instead on the statements made by the Applicant to the effect that he was resigning. The Applicant claimed that to the extent he did say something such as “I’m done”, it was said not as a resignation but rather as an expression to preserve some face in a public setting.

[85] In terms of a resignation, I find that the words attributed to the Applicant at the end of the toolbox meeting by three of the Respondent’s witnesses, specifically words to the effect of “I’ve been waiting for this for a long time” and words to the effect of “I don’t want to work for you anymore” suggest that the Applicant did resign, albeit that he did so in the heat of the moment and in a state of high agitation. If this was indeed the case, then there was an obligation upon the Respondent to do more than simply accept that resignation if it wanted to rely upon it as being the action that severed the employment relationship. As was stated by the Full Bench of the FWC in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli*:

“Having regard to the above authorities and the bifurcation in the definition of “dismissal” established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

- (1) *There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the “heat of the moment” or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although “jostling” by*

the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.”⁸

[86] As such, even if there was a resignation, I think it was incumbent upon the Respondent to seek to confirm, after a reasonable period of time, if the Applicant did indeed wish to resign. In terms of whether the Applicant was terminated at the toolbox meeting or resigned in the heat of the moment, I find that it is more likely on balance of probability that the Applicant did resign. However, for reasons that I will now explain, I find that it does not in any case matter whether the Applicant was terminated at the toolbox meeting or if he resigned in the heat of the moment.

[87] I find that the most relevant incident in the ending of the Applicant’s employment is that which occurred when he returned to the workplace. I accept the evidence of the Respondent’s witnesses that when the Applicant returned to the office and confronted Ms Thien and then Mr Yang, his behaviour was completely unacceptable. I find that he was aggressive, threatening and that he shouted at both Ms Thien and Mr Yang. I find that he continually refused to leave the premises despite being asked to do so. I find that when Mr Sharp and others were trying to convince him to leave, the Applicant responded by retreating further into the workplace and continuing his erratic and unacceptable behaviour. I do not accept that he was pushed to the ground by four or five male employees during this time and find that his claim that he was is not supported by the evidence before the FWC.

[88] I am not persuaded by the Respondent’s submission that the Applicant’s return to the workplace was simply to cause trouble. It may well have been to try to argue the case that he had not, as was being alleged, resigned his employment. Nevertheless, his behaviour when he returned to the workplace was such that it provided the Respondent with grounds to terminate his employment. Having made this finding, it is appropriate that I comment on what the Applicant, albeit in passing, seemed to submit regarding his employment status at the time he re-entered the workplace, as it seems to me that he was seeking to imply that as he had already been terminated, his actions were therefore not those of an employee and thus not relevant.

[89] In the first instance, as I found above, I am of the view that on balance of probability the Applicant had resigned in the heat of the moment. If so, it was, as per the finding in *Bupa*, incumbent on the Respondent to confirm if this was indeed his intention if it wanted to rely on this resignation. In the absence of such further inquiry, it may have been the case that the termination was taken to be at the initiative of the Respondent. If it is the case that the Applicant resigned in the heat of the moment and his employment status was effectively uncertain, albeit only for a short period, then I find that the Applicant’s actions in re-entering the workplace and behaving as he did during that short period removed the need for the Respondent to make any inquiries about his intentions as the Applicant’s subsequent behaviour entitled the Respondent to terminate his employment.

[90] If, however, I am incorrect and, as per the Applicant’s submissions his employment was terminated by the Respondent at the toolbox meeting, then I nevertheless find that the behaviour in which he engaged upon re-entering the workplace is relevant. In previous decisions, the FWC has taken the view that conduct engaged in by an employee post-termination is relevant when considering whether their termination was unfair. For examples see *Sheldrick v Hazeldene’s Chicken Farm Pty Ltd*, *Dzuirek v A’Vard Industries Pty Ltd* and *Renton v Bendigo Health Care Group*⁹.

[91] I do not accept the Applicant’s characterisation of his employment as having been terminated at the toolbox meeting. However, even if it was then the behaviour in which the Applicant engaged less than half an hour after that meeting must be taken into account when assessing whether or not the Respondent had a valid reason for termination. The Applicant’s submission to the effect that once a termination is given effect then all future behaviour by the employee is irrelevant simply cannot stand.

[92] In summary, I find that when the Applicant re-entered the workplace, he engaged in aggressive, threatening and erratic behaviour that was such that it entitled the Respondent to terminate his employment. As such, there was a valid reason for termination.

Was the Applicant notified of the valid reason?

[93] 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).¹⁰

[94] Previous decisions of the FWC and its predecessor bodies have found that 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,¹¹ and in explicit¹² and plain and clear terms.¹³

Submissions and Evidence

[95] The Applicant submitted that he was not notified of the reason for his termination on the day of termination and that such notification as he did receive was via email some days later and then again in the Form F3. The Applicant also submitted that the reasons for termination varied between:

- (i) the day of his termination, where he submits that he was simply told that he was hopeless, uncooperative and unable to do his job; and
- (ii) the email of 5 September 2023, where he was told his termination was for “...*a series of misconducts which had caused serious damages (sic) to the company’s assets, reputation and customer satisfactory (sic) level...*”; and
- (iii) the Form F3 submitted by the Respondent where the Respondent stated that the reasons for termination were:
 - (a) “*on 30th of August, trespassing (sic) company property without consent.*”

- (b) *on 30th of August harassing female staff members by carrying out unlawful video recording on a private premises.*
- (c) *Purposely damaging company vehicle in (sic) numerous occasions, as per the statement from your former co-workers.*
- (d) *purposely driving company forklift to (sic) walls, as per the statement from your co-workers.*
- (e) *purposely disposing brand new packaging rolls to dead corners.*
- (f) *Being abusive to co-workers, threatened to have a fight with at least one co-worker.*

[96] The Respondent conceded in its submissions that it had not given the Applicant the reasons for his dismissal prior to his termination, but submitted that this was due to the highly Applicant's highly agitated state. Instead, the Respondent submitted that it had emailed the Applicant the reasons for his termination on 5 September 2023.

[97] The email of 5 September 2023 and the Form F3 were both in evidence and support the Applicant's position regarding the changing nature of the allegations against him. As I stated above, I find that the Applicant resigned his position at the toolbox meeting and so his allegations about the reasons for termination given at the toolbox meeting are not relevant to this consideration. In its submissions, the Respondent moved away from a number of the allegations against the Applicant, such as damaging company property, and focused instead on the events which took place after the Applicant re-entered the workplace on 30 August 2023 as its reasons for termination.

Consideration

[98] I find that the Applicant was not notified of the valid reason for his termination prior to his dismissal. Further, I find that the email dated 5 September 2023 which confirmed his termination also failed to clearly set out the valid reason for his termination, in that it merely refers to misconduct. Such clarity as is provided in that email regarding the misconduct seems to suggest that the Respondent is, at least in part, relying on damage to company property as a justification for termination, as evidenced by its claiming the Applicant had damaged company assets. This allegation was not pursued as part of the Respondent's submissions.

[99] I accept that the Respondent believed that for the safety of its employees it was more prudent to remove the Applicant from the premises on 30 August 2023 and then advise him of his termination at a later time and further accept that such a course of action may be necessary in some cases. However, the Applicant left the premises at approximately 11am on 30 August 2023 and was not advised of his reasons for termination until the email dated 5 September 2023. While I accept that there was a weekend between 30 August 2023 and 5 September 2023, I do not accept that the Respondent notified the Applicant of the reasons for termination within a reasonable time period. Further, I do not think that the Respondent has, in the email dated 5 September 2023, advised the Applicant of the specific reasons for termination upon which it relied at hearing. As a consequence, the Applicant when making his application for an unfair dismissal remedy was still unaware of the true scope of the allegations against him for which

he would need to argue his case. I find this to be a significant procedural flaw that has some bearing on the fairness of the dismissal.

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

[100] 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.¹⁴

[101] 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.¹⁵ 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.¹⁶

Submissions and Evidence

[102] The Applicant submitted that he did not have an opportunity to respond to any valid reason. He submitted that, in addition to not being given the valid reason for his termination in clear terms, there was no opportunity provided to him to speak to the Respondent about his termination. The Applicant submits that such offer as was made by the Respondent to discuss his situation was made to his wife and made some sixteen days after his dismissal.

[103] The Respondent submitted that it had attempted to provide an opportunity for the Applicant to respond. Although the Respondent concedes no opportunity was provided on the day of termination, it submits that the contact made with the Applicant's wife was intended to set up a meeting at which the Applicant's employment situation could be discussed.

[104] From the evidence it is clear that a meeting between the parties was arranged but that the Applicant and his wife did not attend. In his submissions, the Applicant claimed that when Mr Yang spoke to his wife, Mr Yang continued to insist that the Respondent had done nothing wrong. Given this, and the fact that Mr Yang had not paid him his entitlements, the Applicant did not want to meet with Mr Yang. In response to my question about why he did not attend the meeting after it had been arranged, the Applicant stated that he and his wife had not attended because they were unwell. In response to my further question about re-scheduling the meeting, the Applicant said that he did not attempt to set up an alternative meeting because he did not trust Mr Yang.

[105] As explained in paragraph [63] above, I also questioned Mr Yang with respect to this meeting and the reason why he had not paid the Applicant his entitlements. Mr Yang's evidence was that he did not want to summarily terminate the Applicant and that he was waiting for the Applicant to respond to his email.

Consideration

[106] I find that the Applicant was not provided with an opportunity to respond to the valid reason for his termination. In the first instance, the email dated 5 September 2023 does not, as

I found above, clearly articulate the specific reasons for termination upon which the Respondent relies and, in addition, contains allegations of behaviour upon which the Respondent does not rely. It is settled that to respond to a valid reason for termination the employee must be given that valid reason in clear terms and until the Respondent made its submissions, the valid reason for termination upon which the Respondent relies was not made clear.

[107] I also do not find that the meeting proposed by Mr Yang can be said to be an opportunity to respond to the reason for termination. In the first instance, the email of 5 September 2023 does not invite the Applicant to discuss his termination. Instead, it unequivocally confirms that he is terminated and sets out his entitlements. The only invitation to respond is for the Applicant to advise if he agreed with the amount calculated for his entitlements. Secondly, the Respondent waited, by his own evidence, some ten or so days to follow up that email when he did not get a response. Such a delay is not consistent with an intent to give the Applicant an opportunity to respond. I am mindful that in his evidence Mr Yang said that he would have considered what the Applicant had to say, and it may be that this is the case. However, it is incumbent upon the employer in these situations to follow a fair and reasonable process and I do not find that the delay in reaching out to the Applicant, and indirectly through his wife, was reasonable. In summary, I find that there was no opportunity to respond to the valid reason and this is again a serious procedural flaw that has some bearing on the fairness of the dismissal.

[108] It should be noted, however, failure to provide an Applicant with an opportunity to respond does not automatically render the dismissal harsh, unjust or unreasonable. As noted by the Full Bench in *Etienne v FMG Personnel Services*¹⁷, “s.387(c) is not a ‘criterion’. It is not the case that a person *must* be provided with an opportunity to respond to any reason related to conduct or performance. Rather, s.387(c) is a consideration to which the Commission must have regard in its analysis of whether a termination is harsh, unjust or unreasonable...”¹⁸

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

[109] 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.

[110] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”¹⁹

Consideration

[111] It was common ground between the parties that the Applicant had not asked for a support person to assist him on the day of his termination. However, it would not appear that there would have been a practical opportunity for him to have done so. Notwithstanding this, it is

clear that when the Respondent attempted to arrange a meeting with the Applicant, the Respondent did so on the basis that the Applicant would have a support person with him.

[112] As such, I find that this matter is a neutral consideration when assessing whether the dismissal was harsh, unjust or unreasonable.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[113] 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?

Submissions

[114] The Respondent submitted that the size of its enterprise had no impact on the procedures followed in effecting the dismissal. The Applicant made no relevant submissions on this matter.

Consideration

[115] I do not agree with the Respondent's submissions that its size had no impact on the procedures followed. Although the Respondent is not a small business as defined in the Act, it is nonetheless what might be colloquially referred to as a small business, particularly in terms of its management resources and staffing levels. It is clear that the business has no specialist human resources or employee relations staff. Mr Yang agreed under cross-examination that he himself provided the human resources function for the business and had no specialist human resources advice available. Given that the evidence shows that Mr Yang's management was ridiculed by the Applicant at the toolbox meeting, the presence of a representative of the Respondent who was experienced in dealing with conflict and not directly implicated in the Applicant's criticism may have resulted in a more formal process of dealing with the Applicant's resignation. It may have also assisted in terms of removing the Applicant from the workplace after he re-entered it to alleviate any safety concerns whilst still ensuring that the Applicant was afforded a fair process of review and given a proper opportunity to respond.

[116] That is not to say that Mr Yang has reacted in an unusual way to the Applicant's behaviour when he returned to the workplace on 30 August 2023. However, it is clear from Mr Yang's evidence that terminations of employees are rare for the Respondent and as such it is perhaps understandable that the circumstances faced by the Respondent on 30 August 2023 were unexpected and outside of its scope of its experience. As such, I find that the size of the business and its consequential absence of dedicated human resources expertise did impact on the procedures used. As I have found above, the Applicant was not advised of the valid reason for his termination either prior to dismissal or indeed prior to the Respondent making its submissions in this matter, and the Applicant was also not afforded an opportunity to respond to the valid reason. These are significant procedural defects and may have been avoided in a larger organisation with more experience of terminating employees and with dedicated human

resources expertise available. While it is not the case that being a small business and / or lacking human resources expertise means that an employer is exempt from following fair procedures for termination, in the current situation I find that the Respondent having those characteristics does to some extent mitigate its procedural failings.

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?

Submissions

[117] The Respondent submitted that the lack of dedicated human resource management specialists or expertise had no impact on the procedures followed in effecting the dismissal. The Applicant made no relevant submissions on this matter.

Consideration

[118] I have set out my consideration of the matter as part of my findings in paragraphs [115] and [116] above.

What other matters are relevant?

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

Submissions

[120] The Applicant submitted that I should consider his long period of service with the Respondent when considering the harshness of the termination. He also claimed that he had suffered financial stress and that he had to cancel an overseas trip to visit his parents. The Respondent made no submissions with respect to other relevant matters.

Consideration

[121] As was found in *Telstra Corporation v Streeter*²⁰, an employee's long and satisfactory work performance or history may be taken into consideration under s.387(h) of the FW Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or unreasonable. In this instance, I must consider the Applicant's approximately ten years of service in light of the valid reason for termination created by his behaviour. I also note that there is some evidence that the Applicant's service history may have some blemishes with respect to his treatment of other staff and customers.

[122] With respect to the impact on the Applicant personally and financially, it has been established that the effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s.387(h) of the FW Act – see *Ricegrowers Co-operative v Schliebs*.²¹

[123] In the matter before me I am not inclined to take into account the impact the dismissal had on the Applicant in terms of his financial situation. The Applicant provided a character reference from his new employer which suggests that he is highly regarded, and in his submissions, he notes that this position was secured some three and a half weeks after his dismissal. In addition, the Respondent in its uncontested evidence noted that it did not, as it may have been entitled to do, withhold payment of the Applicant's long service leave and in addition paid him two weeks of notice. Given this, I find that the impact on the Applicant's financial situation is not such that it should be taken into account under s.387(h).

[124] I am also not of the view that I should take into account the impact on the Applicant's personal situation. While he claimed he has had to cancel a trip to China, there was no evidence before the FWC that this was actually the case or the extent to which such trip may have been required to be postponed.

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

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

[126] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.²²

[127] In this matter, I find that the Applicant was a clearly disgruntled employee who raised a trivial grievance with the Respondent. When the Respondent attempted to deal with the grievance in a conciliatory way, the Applicant responded by using the toolbox meeting called to try to resolve the grievance as a vehicle for levying personal criticism against the management style and abilities of the Respondent's most senior manager Mr Yang. The parties have then, following a heated exchange, formed different views as to the outcome of that exchange. From the Respondent's perspective, the Applicant had resigned whereas from the Applicant's perspective, he had been dismissed. What is not disputed is that the Applicant left the workplace. The Applicant, after some short period of contemplation, then re-entered the workplace and engaged in serious misconduct by shouting, behaving aggressively, threatening staff of the Respondent, behaving in an erratic manner and refusing to leave when repeatedly requested to do so. As such, I find that the Respondent had a valid reason for termination, albeit that it was not properly articulated at the time or indeed until the Respondent made submissions to the FWC.

[128] In terms of process, the Respondent has failed to provide the Applicant with reasons for termination or any real opportunity to respond. These are serious failings but mitigated somewhat by the size of the Respondent's business and lack of dedicated human resources expertise. The issue of support person is a neutral factor, the termination was not performance based and I am not persuaded that the Applicant's service is such that it should be a significant factor in my consideration. As such, I must consider whether the procedural shortcomings, mitigated by the size of the Respondent and its lack of human resources expertise, are such that they outweigh the valid reason for termination. I find that while the procedural deficiencies are not inconsequential, the severity of the Applicant's misconduct is such that on balance I must conclude that the dismissal was not harsh, unjust or unreasonable.

Conclusion

[129] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act. The Applicant's application is therefore dismissed.



DEPUTY PRESIDENT

Appearances:

W Pan, Applicant.

M Belfield for the Master Builders Association (WA Branch).

Hearing details:

2023.

Perth (via Microsoft Teams):

December 21.

Printed by authority of the Commonwealth Government Printer

<PR770029>

¹ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

³ *Ibid.*

⁴ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁵ *Edwards v Justice Giudice* [1999] FCA 1836, [7].

⁶ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

⁷ Applicant witness statement, at [21].

⁸ *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFCB 3941 [47].

⁹ *Sheldrick v Hazeldene's Chicken Farm Pty Ltd* [2014] FWC 5820 at [64]; *Dzuierek v A'Vard Industries Pty Ltd* [2018] FWC 1091 at [97]; *Renton v Bendigo Health Care Group* [2016] FWC 9089 at [134]

¹⁰ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].

¹¹ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

¹² *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

¹³ *Ibid.*

¹⁴ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

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

¹⁶ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

¹⁷ *Etienne v FMG Personnel Services* [\[2017\] FWCFB 3864](#) at [33].

¹⁸ *Etienne v FMG Personnel Services* [\[2017\] FWCFB 3864](#) at [33].

¹⁹ Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

²⁰ *Telstra Corporation v Streeter* [2008] AIRCFB 15 at [27].

²¹ *Ricegrowers Co-operative v Schliebs* [PR908351](#) (AIRC FB, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001) at [26].

²² *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](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].