



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Patrick Garas

v

Culture Kings Pty Ltd

(U2023/11773)

DEPUTY PRESIDENT MASSON

MELBOURNE, 27 FEBRUARY 2024

Application for an unfair dismissal remedy – applicant involved in altercation – claim of self-defence rejected - termination not harsh, unjust or unreasonable – application dismissed.

[1] On 28 November 2023, Mr Patrick Garas (the Applicant) made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging he had been unfairly dismissed from his employment with Culture Kings Pty Ltd (the Respondent) on 7 November 2023.

[2] Conciliation of the matter before the Commission was unsuccessful and the matter was then listed for determinative conference/hearing before me on 19 February 2024 to determine the merits of the application. Materials were filed by the Applicant and Respondent in advance of the proceedings in accordance with directions issued by the Commission. After hearing from the parties, I determined to conduct the proceeding as a hearing pursuant to s 399 of the Act and both parties were granted permission to be legally represented pursuant to s 596(2) of the Act.

[3] At the hearing, the Applicant was called to give evidence by his legal representative along with former colleagues Brooklyn Munemo and Javid Mohamed. For the Respondent, Mark Padua (Assistant Manager), Marissa Anderson (People and Culture Manager) and Corey-Leigh Niwa (Retail Director) were called to give evidence by the Respondent's legal representative.

Background and evidence

The Applicant's employment

[4] The Applicant commenced employment with the Respondent as a casual Retail Assistant on 4 November 2019, was converted to permanent full-time employment on 18 July

2022 in which role he continued until at his request he returned to a casual retail assistant role on 13 September 2023¹.

[5] The Employment Agreement Casual Retail (Employment Agreement) that was accepted and signed by the Applicant on 16 September 2023 relevantly includes clause 13 Employee Conduct which states as follows.

“13.1 The Employee acknowledges receipt, understanding and agrees to comply in all respects with the Company's Policies, requirements, directions, and further agrees to not at any time engage in or commit any act that reasonably could be considered to reflect unfavourably on the Employer's reputation, bring the Employer into disrepute as determined solely by Company, including but not limited to matters that breach the Company Code of Conduct.”

[6] The Respondent's Workplace Health & Safety Policy² and its Code of Conduct³ are both referred to in the Applicant's Employment Agreement and were stated to be binding upon the Applicant. The Code of Conduct states that serious and wilful misconduct may result in immediate termination of employment or engagement and then sets out a range of examples of serious and wilful misconduct which relevantly includes.

“.....

- Use of abusive or threatening language, intimidating behaviour, assault on or harassment of another team member, customer or any other person during the course of employment or engagement with Culture Kings.

.....

- Deliberate breach of any safety regulation or wilful misconduct endangering the safety of other team members, customers or visitors.

.....

- Committing a serious breach of Culture Kings Policies.

.....”

[7] The Applicant stated during cross-examination that he recalled signing the Employment Agreement, recalled that it (the Employment Agreement) included a Code of Conduct compliance requirement of which he had an understanding and that he knew that abusive language, assault or harassment were unacceptable behaviours in the workplace.

¹ Exhibit R22, Witness Statement of Marissa Anderson, dated 7 February 2024 at [7], Exhibit A, Patrick Garras 'Employment Agreement Casual Retail' dated 16 September 2023

² Exhibit R11, Culture Kings Workplace Health & Safety Policy

³ Exhibit R10, Culture Kings Group Code of Conduct

Incident of 4 November 2023

[8] As background to the events that unfolded on 4 November 2023, Mr Padua explained the process by which staff members are able to place ‘on hold’ store items in circumstances where a customer wants to think about an item before they purchase it. At the Melbourne store there is a cupboard behind the counter which employees use to place ‘on hold’ items pending the customer later confirming whether they wish to proceed to purchase the ‘on hold’ item. Mr Padua states that it is common knowledge among staff that an item placed in the cupboard is left to that employee to either process the sale when the customer returns or place the item back out on the shop floor if the customer either doesn’t want it or fails to return within 24 hours.⁴ The Applicant clarified in his evidence that larger items may be placed back out on the floor as there may be insufficient room in the cupboard and also confirmed that all staff understood that any items placed behind the counter were notionally allocated as sales for the particular staff member who placed the item ‘on hold’.

[9] Mr Padua states that during the course of the afternoon on 4 November 2023 a disagreement emerged between the Applicant and another employee Brooklyn Munemo in which Mr Munemo claimed that the Applicant had sold an item placed ‘on hold’ in the cupboard behind the counter by Mr Munemo at approximately 3.16pm, a claim rejected by the Applicant that day⁵. The Applicant referred to the CCTV footage⁶ taken of the front of house counter area (FOH Footage). He stated in cross-examination that the footage revealed that on the afternoon of 4 November 2023 he had moved the disputed sale item placed in the cupboard by Mr Munemo onto the floor of the cupboard, following which a blonde female customer at approximately 3.16pm came behind the counter and retrieved the item which was a backpack. She then presented the item for sale at the counter which the Applicant processed as a sale of his own. He states he did so as he was not aware that the item was the on-hold item from behind the counter and he did not recall Mr Munemo previously assisting the customer.

[10] Mr Munemo gave evidence that on becoming aware of the sale of the backpack being claimed by the Applicant, he approached the Applicant to confront him about what Mr Munemo regarded as a stolen sale. He states that the Applicant tried to reassure him that he did not know about the alleged stolen sale which made Mr Munemo angry and frustrated. Mr Munemo further states that the Applicant tried to shake his hand to which Mr Munemo says he responded by saying *“nah I don’t f*** with you like that I ain’t shaking your hand”*⁷.

[11] The Applicant confirms that Mr Munemo approached him in a hostile manner accusing him of stealing Mr Munemo’s sale. He says he tried to explain to Mr Munemo that there was a misunderstanding and said words to the effect, *“bro, I’m not sure what sale you are talking about, I served about 100 customers, but I didn’t steal your sales, calm down”*. The Applicant further states that he tried to deescalate the matter by offering to shake hands with Mr Munemo, who refused that offer. The Applicant conceded in cross-examination that having viewed the FOH Footage he now accepts the sale was Mr Munemo’s but that he was not aware of that at the time on 4 November 2023.

⁴ Exhibit R21, Witness Statement of Mark Padua, dated 7 February 2024, at [11]-[13]

⁵ Ibid at [17]

⁶ Exhibit R2, R3 & R4 CCTV Front of House (FOH) Footage, dated 4 November 2023

⁷ Exhibit A4, Witness Statement of Brooklyn Munemo, dated 14 February 2024, at [4]-[5]

[12] To resolve the disagreement on 4 November 2023-, the Applicant requested that Mr Padua review that day's FOH Footage to verify what had occurred. Due to other work commitments Mr Padua was unable to check the footage until after 4.00pm at which point he advised the Applicant that he would be going to the 'back of house' (BOH) area to review the footage. The Applicant and Mr Munemo accompanied Mr Padua⁸. He states that as they walked to the BOH area with Mr Padua, Mr Munemo continued to verbally abuse him regarding the disputed sale, including calling him a snake or a thief to which the Applicant says he responded by stating, "*just wait, I'll show you the footage*" or words to this effect. The Applicant agreed in cross-examination that there was no monetary benefit in him claiming the sale as no commissions were paid on any sale but that Mr Munemo's confronting him challenged his personal integrity and questioned him as a person. Mr Munemo confirmed in his evidence that as he accompanied the Applicant and Mr Padua to the BOH area he remained frustrated and angry and called the Applicant a liar and accepted that he was disrespectful towards the Applicant⁹.

[13] The BOH area is an L shaped area of approximately 10 metres by 4 metres and is accessed by a doorway from the rear of the customer service area. There is only one doorway into the BOH area. The BOH is used as a storeroom for clothing (mostly pants and shorts in different styles, colours and sizes), confetti tubes, mannequins, folding tables, step ladders, stock in cupboards and other ad hoc items. It also contains a computer along with the electrical switchboard. By reason of the shelving and cabinets in the BOH area, the available area for movement is reduced to 1.5 to 2 metres in width at the widest point while the area leading to the doorway narrows to a width of approximately 1 metre.

[14] CCTV footage of the BOH area¹⁰ (BOH Footage) captured the full incident that unfolded after Mr Padua, Mr Munemo and the Applicant arrived in the BOH area to review the FOH Footage. There is no sound although the following relevant events in chronological order are apparent from viewing the footage. Following below are observations of the footage along with the relevant evidence of Mr Padua and the Applicant regarding what occurred.

[15] At 16.25 Mr Padua, Mr Munemo and the Applicant arrived in the BOH area at which point Mr Padua logged in and started to review the FOH Footage by positioning himself on the first step of a step ladder placed in front of the computer which was placed on the shelf of a cabinet. Mr Munemo was positioned to Mr Padua's right slightly behind him while the Applicant was positioned behind Mr Padua and slightly to his left. The Applicant was positioned closest to the BOH door¹¹.

[16] At 16:26 an animated exchange between the Applicant and Mr Munemo can be seen on the BOH Footage in which both men were aggressively arguing with each other while Mr Padua continued to watch the footage¹². Mr Padua states at this stage he heard the Applicant saying words to the effect "*I didn't steal your sale, Bro. How was I supposed to know the bag was your*

⁸ Ibid at [17]-[22]

⁹ Exhibit A3, at [7]

¹⁰ Exhibit R1, Back of House (BOH) CCTV footage from 4 November 2023

¹¹ Ibid at 16:25

¹² Ibid at 16:26

sale.” He states that Mr Munemo was saying in response words to the effect, “*It was my sale. The bag was put away under my name at the counter. You saw me speak to and help that blonde lady earlier today.*” Mr Padua states that the Applicant continued denying that he stole Mr Munemo’s sale¹³.

[17] Mr Padua further states that while he continued to watch the FOH Footage the Applicant and Mr Munemo continued arguing, going back and forward with Mr Munemo accusing the Applicant of stealing his sale while the Applicant continued to deny the accusation. Mr Padua felt the conversation was going nowhere so he interrupted them and said in a loud voice, words to the effect of “*Would you just stop! Stop! You are both arguing over a \$120 sale. Get over it.*”¹⁴ The Applicant in cross-examination did not accept that his exchange with Munemo was escalating at this point but did agree it was ‘heated’.

[18] The Applicant states that while Mr Padua was reviewing the FOH Footage, Mr Munemo continued to abuse him in front of Mr Padua. He states that Mr Munemo’s abuse upset him so much so that he moved closer to him and said “*I haven’t disrespected you once why are you disrespecting me what’s your problem*” or words to that effect¹⁵. At 16.27:22 the BOH Footage reveals that Mr Padua broke away from watching the CCTV footage, stepped down from the ladder and while facing towards the Applicant placed his left arm out so that it was extended to encourage the Applicant to move away from Mr Munemo¹⁶. He states he did so because he felt the matter was escalating¹⁷. He then positioned himself between the Applicant and Mr Munemo facing towards the Applicant. Both the Applicant and Mr Munemo continued arguing aggressively while Mr Padua was positioned between them¹⁸. Mr Padua further states that at this point both the Applicant and Mr Munemo’s voices were becoming louder, and he recalls they were both swearing at each other, including the use of racial insults, although he does not recall the exact swear words used¹⁹.

[19] It was at about this point according to the Applicant that Mr Munemo used words to the effect of “*f*** you n****”, to which the Applicant then said “*stop disrespecting me my n****” or words to that effect²⁰. The Applicant accepts he used the abusive and racially charged word “*n****” when arguing with Mr Munemo but rejects that he otherwise swore during the incident²¹. When cross-examined on the lead up to the physical altercation the Applicant agreed that he was frustrated with Mr Munemo, that he continued to argue with Mr Munemo, that he (the Applicant) wasn’t letting the issue drop, he felt disrespected and was upset, that both he and Mr Munemo were getting louder and that he (the Applicant) was positioned closest to the door. He claimed that the matter escalated very quickly and that he did not have time to back away.

¹³ Exhibit R21, at [26]-[27]

¹⁴ Exhibit R21 at [32]

¹⁵ Exhibit A1, at [8.10]

¹⁶ Exhibit R1 at 16.27:22

¹⁷ Exhibit R21 at [34]

¹⁸ Exhibit R1 at 16.27:22

¹⁹ Exhibit R21 at [34]-[36]

²⁰ Exhibit A1, at [8.11]

²¹ Exhibit A2, Second Witness Statement of Patrick Garras, dated 14 February 2023 at [5]

[20] When cross-examined on the argument between he and the Applicant immediately prior to the physical altercation, Mr Munemo agreed that both he and the Applicant had used the “n***” word in addressing each other. Mr Munemo explained that use of that word between friends in certain cultural groups was akin to using the words ‘bro’ or ‘friend’. He further explained that prior to the events on 4 November 2023, he and the Applicant had used the word in a friendly manner when addressing each other. He accepted however that when the Applicant used the term during their argument, he demanded that the Applicant stop calling him “n***”. He explained that demand as being because the Applicant was no longer behaving like a friend towards him and in those circumstances use of the “n***” word was not ok. Mr Munemo refused to concede that he found the term offensive in the circumstances but rather, it was not ok when the Applicant was being disrespectful towards him. Mr Padua during cross-examination specifically recalled offensive terms being used, including use of the term “n***” and that he recalls both the Applicant and Mr Munemo swearing although he could not recall the specific words used.

[21] At 16:27:29 the Applicant is seen to physically push Mr Padua’s left arm and side of his body with his right hand, which pushed Mr Padua backwards towards and across Mr Munemo. The Applicant then immediately and briefly moved towards Mr Munemo following which Mr Padua used both hands to usher the Applicant away from Mr Munemo towards the end of the BOH area closer to the doorway²². Mr Munemo then followed Mr Padua and the Applicant as Mr Padua attempted to usher the Applicant away from Mr Munemo. At this point, the Applicant and Mr Munemo can be seen in the BOH Footage continuing to argue aggressively as Mr Padua attempts to move the Applicant away from Mr Munemo. As the Applicant is moving backwards with Mr Padua’s encouragement, he physically swats Mr Padua’s right arm away from him in a forceful manner and while still arguing with Mr Munemo positions himself so that he is more directly facing Mr Munemo without Mr Padua between he and Mr Munemo. The Applicant and Mr Munemo both continue to maintain aggressive postures towards each other at this point²³.

[22] At 16:27:32 of the BOH Footage Mr Munemo is then observed lunging towards the Applicant while Mr Padua is sandwiched between the Applicant and Mr Munemo. The Applicant and Mr Munemo then start to grapple with each other while Mr Padua remains positioned between them. An aggressive scuffle continues and moves towards the doorway with Mr Padua still positioned between the two men²⁴. The Applicant states that he was punched in the face by Mr Munemo at one point during the altercation although this aspect is not visible on the BOH Footage as the parties were grappling in the corner near the door and were mostly obscured by a cupboard when the punch is said to have been thrown.

[23] The Applicant states that after Mr Padua initially positioned himself between him and Mr Munemo, he gained the impression that Mr Munemo was going to get physical. He further states that he recalls placing his hand on Mr Padua’s chest or stomach, although he could not remember exactly, in order to move Mr Padua aside as he did not want Mr Padua to get in the way if Mr Munemo did anything physical. The Applicant now accepts that he placed his hand on Mr Padua’s shoulder/chest area and that he applied some pressure when he pushed Mr Padua. In doing so he claims that he did not realise he applied as much physical pressure to Mr Padua

²² Exhibit R1 at 16:27:29

²³ Ibid at 16:27:30

²⁴ Ibid, at 16:27:32

as he had²⁵. The Applicant agreed in cross-examination that Mr Padua had been attempting to deescalate the confrontation immediately prior to the physical contact he made with Mr Padua but restated that he only pushed Mr Padua to try and move him out of the way as he was concerned Mr Munemo was going to do something physical. He described Mr Munemo as having a clenched left fist and that he moved his left leg forward immediately prior to the Applicant pushing Mr Padua, both of which actions he took as aggressive gestures of Mr Munemo. Neither of these alleged actions of Mr Munemo can be seen on the BOH Footage as he was partially obscured by Mr Padua at this point of the footage.

[24] The Applicant went on to state that after pushing Mr Padua in the chest/shoulder, he was then pushed away by Mr Padua, but Mr Munemo advanced and then lunged or charged towards him, and further claims that Mr Munemo formed his hands into fists as he moved towards him. He further states that in attempting to strike him, Mr Munemo had grabbed his upper arm or shoulder area which led the Applicant to try and swipe away Mr Munemo's right hand and in doing so he grabbed Mr Munemo's right arm. From this point the Applicant states he was attempting to hold on to Mr Munemo to prevent him from punching him or continuing to fight. The scuffle then continued with Mr Munemo pushing the Applicant and Mr Padua across the BOH area towards the doorway. He further states that while near the doorway, Mr Munemo threw a further punch that connected with his head near his left eye. As the scuffle continued the Applicant states that his only concern was for Mr Munemo to back off and he tried to keep Mr Munemo at arm's length²⁶. The Applicant denies that he hit Mr Padua in the head during the scuffle²⁷.

[25] When cross-examined on his part in the physical altercation, the Applicant remained adamant that he was neither the aggressor, nor was he an equal protagonist in the incident. He stated that he had no intention of hurting Mr Munemo although he had multiple opportunities to do so. As to withdrawing from the altercation once it commenced, he stated that it was not practical to go 'limp' as suggested by the Respondent as it would have exposed him to the risk of being hit by Mr Munemo. To avoid that risk, he attempted to keep hold of Mr Munemo and keep him at arm's length until the altercation deescalated.

[26] For his part, Mr Padua states that he recalls the Applicant initiated the scuffle by forcefully pushing him towards Mr Munemo following which he recalls Mr Munemo forcefully pushing both he and the Applicant across the BOH area toward the doorway as the Applicant and Mr Munemo grappled with each other²⁸. He acknowledged in cross-examination that his witness statement was incomplete in that it did not describe Mr Munemo's actions immediately following the initial shove Mr Padua received from the Applicant. Mr Padua agreed that the BOH Footage showed Mr Munemo following both Mr Padua and the Applicant across the BOH area as Mr Padua sought to shepherd the Applicant away from Mr Munemo after the initial 'shove'. He further accepted that Mr Munemo did not need to follow them at this point.

[27] Mr Padua also states that he was trying to break the scuffle up when he regained his balance from being pushed into the back of the door at which point, he says the Applicant hit

²⁵ Exhibit A1, at [8.13]-[8.14]

²⁶ Exhibit R21 at [8.18]-[8.29]

²⁷ Exhibit A2 at [2.1]

²⁸ Exhibit R21 at [38]

him in the head²⁹. The BOH footage reveals that the Applicant's arm did make contact with Mr Padua's face, but this appeared to occur inadvertently as a consequence of the Applicant grappling with Mr Munemo rather than as a deliberate act of striking Mr Padua. Mr Padua also states that while he was sandwiched between the Applicant and Mr Munemo as they grappled with each other he told them on two or three occasions to "*stop*", "*calm down*" and said words to the effect, "*you can't be doing this at work*". As the fight moved towards the door a number of confetti tubes fell off the rack system and onto the floor³⁰.

[28] Mr Munemo gave evidence that in the lead up to the incident he had become frustrated with the Applicant as he believed the Applicant had stolen a sale of Mr Munemo's. He states that although the Applicant had not been physical or provoked him, he shoved the Applicant who in turn reciprocated. He accepts that Mr Padua was between him and the Applicant and that he grabbed them both and pushed them across the BOH area. He also accepts that he struck the Applicant which caused his hat to fall off³¹. Mr Munemo did concede during cross-examination that on viewing the BOH Footage, it was clear that the Applicant's 'shove' of Mr Padua was the first physical action although at the time of the incident he claimed he had not observed the 'shove'. He also agreed that the Applicant had not during the course of their argument and subsequent altercation dropped the issue or walked away.

[29] At 16:27:54 the fight concluded, and the Applicant and Mr Munemo separated. Mr Padua is then seen in the BOH Footage directing Mr Munemo to move towards the far end of the BOH area away from the doorway. Mr Munemo is seen to comply with the direction although he appears to remain visibly upset³². At 16:28:00 of the BOH Footage Mr Padua is then observed attempting to direct and usher the Applicant out of the BOH area by encouraging the Applicant towards the doorway³³. Mr Padua states that at this point the Applicant continued to swear at Mr Munemo and despite Mr Padua's instruction to leave the BOH area, he refused to leave, insisting to Mr Padua that he was ok³⁴.

[30] At 16:28:07 Mr Munemo is observed in the BOH Footage to move halfway across the BOH remonstrating in a seemingly agitated state. Mr Padua turned and moved towards him and appeared to be trying to calm him down while the Applicant remained positioned approximately 2 metres away from Mr Padua and Mr Munemo³⁵. Mr Padua states that Mr Munemo then said something to the Applicant which escalated matters again. At this point Mr Padua continued to tell both the Applicant and Mr Munemo to calm down, told Mr Munemo to stay where he was and told the Applicant to get out of the BOH area³⁶.

[31] At 16:28:12 while Mr Padua is moving Mr Munemo towards the far end of the BOH area the Applicant is observed in the BOH Footage to advance behind them continuing to remonstrate with Mr Munemo. At 16:28:16 Mr Padua turned around and forcibly moved the

²⁹ Ibid, at [39]

³⁰ Exhibit R21 at [40]

³¹ Exhibit A3 at [10]-[12]

³² Exhibit R1 at 16:27:54

³³ Ibid, at 16:28:00

³⁴ Exhibit R21 at [43]-[44]

³⁵ Exhibit R1 at 16:28:07

³⁶ Exhibit R21 at [45]-[48]

Applicant with both hands towards the doorway while the Applicant continued to argue with Mr Munemo. This led Mr Padua to turn around and move towards Mr Munemo in an apparent attempt to avoid any reescalation³⁷.

[32] At 16:28:32 it is clear by this point in the BOH Footage judging by Mr Padua's facial expression that he is losing patience with both the Applicant and Mr Munemo. He attempts to again usher the Applicant towards the doorway and out of the BOH area. The Applicant appears reluctant to leave. At 16:28:50 further less animated discussion ensues between the three men with Mr Munemo and the Applicant several metres apart with Mr Padua positioned between the two³⁸. The Applicant accepts that Mr Padua asked him to leave the BOH area, but he tried to reassure Mr Padua that he was ok and that things would not re-escalate, which he says Mr Padua accepted³⁹.

[33] Mr Padua states that by this stage of the incident he was extremely frustrated because neither the Applicant nor Mr Munemo were listening to him. He then spoke in a more forceful manner to the Applicant directing him to leave the BOH area, which he eventually did⁴⁰. At 16:29:13 the Applicant is observed to leave the BOH area while Mr Munemo remains with Mr Padua. Mr Munemo remains visibly agitated and is seen gesticulating with his hands as he speaks with Mr Padua and then while Mr Padua continues to watch the CCTV footage⁴¹. Mr Padua states that after the Applicant left the BOH area, Mr Munemo was extremely apologetic for how he had acted towards the Applicant but remained adamant that the Applicant stole his sale⁴². When cross-examined on the direction to leave the BOH area, the Applicant accepted that he didn't leave the area immediately despite clear instructions from Mr Padua, he agreed that in the heat of the moment he was still responding aggressively and says he was agitated and disappointed with the altercation that had just occurred and was remonstrating with Mr Munemo about the altercation.

[34] At 16:32:32 in the BOH Footage two other staff members are seen to enter the BOH area and speak with Mr Padua and Mr Munemo while Mr Padua continues to watch the CCTV footage. At 16:33:05 the Applicant then returns to the BOH area following which the two other staff members leave the area. The Applicant confirmed in cross-examination that he made a conscious decision to return to the BOH area despite Mr Padua's earlier instruction to leave the area. Mr Padua is then seen to be talking with the Applicant. At 16:34:41 Mr Padua then positions himself and the step ladder directly between the Applicant and Mr Munemo as the discussion continues. Both Mr Munemo and the Applicant continued to make their points for several minutes in a less animated manner⁴³.

[35] Mr Padua states that when the Applicant returned to the BOH area, he again told the Applicant to leave. According to Mr Padua the Applicant again refused to leave the area and continued to insist that he was fine and that he just wanted to talk. He continued to deny that he

³⁷ Exhibit R1 at 16:28:12 - 16:28:16

³⁸ Exhibit R1 at 16:28:32

³⁹ Exhibit A2 at [3.1]-[3.2]

⁴⁰ Exhibit R21 at [50]

⁴¹ Exhibit R1 at 16:29:13

⁴² Exhibit R21 at [52]

⁴³ Exhibit R1, at 16:32:32 – 16:37:46

had stolen Mr Munemo's sale. During this period Mr Padua states that he deliberately positioned the ladder between himself and the Applicant to avoid any reescalation. He also states that Mr Munemo was calmly explaining that the customer in question was one that he had been assisting earlier that day⁴⁴.

[36] At 16:37:46 a female staff member is observed in the BOH Footage to enter the BOH area and notices items strewn on the floor near the doorway which was caused by the earlier altercation. She then moves to join the discussion that is continuing between the Applicant, Mr Munemo and Mr Padua. At 16:39:24 Mr Munemo and the Applicant are seen to shake hands. Mr Padua speaks briefly and then shakes hands with both Mr Munemo and the Applicant then returns to watching the CCTV footage⁴⁵. At 16:41: 32 another male employee enters the BOH area, and the Applicant then leaves the BOH area for the second time followed shortly after by Mr Padua and Mr Munemo⁴⁶.

[37] Mr Padua states that he was glad the Applicant and Mr Munemo shook hands because it meant they could go back to work for the rest of the shift. He says he also asked both of them not to speak to any other employees out on the floor about the incident. He did so to avoid gossip as he was unsure what he needed to do next. He further states that he had not told the Applicant or Munemo that he would not be contacting HR⁴⁷.

The Applicant's dismissal

[38] Following the incident Mr Padua continued to perform his work along with the Applicant and Mr Munemo until the end of their shifts. As soon as Mr Padua left the store, he called Ms Niwa, but she was not available. He then called his immediate manager 'Silos' to let him know what had happened between the Applicant and Munemo. He states Silos advised him that HR would need to deal with the matter and also indicated that he (Silos) would look at potentially changing the rosters of the Applicant and Mr Munemo for the following day. Their shifts were not changed for the following day.

[39] Mr Padua attended work on 5 November 2024 and reviewed the relevant FOH and BOH Footage from the previous day arising from which he formed the view that the Applicant had in fact taken Mr Munemo's sale. Mr Padua then sent an email at 12.59pm on 5 November 2023 to Ms Niwa and others that included 'snips' of the FOH and BOH Footage. The email states as follows;

"Hi team,

Hope everyone's doing well, I know few of you guys are on leave.

There's a very important issue I needed to report, yesterday 04/11/2023 we had an altercation between two staff members Patrick Garas and Brooklyn Munemo at around 16.35 in the pants reserve.

⁴⁴ Exhibit R21 at [58]-[62]

⁴⁵ Exhibit R1 at 16:37:46 - 16:39:24

⁴⁶ Ibid, at 16:41: 32

⁴⁷ Exhibit R21 at [65]

Before it all happened, Patrick approach me at the counter while I was helping out with returns/exchanges. I asked him what's the matter? And his response was "could you please check the cctv when you're done".

Normally when there's a dispute of staff members between a sale, I normally make it fair for both and come into an agreement, at the end of the day we are a team. But in this situation, things got heated when both of the staff members did not come into an agreement while I was in the middle of checking the cctv.

Brooklyns case:

-His adamant that his sale (Sprayground Diablo villain backpack \$119.99) did not go under his name and possibly went on another staff member or stolen

Patrick's case:

-He put through the sale and assume no one claimed the sale instead of putting it under the store, he put under his name

Upon checking the CCTV to get all my facts right:

-Brooklyn came down with the backpack and put it under his rack behind the counter cabinet (15:16PM) and also approach me asking if it's okay to place the backpack in the cabinet or on the ground. I advices him to place it on cabinet if there's enough room. He decided to put it in the cabinet under his number.

- 9 minutes later, Patrick (15:24PM) came to the counter chatting to a staff member and keeps checking the cabinet (not too sure why). A few minutes later he brought out a backpack from the cabinet which was the backpack that Brooklyn brought down earlier for his customer and placed it on the ground.

Instead of coming into an agreement, things got heated as both staff members kept arguing verbally that's when I stepped in the middle as they were getting too close to each other and that's when the incident happened.

I've sent the cctv videos on slack as it wouldn't allow me to attached it here.”⁴⁸

[40] At 2.07pm on 5 November 2023, Mr Padua sent a further email to Ms Niwa and others in the following terms;

“I had to keep Brooklyn in the pants reserve and got Patrick out to cool down. It was resolve after 15-20mins where both agreed it was a misunderstanding and both shook hands.

I didn't have time yesterday to check everything in the cctv it was very busy.

⁴⁸ Exhibit R6, Emails from Mark Padua to Cory-Leigh Niwa, on 5 November 2023

Both of them finished their normal shifts in the end but did not speak at all.

I might be biased here but after rewatching most of the cctv videos of the incident, Brooklyn thinks it was a misunderstanding but basing on the cctv, Patrick lied to him and instigated the incident and it has happened in the past where Brooklyn let Patrick have the sale and let it be. I believe Brooklyn kept everything in him until yesterday where he think he should stand up for himself.

We just don't want this to happen again especially with all Christmas casuals started.

I'm sure you guys will come up with an ultimate solution.”⁴⁹

[41] Mr Padua was cross-examined on his use of the terms ‘might be biased’ in his second email to Ms Niwa on 5 November 2023. He agreed that he had hired Mr Munemo but disagreed that his comments disclosed a bias against the Applicant or that his views had any impact on the investigation and disciplinary action. That was because he was not involved in the investigation or the decision to dismiss both the Applicant and Mr Munemo for their roles in the incident.

[42] At around 3.30pm on 5 November 2024 Mr Padua received a call from Ms Niwa in which she advised Mr Padua that the Applicant and Mr Munemo had been suspended⁵⁰.

[43] Having been alerted to the incident of 4 November 2023 involving the Applicant and Mr Munemo around lunchtime on 5 November 2024, Ms Andersen discussed the matter with Ms Niwa following which she received a copy of the CCTV footage. After her conversation with Ms Niwa, she prepared a letter of allegations (Allegations Letter) for the Applicant which was sent to him at 3.03pm Brisbane time on 5 November 2023⁵¹. The Allegations Letter relevantly stated as follows;

“Re: Confidential investigation of alleged breach of the Code of Conduct

I am writing to inform you that we are in the process of conducting an investigation into allegations in relation to your conduct.

Due to the serious nature of these allegations you are prohibited from attending the Culture Kings Melbourne store until the investigation has been concluded. During this time, you remain employed by the Company and are bound by our policies and your contract of employment.

Culture Kings treats all allegations seriously and as such, is obligated to investigate all complaints. The purpose of this investigation is to conduct an objective and fair assessment of the evidence. Please be aware that no conclusions have been reached as to the allegations made. The process being followed is in accordance with our Code of Conduct, which is included in your employment contract.

⁴⁹ Ibid

⁵⁰ Exhibit R21 at [78]-[86]

⁵¹ Exhibit R22, Witness Statement of Mariss Andersen at [11]-[15]

To assist us in our investigations, you are required to respond to the following allegation:

1. It is alleged that on 4 November 2023 you were involved in a physical altercation with a fellow employee at the Culture Kings Melbourne store while you were on a scheduled shift.

The alleged behaviour appears to be in breach of the Culture Kings Code of Conduct and terms and conditions of your employment contract.

We would like to note that it is the responsibility of all staff members to assist in an investigation as required. The company may present additional allegations at any time during the investigation.

You should be aware that the allegations contained in this letter are serious, and if substantiated could result in disciplinary action, including the termination of your employment.

.....”

[44] The Applicant was invited to a Zoom meeting on 6 November 2023 with Ms Anderson and Ms Niwa, in advance of which Ms Andersen had already interviewed Mr Padua. The Applicant was accompanied by a support person, Javid Mohamed. During the meeting Ms Andersen says she read the allegation and tried to play the CCTV footage but was unable to do so. She says she then gave Applicant an opportunity to defer the meeting if he was not comfortable to proceed. The Applicant declined the request according to Ms Andersen. The Applicant was provided with an opportunity to respond to the allegations and did so, the details of which are recorded in Ms Andersen’s Investigation Report⁵².

[45] Ms Anderson accepted during cross-examination that when she sent the Allegations Letter to the Applicant in advance of the 6 November 2023 meeting, she did not include a copy of the Code of Conduct. She also accepted that the Investigation Report did not record that she attempted but was unable to show the CCTV footage as claimed. Nor did the Investigation Report record that she offered to defer the meeting if the Applicant was not comfortable to proceed. She remained adamant however that she had unsuccessfully attempted to show the video and then offered to defer the meeting. Ms Andersen agreed that she had not stated to the Applicant during the 6 November 2023 that he had a further opportunity to provide a response in writing. She rejected however the proposition put to her during cross-examination that the Allegations Letter lacked specificity in terms of the Applicant’s alleged misconduct or that the Applicant was unaware of the allegation made against him in respect of his role in the 4 November 2023 altercation with Mr Munemo.

[46] Ms Niwa states that during the meeting on 6 November 2023, the Applicant maintained that Mr Munemo initiated the confrontation by approaching him in the store and accusing him of stealing his sale. She says that the Applicant further explained that he approached Mr Padua

⁵² Ibid, at [17]-[21(a)], Exhibit R16, Investigation Report

to try and resolve the matter by arranging for the relevant CCTV footage to be reviewed and that when Mr Padua was reviewing the footage, Mr Munemo continued yelling at the Applicant. The Applicant further stated during the meeting that Mr Munemo started the fight with him⁵³. Ms Niwa further states that the Applicant's version of events did not accord with the BOH Footage and further, the Applicant did not show any remorse nor take accountability for his actions and kept saying words to the effect of, "*Brooklyn started it. I was only defending myself. It was self-defence. I was trying to de-escalate the situation.*" Ms Niwa disagreed with the Applicant's statement and believed that he could have and should have walked away from the confrontation with Mr Munemo, particularly given he was a more senior employee⁵⁴.

[47] The Applicant states that the meeting on 6 November 2023 took no more than 20 minutes, that he was not given an opportunity to provide a written response and the Respondent did not ask him for any further information or clarification⁵⁵. He also rejects that Ms Andersen tried to play BOH Footage. Nor did she explain that she was unable to show the footage or ask if he wanted to defer the meeting⁵⁶. Mr Mohamed supported the Applicant's evidence on these points⁵⁷. The Applicant agreed during cross-examination that during the meeting he was allowed to provide his version of events without interruption and that both Ms Andersen and Ms Niwa listened while he spoke. He also claimed during cross-examination that he apologised multiple times during the meeting.

[48] Following the meeting with the Applicant, Ms Andersen states she had a discussion with Ms Niwa during which they agreed that based on all the available information the appropriate response would be that of termination of the Applicant's employment⁵⁸. Ms Andersen was challenged during cross-examination as to whether her view of the respective contributions of the Applicant and Mr Munemo to the altercation was influenced by Mr Padua's 'bias' referred to in his email of 5 November 2023. Ms Andersen agreed that she was aware of the email of 5 November 2023 but rejected that her subsequent investigation of the incident was impacted by the comments in Mr Padua's email. She confirmed that she relied in part on Mr Padua's account but also relied heavily on the available cctv footage.

[49] The proposed disciplinary action arising from the 6 November 2023 meeting was then agreed to by both the Respondent's People and Culture Director, Ms Emma Grasso, and Brand President Ian Everest. Ms Niwa states that following consultation with Ms Grasso and Mr Everest she and Ms Andersen agreed that it was necessary to meet with the Applicant again to provide him with an opportunity to view the BOH Footage⁵⁹. A further meeting was then arranged with the Applicant for 7 November 2023⁶⁰. Ms Anderson agreed in cross-examination that based on the information available to her and Ms Niwa after the 6 November 2023 meeting with the Applicant, they had formed a view that dismissal was the appropriate sanction but

⁵³ Exhibit R23, Witness Statement of Cory-Leigh Niwa, dated 7 February 2024, at [35]

⁵⁴ Ibid at [36]-[37]

⁵⁵ Exhibit A1, at [14]-[15]

⁵⁶ Exhibit A2 at [10.1]

⁵⁷ Exhibit A3, Witness Statement of Javid Mohamed, dated 14 February 2024, at [7.4]-[7.5]

⁵⁸ Exhibit R22, at [21(b)]

⁵⁹ Exhibit R23 at [44]

⁶⁰ Exhibit R22, at [21(c)]

rejected that her mind was made up, particularly in circumstances where the cctv footage had not been shown to the Applicant in the 6 November 2023 meeting.

[50] The Applicant attended the further Zoom meeting on 7 November 2023 with Ms Andersen and Ms Niwa. He was not accompanied by a support person and when asked, confirmed he was comfortable to proceed without a support person. Conscious that she had not gone through BOH Footage with the Applicant in the previous meeting, Ms Andersen states she made sure the footage was available for the meeting and went through it with the Applicant. She states that the Applicant did not raise any additional matters having viewed the footage. During the meeting and in response to Ms Andersen advising the Applicant that his employment was to be terminated, the Applicant raised the fact that he had never received a warning or done anything wrong to which Ms Niwa responded, reminding the Applicant of an incident in July 2023 where he had raised his voice in speaking to a colleague⁶¹.

[51] The Applicant states that at the meeting on 7 November 2023, Ms Andersen advised him that the Respondent had determined that he was the aggressor to which the Applicant states he responded that he had not punched Mr Munemo. He also states that he asked Ms Andersen whether the Respondent had checked the FOH Footage which would have shown him attempting to deescalate the matter with Mr Munemo, however he says Ms Andersen refused that request. He further states that Ms Andersen showed the BOH Footage and insisted that he had punched Mr Munemo at a point when the Applicant states he was getting his hair pulled. He says that when he was attempting to explain, he was interrupted by Ms Niwa who said words to the effect of, *“Patrick we can go back and forth, but the decision is final so there is no point”*. During cross-examination, the Applicant could not recall being provided an opportunity to provide any further information. The Applicant states that Ms Andersen then advised him that the Respondent had decided to terminate his employment to which he replied that the termination was unfair as he had never received any formal or written warnings⁶².

[52] The Applicant received a letter dated 7 November 2023 confirming the termination of his employment following the meeting on 7 November 2023. It relevantly stated as follows;

“Re: Termination of Employment Serious and Wilful Misconduct

I am writing to you about the termination of your employment with Culture Kings Pty Ltd.

On 6 November 2023 Culture Kings presented allegations to yourself as Casual Retail Sales Assistant to seek your response into alleged breaches to the Culture Kings Code of Conduct stemming from your involvement in a physical altercation with another employee at the Culture Kings Melbourne store on Saturday, 4 November 2023.

Culture Kings provided you an opportunity to attend a meeting to capture your response to serious allegations which was held on Monday, 6 November 2023. After considering all evidence, statements and responses the investigation has substantiated that your conduct on 4 November 2023 represents a significant violation of the Culture Kings

⁶¹ Exhibit R22, at [21(d)]

⁶² Exhibit A1, at [16]

Code of Conduct, deemed as serious and wilful misconduct. Consequently, your employment with Culture Kings has been terminated with immediate effect, 7 November 2023.

All intellectual property rights arising in connection with your employment or which may have involved the use of our property or confidential information is Culture Kings property. If you are uncertain of the confidentiality of any information or material, you must treat the information or material as confidential until we advise in writing that it is not.”

[53] On 10 November 2023, the Applicant sent the following text message to Ms Niwa;

“Hey Corey, I just wanted to apologise to you regarding the incident I should've known better and walked away and as a role model and sales leader and although I tried to de-escalate the situation multiple times, there's no excuse for it, it should've never escalated to that point. I'm disappointed in myself as it's against my moral code and I should've turned the other cheek. I've never been in a physical altercation in my life. I apologise for letting you and Marissa down and the rest of the team. I spoke with Simon and Tahnee and I want to say a massive thank to you also for your attempt to separate Fallen Breed, for....”⁶³

Fallen Breed Brand

[54] Ms Andersen states that the Applicant and Mr Mohamed are shareholders of a company called Fallen Breed Pty Ltd (Fallen Breed), which is the owner of certain trademarks used to create the clothing brand ‘Fallen Breed’. The Applicant, Mr Mohamed and Fallen Breed entered into a Brand License Agreement⁶⁴ (the License Agreement) with TF Apparel (a company related to the Respondent) on 20 February 2023 to collaborate and develop the ‘Fallen Breed’ brand together on the terms of the Agreement. The Respondent’s records reveal that in the January - October 2023 period the Respondent paid royalties to the Applicant under the License Agreement to a value of \$16,641⁶⁵.

[55] On 30 November 2023, the Applicant received a letter from the Respondent advising that as a result of the termination of his employment, he was required to forfeit his shares in the Fallen Breed brand to the Respondent pursuant to clause 10(e) of the License Agreement for the sum of \$1000 within 30 days of the termination of his employment⁶⁶. Following receipt of this correspondence the Applicant wrote to the Respondent on 30 November 2023 requesting a reconsideration of the Respondent’s decision to enforce clause 10(e) of the License Agreement.

[56] Both Ms Andersen and Ms Niwa agreed in cross-examination that they became aware of the detail of the License Agreement during the course of the investigation into the 4 November 2023 altercation between the Applicant and Mr Munemo, and specifically that the

⁶³ Exhibit R18, Text message from Applicant to Cory-Leigh Niwa, dated 10 November 2023

⁶⁴ Exhibit R19, Fallen Breed Brand License Agreement

⁶⁵ Exhibit A2, at [24]-[26], Exhibit R20, Finance Report Royalties under Fallen Breed Brand Licensing Agreement

⁶⁶ Exhibit A1, at [24]

Applicant's dismissal would have a significant impact on him in relation to forfeiting his shares in Fallen Breed.

Has the Applicant been dismissed?

[57] A threshold issue to determine is whether the Applicant has been dismissed from his employment. Section 386(1) of the 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.

[58] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant. There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

Initial matters

[59] Under section 396 of the 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; and
- (d) whether the dismissal was a case of genuine redundancy.

[60] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant was dismissed on 7 November 2023 and filed his unfair dismissal application on 28 November 2023, that latter date being within 21 days of the date of his dismissal;
- at the time of the Applicant's dismissal the Respondent employed approximately 593 employees and is therefore not a small business employer within the meaning of s.23 of the Act;
- the Applicant commenced employment with the Respondent on 4 November 2019 and at the time of his dismissal had been employed for a period of over 4 years, that period being in excess of the minimum employment period of six months;

- the Applicant was covered in his employment by the *General Retail Industry Award 2020* and at the date of his dismissal was in receipt of a base casual hourly rate of pay of \$30.91; and
- the Applicant was not dismissed 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.

[61] Having considered each of the initial matters, I am satisfied that the application was made within the required period in subsection 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct – s.387(a)?

[62] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁶⁷ and should not be “capricious, fanciful, spiteful or prejudiced”⁶⁸. However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer⁶⁹. 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).⁷⁰

[63] In cases relating to alleged misconduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.⁷¹ It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.⁷²

[64] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.⁷³ In cases such as the present where a serious allegation is made, the *Briginshaw* standard applies so that any findings, if made, of the misconduct alleged are not made lightly;

“The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.’”⁷⁴

⁶⁷ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁶⁸ *Ibid.*

⁶⁹ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁷⁰ *Ibid.*

⁷¹ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213

[24].

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] HCA 34.

[65] The decision of the Respondent to dismiss the Applicant was based on its conclusion on the Applicant's participatory role in a physical altercation with another employee Mr Munemo, that took place in the BOH area of its Melbourne CBD store on 4 November 2023, and which breached the Respondent's Code of Conduct. It is uncontroversial that the Respondent has a Code of Conduct and other policies that applied to the Applicant in his employment and of which he was aware, having entered into his most recent Employment Agreement on 13 September 2023 which referenced the relevant policies and the requirement to comply with same. The Code of Conduct relevantly describes certain behaviour that would constitute serious misconduct and if engaged in would expose an employee to the risk of dismissal. The specified conduct includes the following; "Use of abusive or threatening language, intimidating behaviour, assault on or harassment of another team member, customer or any other person during the course of employment..."

[66] The altercation that took place between the Applicant and Mr Munemo at approximately 4.30pm on 4 November 2023 in the BOH area of the Respondent's Melbourne CBD store was preceded by Mr Munemo's claim the Applicant had 'stolen' a sale of Mr Munemo. While it is unnecessary for me to resolve where blame lay in terms of the disputed sale, it is sufficient to say that at the time of the initial confrontation between Mr Munemo and the Applicant over the disputed sale at around 3.30pm on 4 November 2023, Mr Munemo was very aggrieved at the Applicant's perceived conduct of claiming a sale of a backpack that Mr Munemo had put 'on hold' for a customer. I am prepared to accept that the Applicant at that point was also aggrieved at being accused by Mr Munemo that he had stolen his sale. I also accept that the Applicant sought to diffuse the situation at this point and offered to shake Mr Munemo's hand, an offer that was rejected by Mr Munemo.

[67] What the evidence reveals is that the Applicant then sought his manager Mr Padua's assistance in resolving the dispute by viewing the FOH footage with he and Mr Munemo. While initially unable to do so because of other tasks he was performing, Mr Padua subsequently invited the Applicant and Mr Munemo to accompany him to the BOH area at around 4.25pm to view the FOH Footage. I am further satisfied that at this point when the three men moved to the BOH area Mr Munemo continued to challenge the Applicant and in doing so cast aspersions on the Applicant's character which by the Applicant's own admission angered and frustrated him. The Applicant readily admitted that while no commissions were paid on sales, he nonetheless was upset by Mr Munemo's accusations as it challenged his integrity and who he was as a person.

[68] It is apparent from the BOH footage that when the three men arrived in the BOH area Mr Padua positioned himself on the first step of the step ladder adjacent to the shelving on which the BOH computer was placed and commenced watching the FOH footage. The Applicant and Mr Munemo who were both positioned behind him and approximately 1 metre apart were arguing in a heated manner. This is plainly apparent from their facial expressions and body language and is confirmed by Mr Padua's evidence of the exchange that was occurring between the two men as he watched the FOH Footage. It is not the case that either the Applicant or Mr Munemo were prepared to let the matter go at this point. In fact, on Mr Padua's evidence which I accept, the exchange between the two men became more heated which led him to step off the step ladder and move between the Applicant and Mr Munemo to try and calm things down. Both the Applicant and Mr Munemo effectively confirmed this escalation by their

concessions that both directed what is often regarded as a racial slur towards each other, when they used the “n***” word. I also accept based on Mr Padua’s evidence that both the Applicant and Mr Munemo were swearing at each other during this exchange.

[69] I am further satisfied that despite Mr Padua’s efforts to separate and calm the Applicant and Mr Munemo down, the heated argument between the two men continued with both protagonists moving closer to each other with Mr Padua in between them. The Applicant then shoved Mr Padua in a forceful manner that forced him back and across in front of Mr Munemo. **The claim by the Applicant that he did this to move Mr Padua out of the way of Mr Munemo as he sensed Mr Munemo was about to react physically is simply not believable. The action of the Applicant in shoving Mr Padua as seen in the BOH Footage was not the action of a man trying to protect a colleague from a risk. It was clearly an action on the part of the Applicant to get Mr Padua out of the way so that he could directly confront Mr Munemo.** For the Applicant to contend otherwise lacks credibility on any fair viewing of the footage and is rejected. Moreover, there is nothing in the BOH Footage that reveals Mr Munemo was about to react physically immediately prior to the Applicant shoving Mr Padua. Both the Applicant and Mr Munemo were clearly angry as they argued immediately prior to Mr Padua being shoved by the Applicant. **The Applicant’s explanation that he was responding to a physical threat is not borne out by the direct video evidence and is self-serving in my view.**

[70] Having been forcefully shoved by the Applicant, Mr Padua then sought to shepherd the Applicant away from Mr Munemo who followed them across the BOH area as both the Applicant and Mr Munemo continued to argue aggressively. Immediately prior to Mr Munemo lunging towards the Applicant, the Applicant can be seen physically swatting Mr Padua’s arm out of the way and positioning himself to directly confront Mr Munemo. It is at this point that Mr Munemo lunged towards the Applicant with Mr Padua sandwiched between both men trying to keep them separated. The Applicant and Mr Munemo then grappled with each other in a violent manner for several seconds, variously grabbing each other arms, shoulders, hair and other parts of the body while Mr Padua remained caught between them. Mr Munemo agrees he threw at least one punch that dislodged the Applicant’s hat although this cannot be seen in the footage as the men were obscured at this point of the altercation. While neither man deliberately made contact with Mr Padua, he was inevitably caught up in their actions and was struck at least once across the face by the Applicant. Both the Applicant and Mr Munemo grappled with equal vigour, and it appears that the end of the altercation occurred through the encouragement and direct involvement of Mr Padua.

[71] Mr Munemo in his evidence sought to take responsibility for the escalation of events by stating that the Applicant did not provoke him prior to Mr Munemo pushing he and Mr Padua across the BOH. **I found much of Mr Munemo’s evidence unsatisfactory.** He stated that he could not recall the Applicant initially shoving Mr Padua when it would have been plainly apparent to him that had occurred. His evidence also ignores that he and the Applicant were both ‘in each other’s face’ immediately prior to the altercation, a point at least conceded by the Applicant. Mr Munemo was also unwilling to concede that he took offence at the Applicant’s use of the “N***” word even though he had demanded during their heated argument that the Applicant not use that term. **For these reasons I place limited weight on Mr Munemo’s evidence as to the altercation and the events that immediately preceded it.** It directly conflicts with the evidence available on the BOH Footage.

[72] Following the altercation Mr Padua can be seen directing both parties to separate and for the Applicant to leave the BOH area. The Applicant refused to leave the BOH area and continued to remonstrate with Mr Munemo despite being directed by his manager on several occasions to remove himself from the BOH area. This tells strongly against claims by the Applicant that he had been trying to deescalate the matter throughout. Even after the Applicant did leave the area he returned shortly after despite earlier directions from Mr Padua.

[73] I am satisfied that the Respondent has called and established on the evidence that the Applicant and Mr Munemo engaged in a violent altercation and while neither were seriously injured, there was a significant potential for that to have occurred given the confined space within which the altercation took place. While I accept that the events in the BOH area were originally precipitated by Mr Munemo's allegation levelled against the Applicant, I am also satisfied that the physical altercation was directly initiated by the Applicant's conduct, that of forcefully shoving of Mr Padua. The conduct of the Applicant in both initiating and then participating in the physical altercation was in clear breach of the Respondent's Code of Conduct and the gravity of the misconduct was compounded by the fact that Mr Padua was literally and figuratively caught in the middle of the altercation. Added to this was the offensive language and racial slurs used by both the Applicant and Mr Munemo. The failure of either the Applicant or Mr Munemo to comply with Mr Padua's clear and direct instructions to calm down prior to the altercation reveals a wilful disregard by both men of their obligations under the Code of Conduct and other policies of the Respondent as well as being heedless of the potential consequences of escalation. It reflects poorly indeed on both the Applicant and Mr Munemo.

[74] It is also necessary for me to say something about the offensive language and racial slurs used by the Applicant and Mr Munemo. The swearing was occurring in the presence of and despite the efforts of Mr Padua to calm things down. The Applicant and Mr Munemo paid Mr Padua's directions no heed. As to the racial slur directed at each other, I found attempts of Munemo to downplay the seriousness of use of the "n****" word wholly unconvincing. Even if it were accepted that the use of that term between friends in certain demographics or cultural groups is ok in some circumstances, it does not render the use of the term in the workplace ok in any circumstances. To illustrate the point, the fact that two employees may happily and frequently use sexist, demeaning and offensive language between each other outside of work hours without offending each other, does not mean it is ok for that language to travel into the workplace. That is for the simple reason that employers are obliged to ensure that other employees and potentially customers are not subjected to offensive harassing or intimidating language and behaviour. The same applies to the use of the universally understood racial slur of "n****". It has no place as part of the banter in the workplace in any circumstances.

[75] In explanation of his involvement in the altercation, the Applicant claims that he was provoked by Mr Munemo, sought to deescalate the confrontation, and ultimately only acted in self-defence when the altercation occurred. The claimed provocation arose the Applicant submits through Mr Munemo's accusation that he (the Applicant) stole a sale of Mr Munemo. Further, the Applicant submits that Mr Munemo continued to insult and offer gratuitous character assessments of him as they moved to and on arrival in the BOH area with Mr Padua. While conceding he and Mr Munemo were engaged in a heated argument immediately prior to the altercation, the Applicant submits it was the actions of Mr Munemo that led to the altercation and that he (the Applicant) was simply responding to the perceived threat when he shoved Mr

Padua. Further, once the altercation commenced, he only took defensive actions to restrain Mr Munemo and avoid being hit or hurt by him.

[76] Before turning to consider the Applicant’s provocation and self-defence arguments, it is necessary to say something about the onus of proof in dealing with a self-defence argument. This was summarised succinctly by a Full Bench in *NSW Trains T/A NSW Trainlink v Wael Al-Buseri*⁷⁵ (Al- Buseri) where the following was said;

“[25]If an employer adduces evidence before the Commission to establish misconduct on the part of an employee and the employee’s response is to assert that they used self-defence and thereby had a lawful reason to act in the way that they did, then the employee bears the onus of adducing evidence necessary to establish that they acted in self-defence. That reasoning involves a direct application of the approach described in paragraph [21] above. Further, such an approach is consistent with the way in which arguments of self-defence are considered in other civil law contexts.

.....

[28] In any event, we agree with NSW Trains that the finding in paragraph [73(c)(ii)] of the Decision is erroneous because it applies the wrong test in relation to self-defence in a civil law context. There is no issue between the parties, and we agree, that the common law test to be applied in cases involving self-defence is whether a person believes on reasonable grounds that it was necessary in self-defence to do what they did. This test is applicable in civil matters. There is both a subjective and an objective element to the test. The subjective element concerns the belief that the conduct was necessary in the circumstances. The objective element goes to whether there were reasonable grounds for the belief.”

[77] Turning firstly to the Applicant’s claim of provocation. As previously stated above, I am satisfied that Mr Munemo confronted the Applicant when he approached him in the FOH area of the Respondent’s Melbourne CBD store and accused the Applicant of stealing a sale of his. I am also satisfied that at that stage the Applicant responded by attempting to diffuse the confrontation and offered to shake Mr Munemo’s hand, an offer that was rebuffed by Mr Munemo. When the Applicant and Mr Munemo subsequently accompanied Mr Padua to the BOH area to view the FOH Footage, I am further satisfied on the evidence that Mr Munemo continued to cast aspersions on the Applicant’s character and conduct as they moved to the BOH area.

[78] There is little doubt that the Applicant was angered by Mr Munemo’s accusation that he had stolen a sale of Mr Munemo. The Applicant conceded as much when he agreed in cross-examination that in the lead up to the physical altercation he was frustrated with Mr Munemo, that he continued to argue with Mr Munemo and that he (the Applicant) wasn’t letting the issue drop. The Applicant also admitted that he felt disrespected, was upset and agreed that both he and Mr Munemo were getting louder. At a number of points between the three men entering the BOH area and the altercation between the Applicant and Mr Munemo commencing, the Applicant had numerous opportunities to remove himself from the conflict. He did not do so,

⁷⁵ [2023] FWC 165.

and despite being closest to the door and despite the attempts of Mr Padua to calm things down, the Applicant continued to argue aggressively with Mr Munemo as well as adopting aggressive body language in his argument with Mr Munemo, which was reciprocated by Mr Munemo.

[79] While Mr Munemo's allegation of the theft of a sale levelled against the Applicant precipitated events that led to the BOH altercation, as time passed in the verbal exchange between the Applicant and Mr Munemo in the BOH area, **it is plainly apparent from the BOH Footage and on the evidence of Mr Padua which I accept, that the Applicant became an equal and vigorous protagonist in a heated argument with Mr Munemo.** In all of these circumstances I do not accept that the Applicant was provoked to engage in the physical altercation. By the time the altercation erupted, he was clearly an equal protagonist and was giving (verbally) 'as good as he got' from Mr Munemo. As previously stated, he had numerous opportunities to walk away and did not. The provocation argument raised by the Applicant is rejected.

[80] Turning now to whether the Applicant held a belief that his conduct of shoving Mr Padua and engaging in the altercation with Munemo was necessary in the circumstances, this requires a subjective assessment on whether the Applicant held a belief that his conduct was necessary in the circumstances. The Applicant's contention of self-defence appears premised on his belief at the time of the incident that there was a risk of Mr Munemo becoming violent towards the Applicant. It also appears premised on the Applicant's claims of having been attempting to deescalate the confrontation with Mr Munemo.

[81] The first point to be made is that from the point the parties entered the BOH area, there is no evidence beyond the Applicant's assertion that he was attempting to deescalate the dispute. The contrary is the case. As previously found, he engaged as an equal protagonist in an aggressive argument with Mr Munemo, swore at and directed an offensive racial slur at Mr Munemo. Further he declined to move away from Mr Munemo when encouraged by Mr Padua to do so immediately before the altercation. Further, after the altercation, he repeatedly resisted directions from Mr Padua to leave the BOH area and continued to remonstrate aggressively with Mr Munemo. None of these behaviours are consistent with the Applicant's claimed attempts to deescalate the confrontation either before or immediately after the altercation. Further, when one carefully reviews the BOH Footage and **as I have already found, the Applicant's shove of Mr Padua was not an action taken to move Mr Padua out of the 'line of fire'.** I am satisfied that it was an aggressive action taken by the Applicant in the heat of an argument to enable the Applicant to confront Mr Munemo more directly.

[82] In the above circumstances I do not accept that when the Applicant forcefully shoved Mr Padua, he took that action out of a belief that he was at physical risk. **Rather, I am satisfied he took that action because he wished to confront Mr Munemo more directly.** The conduct of the Applicant was in my view aggressive rather than defensive as he claimed. I consequently do not accept that the Applicant believed that his conduct was necessary in the circumstances.

[83] If, however I am wrong on the subjective belief the Applicant held that he was at risk from Mr Munemo at the time of shoving Mr Padua, I would nonetheless find there were no reasonable grounds for holding that belief. The Applicant's case relies heavily on his claim that Mr Munemo had a clenched fist and had moved his left leg towards the Applicant which the Applicant perceived as potential precursor to a physical action on Mr Munemo's part. **While Mr Munemo can be seen in the BOH Footage continuing to argue with the Applicant there is**

no visible physical conduct on his part that discloses an imminent physical risk to the Applicant. It is in fact the Applicant that aggressively shoves Mr Padua and can be seen at the same time aggressively speaking, if not yelling, at Mr Munemo. It follows that I do not accept that there were reasonable grounds for the Applicant to believe he was at some physical risk that required him to take the action he took.

[84] Turning finally to the Applicant's evidence and submissions that his conduct once the altercation started was that of defending himself, I reject that contention. I have previously found that the Applicant was equally aggressive during the altercation. On any fair viewing of the BOH Footage, the Applicant was just as forceful during the altercation as Mr Munemo, and it was only Mr Padua's insertion into the middle of the affray and his attempts to restrain the two men that prevented a potentially more violent outcome in my view.

[85] It follows from the foregoing that I am satisfied that the Applicant's conduct of initiating and then participating in the altercation with Mr Munemo was a breach of the Respondent's Code of Conduct and constitutes serious misconduct. I reject the Applicant's claims of provocation and self-defence. I am further satisfied that the offensive language and racial slur used by the Applicant was also in breach of the Code of Conduct. Whether considered separately or together the conduct establishes a valid reason for the Applicant's dismissal and given the gravity of the conduct, this weighs strongly in favour of a finding that the dismissal was neither harsh, unjust, or unreasonable.

Notification of the valid reason – s.387(b)

[86] 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,⁷⁶ and in explicit⁷⁷, plain and clear terms⁷⁸.

[87] The Applicant contends that a valid reason for termination was not explicitly articulated prior to his dismissal. That contention is rejected. The Allegations Letter put the Applicant on notice that his alleged involvement in a physical altercation in breach of the Respondent's Code of Conduct, on 4 November 2023 was the subject of a disciplinary investigation. The Applicant well understood what was put against him by way of allegation and he was able to respond to that allegation in a meeting on 6 November 2024. The allegation put to him in the Allegations Letter was found to be substantiated by the Respondent and was ultimately relied upon by the Respondent in dismissing the Applicant. I do not accept that the reason relied of for dismissal, which I have found constituted a valid reason for dismissal, was not articulated in explicit, plain, and clear terms. This weighs in favour of a finding that the dismissal was not unfair.

Opportunity to respond to any reason related to capacity or conduct – s.387(c)

[88] 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

⁷⁶ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

⁷⁷ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

⁷⁸ *Ibid.*

employment.⁷⁹ The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.⁸⁰ 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 the concern, this is enough to satisfy the requirements.⁸¹

[89] The Applicant was invited to a meeting on 6 November 2023 at which he was given an opportunity to respond to the allegation regarding his involvement in an altercation on 4 November 2023. The Applicant agreed during cross-examination that during the meeting he was allowed to provide his version of events without interruption and that both Ms Andersen and Ms Niwa listened while he spoke. There was a dispute between the parties over whether Ms Andersen attempted to show the BOH Footage during the meeting or whether she offered to defer the meeting. It is unnecessary for me to resolve that evidentiary contest as there is no doubt the Applicant was not shown the BOH Footage during the meeting. I regard this failure as a shortcoming of the disciplinary process undertaken by the Respondent. That is so in circumstances where the Respondent relied heavily on the BOH Footage, both in its decision to dismiss the Applicant and in these proceedings.

[90] While the Respondent failed to show the BOH Footage in the meeting of 6 November 2023, it submits that failure was remedied by the BOH Footage being shown to the Applicant in the second meeting on 7 November 2023 following which the Applicant was given an opportunity to add any further information. The Applicant states that the act of showing the BOH Footage in the meeting on 7 November 2023 was irrelevant in circumstances where the decision to dismiss him had already been taken. That he says was evidenced by the agreement reached on 6 November 2023 between Ms Andersen, Ms Niwa and the Respondent's People and Culture Director, Ms Emma Grasso, and Brand President Ian Everest that the appropriate action to be taken was that of the dismissal of the Applicant.

[91] Ms Andersen rejected during cross-examination that the Applicant's dismissal which took place on 7 November 2023 was pre-determined prior to that meeting, particularly in circumstances where the Applicant had not been shown the BOH Footage prior to that meeting. I found that evidence unconvincing in circumstances where the sanction of dismissal had already been agreed with senior executives of the Respondent prior to the 7 November 2023 meeting. I am fortified in my view by the evidence given by the Applicant that went unchallenged, that when he started to attempt to explain his position in respect of some aspects of the BOH Footage, he was cut off by Ms Niwa who stated the decision had already been made.

[92] I am satisfied that the showing of the BOH Footage to the Applicant on 7 November 2023 was a largely superficial exercise and that the decision to dismiss the Applicant had already been taken by the Respondent. While that tells against a finding that the Applicant had an opportunity to respond to the allegation, I also take into account that the Applicant was provided with a reasonable opportunity in the meeting of 6 November 2023 to put his side of the story which he did. Nevertheless, the failures of the Respondent to provide the Applicant

⁷⁹ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

⁸⁰ *RMIT v Asher* (2010) 194 IR 1, 14-15.

⁸¹ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

with an opportunity to view and respond to the BOH footage before it effectively decided to dismiss him, **leads me to find that the Applicant was not given a proper opportunity to respond to the alleged misconduct.**

[93] While I have found that the Applicant was not given a proper opportunity to respond to the alleged misconduct before his dismissal because of the failure to show him the BOH Footage at the 6 November 2023 meeting, **I accord that failure limited weight in my assessment. That is because the BOH Footage does not assist the Applicant now, nor would it in my view have assisted him at the time of his dismissal had he been shown the footage at the meeting on 6 November 2023.** I regard it as unlikely that the Applicant could on the basis of responding to the BOH Footage, have altered the outcome of the decision to dismiss him, even if he had been shown the BOH Footage on 6 November 2023.

Support person – s.387(d)

[94] 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.

[95] 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.”⁸²

[96] I am satisfied that the Applicant was afforded an opportunity to be accompanied by a support person in each discussion held in relation to the investigation of the alleged misconduct and in respect to his dismissal. This included Mr Mohamed accompanying the Applicant at the 6 November 2023 Meeting. The Applicant elected not to be accompanied by a support person at the meeting on 7 November 2023. These circumstances weigh in favour of a finding that the dismissal was not unfair.

Warnings regarding unsatisfactory performance – s.387(e)

[97] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed – s.387(f)

[98] The Respondent’s Form F3 response indicates that at the time of the Applicant’s dismissal the Respondent employed approximately 593 employees. There is no evidence before me, and nor did either party contend, that the Respondent organisation’s size impacted on the

⁸² Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g)

[99] The evidence in this matter indicates that the Respondent had access to the services of an in-house human resources specialist. This factor weighs neutrally in my consideration.

Other relevant matters – s.387(h)

[100] The Applicant has raised several matters which he contends weigh in favour of a finding that the dismissal was unfair. These are considered below.

[101] Firstly, the Applicant contends he was not the instigator of events of 4 November 2023. That is true to the extent that events were set in motion so to speak by Mr Munemo's accusation that the Applicant had stolen a sale of Mr Munemo and that Mr Munemo proceeded to insult and denigrate the Applicant prior to and on arrival in the BOH area at approximately 4.25pm. However, as I have also found above, by the time the pair of men were arguing heatedly in the BOH area, the Applicant had multiple opportunities to 'walk away'. He did not and became at least an equal participant in the argument and then in the physical altercation with Mr Munemo. In these circumstances the contention that the Applicant had not instigated events is rejected.

[102] Secondly, the similar contention that Mr Munemo provoked the Applicant is also rejected for the same reasons as set out immediately above. By the time the altercation commenced the Applicant was arguing with equal aggression to Mr Munemo, similarly swore and directed a racial slur at Mr Munemo and initiated the altercation by forcefully shoving Mr Padua towards Mr Munemo.

[103] Thirdly, the claim by the Applicant that he acted in self-defence of a by-stander (Mr Padua) was considered and rejected above at [69] & [80]-[81]. It has no merit whatsoever for the reasons previously stated.

[104] Fourthly, the Applicant contends that he sought to diffuse the situation by seeking the assistance of Mr Padua, by requesting the FOH Footage be viewed and offering to shake Mr Munemo's hand. I agree that the Applicant did each of these things before the men moved to the BOH area at approximately 4.25pm. If the matter had ended at that point, it would have reflected more favourably on both men. However, it is clear from the BOH Footage and the witness evidence that when the men moved to the BOH area things escalated dramatically and the Applicant contributed to that in no small part. The fact that the Applicant initially sought to diffuse the matter while in the front of house does not excuse his conduct in the BOH area and does not weigh in favour of a finding that the dismissal was unfair.

[105] **Fifthly, contrary to the Applicant's contention, I do not accept that his response to the threat he perceived from Mr Munemo was not disproportionate. For the reasons earlier stated, I am not persuaded that there were reasonable grounds for the Applicant to believe he was at some physical risk that required him to take the action he took.**

[106] Sixthly, the fact that the Applicant was not in a supervisory position over Mr Munemo is irrelevant. This argument appears premised on the proposition that because the Applicant and Mr Munemo were colleagues performing the same role, that of a retail assistant, that somehow excused the Applicant's conduct in engaging in an altercation. Even if that were the case which it is not, it ignores the fact that quite independently of the altercation the Applicant engaged in with Mr Munemo, there were any number of behaviours directed by the Applicant towards Mr Padua that in themselves constitute serious misconduct. These included direct and aggressive physical contact with Mr Padua and flaunting Mr Padua's express instructions to the Applicant on a number of occasions to leave the BOH area.

[107] Seventhly, it is true that Applicant's length of service with the Respondent was that of five years. I note however that the Applicant is a young man, and no evidence was led that the Applicant has had difficulty or is likely to have difficulty finding alternate employment. I also note that at the time of his dismissal the Applicant at his own request had converted from permanent back to casual employment and was working only on weekends. It follows that the length of the Applicant's service is a matter to be given limited weight.

[108] Finally, the Applicant contends that his loss of employment will also result in the forfeiture of his shares in the Fallen Breed brand under the terms of the License Agreement. This he submits is a harsh consequence in circumstances where he and Mr Mohamed have worked hard to develop the brand and where sales of the Fallen Breed products through the Respondent were several hundred thousand dollars in the 2023 year for which the Applicant received over \$16,000 in royalty payments. What was not in evidence was whether the Respondent had enforced clause 10(e) of the License Agreement, the share forfeiture clause, which would result in the forfeiture of the Applicant's shares for a payment to him by the Respondent of \$1,000.

[109] I accept that the Applicant will be adversely impacted by the loss of his shares in the Fallen Breed brand as a consequence of his loss of employment with the Respondent. That however is a direct consequence of the Applicant's actions in circumstances where he was fully aware of the terms of the License Agreement into which he had freely entered. I place no weight on this matter.

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

[110] I have made findings in relation to each matter specified in s.387 of the Act 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.⁸³

[111] **As set out above, I am satisfied that a valid reason for the Applicant's dismissal related to his conduct has been established.** I am also satisfied that while the Applicant was notified of a valid reason for his dismissal prior a decision being made to terminate his employment, he was not given a proper opportunity to respond to alleged misconduct. The dismissal was not

⁸³ *ALH Group Pty Ltd v/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]– [7].

related to the Applicant's performance and the size and capacity of the Respondent did not impact on the procedures that it followed and as such these matters weigh neutrally in my consideration of whether the dismissal was unfair. The only other matter that weighs in favour of a finding that the dismissal was unfair is that of the Applicant's length of service.

[112] As I have earlier stated, I place limited weight on Applicant's length of service and the procedural failures in the dismissal process. They are not sufficient to displace the significant weight I give to the valid reason for the Applicant's dismissal. It follows that having considered each of the matters specified in s 387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust, or unreasonable because there was a valid reason for the dismissal and no other factors weigh significantly in favour of a finding that the dismissal was unfair.

Conclusion

[113] 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 s.385 of the Act.

[114] The application is dismissed. An Order will be separately issued giving effect to my decision.



DEPUTY PRESIDENT

Appearances:

S Platel of Counsel for the Applicant.

N Campbell of Counsel for the Respondent.

Hearing details:

2024.

Melbourne:

February 19.

Printed by authority of the Commonwealth Government Printer

<PR771780>