

[2017] FWC 3867 [Note: a [correction](#) has been issued to this document]

FAIR WORK COMMISSION

DECISION

Fair Work Act 2009

s.394—Unfair dismissal

Anthony King

v

The Trustee for BARTLETT FAMILY TRUST T/A Concept Wire Industries
(U2017/1068)

COMMISSIONER WILSON

MELBOURNE, 24 JULY 2017

Application for an unfair dismissal remedy.

[1] Anthony King has made an application for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (the Act) against his former employer, Concept Wire Industries. Mr King was dismissed for misconduct, specifically relating to alleged bullying directed towards a colleague in October 2016.

[2] Section 396 of the Act requires the determination of four initial matters before consideration of the merits of the application. Section 396 relevantly provides:

396 Initial matters to be considered before merits

“The FWC must decide the following matters relating to an application for an order under Division 4 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.”

[3] Neither party put forward that any of the initial matters required consideration by the Commission. The material before the Commission, in any event, allows a finding that Mr King’s unfair dismissal application was made within the required 21 day period; that Mr King is a person protected from unfair dismissal; and that questions of consistency with the Small Business Fair Dismissal Code and genuine redundancy do not arise.

BACKGROUND

[4] Evidence in this matter was received on behalf of the Applicant from Paul Chirgwin, an Australian Manufacturing Workers’ Union (AMWU) official; Sasha Cupovski, who was ordered to attend the Commission to give evidence upon application by the Applicant; and from Mr King himself. Evidence for Concept Wire Industries was given by Mr Marcus Bartlett, Managing Director; Mr Yuri Anriquez, Machine Operator and subject of the alleged bullying behaviour; Mr Harvey Wilson, Supervisor; Mr

Rustico San Martin, Production Supervisor; and Mr David Kearsy, General Manager of Concept Wire Industries.

[5] Concept Wire Industries is a family-owned business which manufactures wire products in Melbourne's West, and currently employs 25 employees. ¹ Concept Wire Industries's workforce is comprised of employees undertaking a variety of roles, with various machine operators, truck drivers, storepersons and office staff working at a large warehouse. Mr King's role included truck and forklift driving as well as machine operating and general duties.²

[6] The AMWU has an active presence at Concept Wire Industries; a presence which increased on site during mid-2016. ³ On 17 October 2016, Mr King attended a short meeting conducted by Mr Chirgwin. At that meeting the apparent need to elect a site delegate was discussed. Mr King "was interested in taking on the role of delegate and the other employees were encouraging in that respect".⁴ Mr Chirgwin recounts telling the members at the meeting that he would return the following week, on Tuesday, 25 October 2016 and hold a further meeting to elect a delegate.⁵ Mr King then relates the upshot of the meeting in the following terms:

"23. After the meeting I decided to let other employees know about the upcoming meeting the next week and encourage them to attend.

24. I spoke to many if not all of the employees on the shop floor and in the warehouse." ⁶

[7] After the conclusion of that meeting, Mr King approached a number of colleagues about joining the union. Mr King's version of what was said and when differs from the accounts of his interlocutors, Mr Cupovski and, especially, Mr Anriquez.

[8] Mr King recalls the 17 October 2017 conversation as follows:

"25. Shortly after the meeting I spoke to two employees Yuri Anriquez and another employee named Sasha Cupovski in the area in which I often work. In order to speak to them I went up to the area where they were working. They were both standing at machines on either side of me and I was in the middle between the two of them, approximately two metres away from them both. Yuri was on my left and Sasha was on my right. At that time Yuri had just finished his morning break and Sasha was just about to take his.

26. There was a fair degree of background noise in the plant due to machinery being operated so I needed to speak reasonably loudly to them but I wasn't shouting.

27. I recall that I said words to the effect of: "Hey Guys - the Union just left - we're going to have a union meeting next Tuesday basically to vote for a possible in-house delegate- and ah - yeah - I'm encouraging you guys to come along to it."

28. Both of them listened to what I had to say. Sasha was immediately responsive and he said something like: "What's in it for me?"

29. I responded with words to the effect of: "You can't just lose your job like that. You've got rights. You can deal with issues like what they're doing with us."

30. Sasha seemed to be interested and we had a brief further exchange about it and I finished by saying "So guys do you want to join? - We're gunna have the meeting."

31. Yuri didn't appear to be very interested. He simply said "No." I wasn't very surprised by this. It was not uncommon for Yuri to be unresponsive.

32. I responded by saying: “We’ve got the numbers - It’s not like we need the numbers. Don’t isolate yourself - If we have a meeting you can find out for yourself you won’t have to ask me.”

33. Overall the exchange was very brief. Sasha went on his break and I then went back to work about ten metres away on the machine I had been operating.

34. The whole exchange was unremarkable at the time. I did not pressure either Yuri or Sasha to join the AMWU in any way. All I did was raise the issue with them both.” [7](#)

[9] As to the possibility of further discussions on the subject, Mr King says that he does not specifically recall discussing union matters with Mr Anriquez that day, but acknowledges the possibility of mentioning it in passing. Mr King is similarly unsure on whether the matter was further discussed with Mr Anriquez on subsequent days – while allowing for the possibility of further exchanges, Mr King maintains that their discussions were not heated and did not perceive any discomfort on the part of Mr Anriquez. [8](#)

[10] Mr Anriquez’s account contradicts that of Mr King. Mr Anriquez says there were four instances in which Mr King approached him, and in each instance there were no witnesses to the conversations present. [9](#) Of the 17 October 2016 conversations he says that when Mr King approached him Mr Cupovski was not present, which was the case whenever Mr King spoke to him. [10](#) Mr Anriquez’s recollection of their interactions is as follows:

- On 17 October, at around 12:30 PM, Mr King said “Yuri you should join the union”, to which Mr Anriquez replied “no”. Mr King suggested he would get better pay and conditions if he did, to which Mr Anriquez “said ‘no’ as in I didn’t want to join” and because it was his choice not to do so. Mr King then walked away. [11](#)
- Later on 17 October, just after 3 PM. Mr King again approached Mr Anriquez and suggested he join the union. When he refused, Mr King’s “facial features changed and his face became slightly red and flustered. I took Tony’s facial features to mean he was angry and frustrated with my response.” Mr King then allegedly said to him “well if you don’t join the union I will find a way to get you sacked”, to which Mr Anriquez did not reply. Mr King then reiterated his point, before being asked to leave by Mr Anriquez, which he did “throwing his arms around”. [12](#)
- The third occasion on which such an interaction took place is said by Mr Anriquez to be on Tuesday, 18 October 2016 near to 12:45 PM involving potentially more serious allegations on the part of Mr Anriquez;

“5) ... Tony came up to me and asked me to join the union again. Tony said words to the effect of, “*You should join the union*”. Tony didn’t greet me when he approached me he just immediately said this. I had just finished lunch and was sitting down getting ready to operate my machine when Tony approached me. I replied to Tony’s comment and said, “*No*”. I was upset that Tony had approached me again after he had already asked me twice the day before.

6) After I said “*No*” Tony tried to force the issue again by repeating the statement, “*You should join the union*”, or words to that effect. Tony was angry at me and his mannerism and body language was aggressive. When Tony made this comment I was sitting down working on my machine and he was standing upright, standing very close to me. When Tony made the

comment he bent over and got into my face. I found Tony's actions to be intimidating and really aggressive. I told Tony to go away and leave me alone. I recall saying words to the effect of, "*I don't want to join it's my own choice*". I then immediately said words to the effect of, "*Tony go away and leave me alone*". Tony then walked away." [13](#)

- Mr Anriquez also says that there was a fourth and final further request by Mr King for him to join the union later the same day, 18 October 2016 at or around 3 PM;

"7) ... Tony came up to me again and asked me to join the union. Tony said words to the effect of, "*Yuri you should join the union*". I responded and said words to the effect of, "*Tony leave me alone*". Tony then replied and said words to the effect of, "*If you don't join the union I will isolate you from everybody*". Tony was angry that he was not getting what he wanted. I could see in his facial features that he was frustrated. I didn't respond to Tony's comment and he walked away." [14](#)

[11] Importantly Mr Anriquez gave evidence that interactions with Mr King left him feeling intimidated and bullied and that they happened when he was working on the "wall- ties" machine and no one else was around to witness or overhear interactions. [15](#) Mr Anriquez maintained this broad construct of evidence as a witness to the Commission while accepting that he had known Mr King for some time and that they would sometimes talk including about a shared interest in certain science podcasts as well as that on occasions he would confide in Mr King.

[12] Mr Anriquez's evidence is that generally he was fearful of losing his job; finding another job when one is not especially skilled could be difficult. He accepted that he had said things to that effect in the past to Mr King. In his oral evidence Mr Anriquez maintained that Mr King had said in relation to his requests that he join a union that if he did not join he would find a way to get Mr Anriquez sacked. In response to the proposition that Mr King had said something altogether more nuanced to the effect that joining the union would provide benefits to Mr Anriquez including that it would be more difficult getting sacked, Mr Anriquez denied that was what had been what is said. Mr Anriquez also denied the possibility that he may have misheard what was being said to him.

[13] Mr Anriquez's evidence is that he reflected on the conversations with Mr King which left him feeling quite anxious. As a result he had not slept on the Monday night and did not eat or sleep on the Tuesday night. When he woke up he made a decision that he would see Mr Kearsey, Concept Wire Industries's General Manager, about the matter on the Wednesday morning, which is what he did. Mr Kearsey was the first person he spoke to about this situation. Having explained to Mr Kearsey what he alleged to have happened, Mr Kearsey said that he should leave the matter with him.

[14] At about 1:00PM on 19 October 2017 Rustico San Martin told Mr Anriquez that Mr Wilson wanted to see him in his office. The product of that meeting was that Mr Wilson physically wrote out a complaint but that the content of the complaint against Mr King were all Mr Anriquez's own words.

[15] As referred to within Mr Anriquez's evidence a complaint about Mr King was made by him on 19 October 2016. The complaint made by Mr Anriquez as transcribed by Mr Wilson is in relatively short terms, setting out the following (as written in the original):

"Complaint from Yuri regard Anthony King.

On Monday afternoon Tony had approach me and said to me that I should join or not the union and said no it is my choise to join or not the union. Later that day he approach me again and said to me join the union or he will find away to sack me. I said to him no.

On Tuesday he came up to me. And said I should join union. And I said no again. Later on Tuesday 18/10/16 he approached me again and said I will isolate you from everybody. Meaning the workers in the factory. He made me feel bullied. Threatening, and intimidated.” [16](#)

[16] And on the same, in different handwriting, apparently that of Mr Kearsley and dated 24 October 2016;

“On questioning the times of the above incidents Yuri expressed to me that. “I don’t feel that I can work in the same factory as Tony due to the prospect of a anxiety + panic attack resulting in me quitting.”” [17](#)

[17] Mr Kearsley gave evidence that he believed Mr Anriquez was very upset about circumstances. [18](#)

[18] After Mr Anriquez’s complaint was made, Mr Kearsley conducted a preliminary investigation;

“11) ... I spoke to basically everyone individually and had four questions to ask to get a better idea of whether we had a bullying issue, and if so, how wide spread it was. I really didn’t know whether it was ‘bullying’ or ‘harassment’ or whatever. And I didn’t want to use certain terms and have them used against me. I wanted to see what was really going on. I didn’t want this to be painted as a union issue, when the subject of the matter was health and safety. The alleged action of Tony, rather than the motivation. Since the union came on site, I’ve been encouraging and welcoming but told employees no one is to force anyone to join and nobody is to question anyone’s choice if they choose to join or not to join (management or employees) because that would be unfair and be a big pressure. That was really important to me.

12) I asked the following questions, although if they said no to the first question I didn’t go any further.

(a) Have you been approached by anyone in regards to not joining the union?

(b) Did you feel pressured by the approach?

(c) How did you feel?

(d) May I ask who the person was

13) Four people said they’d been approached by Tony and asked to join the union but they said they did not feel pressured. I asked every single employee but I just can’t recall which 4 said they’d been approached. I just wanted to know if he’d spoken to everybody about membership, not just Yuri. I didn’t take individual notes of each conversation as I intended to do a formal investigation with documentation at a later date.

14) At 2:25pm on 24 October 2016, after discovering Yuri was the only individual who felt intimidated and/or pressured by Tony to join the union, I asked Yuri to speak to me to get more details regarding the times the incidents allegedly happened. Yuri then said words to the effect of, “*I don’t feel like I can work here anymore if Tony is going to be here*”. I felt the whole thing had a serious effect on Yuri and it was a safety issue and I was concerned for his mental health. Again, he was still in a distressed and anxious condition. The stress appeared to be taking a toll on him. Yuri then added further detail to his original complaint and stated, “*I don’t feel that I can work in the same factory as Tony due to the prospect of an anxiety and panic attack resulting in me quitting*”. I recorded Yuri’s additional notes at the bottom of the second page of his original complaint. We then dated and signed it.” [19](#)

[19] Serge Cupovski is a machine operator and labourer who has been employed by Concept Wire Industries since 2014. He lives at the same premises as Mr King, renting a room from him. He recollects the union meeting at which there was discussion about joining the union. His evidence includes that Mr King had not spoken to him directly about membership of the union. His own interest in respect of membership was along the lines of “what’s in it for me”. He also recalls seeing Mr King and Mr Anriquez speaking after the union meeting on 17 October 2016; Mr Anriquez was sitting at the machine at which he works and Mr King was standing nearby near to another machine. He did not think anything about the interaction may have been intimidating. He did not recollect anything in the workplace that may have been bullying behaviour.

[20] Mr Cupovski’s evidence includes that when he discussed membership of the union with Mr Kearsey, a day or two after the events complained of by Mr Anriquez, the latter had said in response to the question “while I’m in the office, David, I’d like to know what is in it for me” words to the effect of “if you’d like to know what is in it for you I’ll have to minimise your wages to the award”, [20](#) with the implication that would be the result if people did join the union. Mr Kearsey agrees the two met and discussed the allegations made by Mr Anriquez, but denies the conversation reported by Mr Cupovski about what may be in it for him if he were to join the union.[21](#)

[21] On 20 October 2016 Mr King was stood down on pay while an investigation could be conducted. [22](#)

[22] In furtherance of his decision to conduct a preliminary investigation, Mr Kearsey met with Mr King and his union representative, Mr Chirgwin, as well as Mr San Martin, Mr Wilson and Mr Bartlett on Tuesday, 25 October 2016. Mr Anriquez’s complaint was provided to Mr King and Mr Chirgwin and a response was sought from Mr King. The comment was made in the meeting on behalf of Mr King that the investigation was “union bashing”;

“From Paul and Tony’s comments, though, it was immediately about me not wanting the union here and that I’d already made my mind up that Tony was guilty. I said I hadn’t. I said I didn’t know what the decision would be and was listening to what they had to say. Tony said “*You’ve already made up your mind*”, “*you’ve totally made up your mind*” and “*This is union bashing*”. Alarm bells started ringing in my head when they said that so I knew we needed someone independent and external to investigate. My integrity was being questioned so I later asked Marcus to get someone independent to investigate and I would adhere to whatever decision was made.” [23](#)

[23] Mr Kearsey asserts that Mr King was agitated and aggressive [24](#) in the meeting with Mr Chirgwin gesturing to him to calm down,[25](#) although this is denied by Mr King who does concede however that he was quite upset and frustrated.[26](#)

[24] Most parts of the meeting on 25 October 2016 were recorded in two audio files. While the audio recordings were introduced into evidence in these proceedings none of the witnesses were examined about the contents and the representatives did not take the Commission to specific parts of the files for consideration, although the invitation was given generally to the Commission to listen to their contents after the matter adjourned in order to form an opinion as to whether Mr King was unduly agitated and aggressive in the meeting.

[25] I have listened to the recordings. While they support the view that the meeting was heated, mainly but not exclusively on Mr King’s part, I am unable to make the finding from them that Mr King was agitated and aggressive and required calming down. There are several points at which Mr King appears to vehemently deny some of the central allegations, however, I am unable to find from the audio recordings that his conduct was unacceptable or belligerent.

[26] In saying this, the recordings do lead to the view that Mr King did not accept, at that time at least, that he had approached Mr Anriquez about union membership. He was asked pointedly if he had approached Mr Anriquez twice on the Monday, 17 October 2016, and replied that he didn’t even know what these

accusations are; and that he probably approached Mr Anruqiez 17 times on that day about various matters, since they work together. [27](#)

[27] With the complaint having been made and unresolved through the preliminary investigation, Concept Wire Industries determined it should formally investigate the complaint. In order to do so, it commissioned an investigation report from its solicitors, McDonald Murholme who subcontracted the work associated with the investigation to another legal practitioner, Katherine Wirth.

[28] Mr King participated in the investigation and agreed to be interviewed. He attended a meeting with Ms Wirth on 28 November 2016 with his union representative Mr Chirgwin. Ms Wirth asked questions about the allegations which he generally denied and following her interview with him, Ms Wirth gave Mr King a typed up version of what he had said to her. [28](#) In addition to Mr King Ms Wirth interviewed a number of people for her investigation, namely Mr Anriquez, Mr Wilson, Mr Kearsey, Mr Cupovski, Mr San Martin, Natasha Grozdanovska, a Sales and Administration Employee, Kieth Wickham, a warehouse worker, and Stephen Tang, also a warehouse worker. [29](#) The last three of these people did not give evidence in these proceedings. Ms Wirth's investigation concluded that the allegation made by Mr Anriquez was substantiated and that the behaviour was bullying. [30](#) Ms Wirth's analysis of the matters to be considered in her investigation is set out in her report as follows;

“6. ANALYSIS AND FINDINGS

Yuri gives quite a detailed account of events. Harvey recalls that he was surprised by the amount of detail provided by Yuri.

The alleged incidents took place on Monday 17 October 2016 and Tuesday 18 October 2016. Yuri spoke to David, Harvey and Rustico about what had occurred very soon after, on 19 October 2016, and the incident was documented. The account that David, Harvey and Rustico give of what Yuri said is broadly consistent.

David says that when Yuri spoke to him he was “visibly distressed. He had a nervous look about him and looked upset”.

Harvey says that Yuri appeared upset, and emotionally he looked uneasy. Harvey says he believed what Yuri was telling him. According to Harvey, Yuri is an honest guy- “straight up since the day dot he's been here”.

Rustico says that Yuri looked upset and “he knows Yuri was scared because he was a bit shaky that day and he has never made a complaint before”.

Tony's evidence is less clear. He admits to speaking to Yuri about the union (or presumes that he did this) but he is very vague about what was said, exactly when this occurred, and on how many occasions this occurred. Tony blames David for putting Yuri up to this, saying that what Yuri says is a total fabrication.

There were no direct witnesses to the conversations in question, although I note that Sasha says he did hear Tony asking Yuri if he wanted to join the union but he couldn't hear what they were saying.

Sasha says that Tony told him that he asked Yuri why he didn't want to join the union and told him, “you are going to isolate yourself mate?”

Kieth gives evidence that about a week prior to the incident with Yuri, Tony asked him and Steve 3 or 4 times over about 5 minutes if they were going to join the union. He said Tony was pushy. Steve gives a different account of events, saying that Tony only asked them once if they wanted to join the

union and that he didn't put any pressure on them and he wasn't annoyed when they did not want to join the union.

On the balance of probabilities, I find the allegation to be **substantiated**, on the basis that I prefer the evidence of Yuri over that of Tony. My reasons for this are as follows:

- Yuri's allegation was documented within a very short time of the incidents occurring;
- Yuri's behaviour is consistent with him having been pressured by Tony, that is, Harvey, David and Rustico all say that Yuri appeared upset when he made the complaint;
- Yuri's account of events is consistent with the evidence provided by Sasha, who says that Tony told him that he asked Yuri why he didn't want to join the union and that he said to Yuri "you are going to isolate yourself mate?"
- There is no evidence that Yuri was "put up to this" or fabricated the complaint. In fact, quite the contrary, as both David and Harvey say they checked with Yuri to see if he was serious about his intentions to make a complaint.
- Tony's account of events is vague. This is to be contrasted with Yuri's detailed and consistent account of events, which he relayed to a number of people very soon after the events were said to have occurred and which were documented." [31](#)

[29] As noted above, Mr King's interview with Ms Wirth was on 28 November 2016. He did not hear about developments with the investigation until the New Year when he was requested to attend the meeting on 10 January 2016. Mr King attended that meeting without Mr Chirgwin because the latter was unavailable since he was on annual leave at the time. [32](#) The meeting took place with Mr King and, on behalf of Concept Wire Industries, Mr Kearsey and Mr Bartlett who informed him of the results of the investigation and broadly that the claimant bullying had been substantiated. They asked him whether he had anything to say about the findings and in response Mr King said that the investigation had no merit and he would be seeking advice about it and that it had never been his intention to bully or hurt anyone. Mr King was told by management representatives that his employment was to be terminated and that there would be another meeting at which his termination would be formalised.[33](#)

[30] The meeting held on 10 January 2017 was also the subject of audio recordings provided to the Commission. Again, the parties did not take Commission to any particular part of the files for review. I have listened to the recordings and make no findings about them.

[31] The second meeting took place on Monday, 16 January 2017 and on that occasion Mr Chirgwin was able to attend with Mr King Mr Bartlett and Mr Kearsey were in attendance on behalf of Concept Wire Industries. Mr King records the meeting as being brief and essentially for the purpose of confirming that his employment was to be terminated. [34](#) The statement records about this meeting indicate that Mr King later

received a written confirmation of the termination of his employment, dated 12 January 2017. The letter reiterates the reasons for his dismissal as being his conduct toward Mr Anriquez;

“...Therefore, given the evidence before me, including the findings of the independent report provided by Katherine Wirth Consulting we believe there are grounds for dismissal based on the following:

Under the definition of bullying in the Fair Work Australia Act s.789FD

- An individual repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and
- That behaviour creates a risk to health and safety.

Your behaviour to the complainant was considered by the independent investigation as repeated as you spoke to the complainant more than once over the course of two days.

Your behaviour was considered by the independent investigation to be intimidating, threatening and aggressive. Therefore the behaviour you displayed was unreasonable.

You were aware of the mental health of the complainant, but you still showed behaviour that created a risk to the health and safety of the complainant.

Your continued employment at Concept Wire Industries is considered a significant risk to the health and safety of fellow employees, therefore we advise you that you are formally dismissed from the employ of Concept Wire Industries effective immediately.” [35](#)

[32] Mr Anriquez’s evidence, and those of other witnesses, includes that he suffers from some level of anxiety and that he keeps to himself. There is an undertone, without formal evidence on the subject, that these things amount to some level of mental illness that may either affect how he perceives matters, or how he is treated. For example, in the meeting on 25 October 2016, Mr Kearsey specifically levelled the allegation to Mr King (which was denied) that he took advantage of Mr Anriquez’s situation and approached him about union membership more so than others. [36](#)

[33] I accept and prefer Mr Anriquez’s evidence to that of Mr King where there is a conflict between their evidence. Mr Anriquez gave his evidence calmly and without prevarication or embellishment and was consistent both with the content of his original complaint to Concept Wire Industries; the matters he reported to Ms Wirth; and the content of his witness statement. He was clear and consistent in his recollection of the factual matters to which he referred. Mr King’s evidence was also given calmly and consistently at least within the matters discussed within the oral evidence and his witness statement but suffered from some differences between his later evidence and the earlier extended interview conducted on 25 October 2016. I consider in context that Mr King has not been entirely truthful with Concept Wire Industries about the extent of the interactions he had with Mr Anriquez or the things that he said to him.

[34] I also accept the evidence of Mr Kearsey and Mr Bartlett and prefer it to that of Mr King. Their evidence is consistent with both the documentary evidence before the Commission, the contents of the investigation report and also the audio of the extended interview conducted on 25 October 2016. I also accept Mr Wilson’s evidence about his interactions with Mr Anriquez’s and especially in relation to the formality of assisting Mr Anriquez’s make a written complaint about Mr King’s conduct.

[35] I accept generally the evidence of Mr Chirgwin and Mr San Martin.

[36] I do not accept Mr Cupovski's evidence in any respect and consider him to be an unreliable witness. The allegations he made that to the effect that Mr Kearsey had said things to him about his wages being reduced to the award level if he joined the AMWU are implausible in the context of the evidence he actually gave. That is not to say that such an allegation could not be considered plausible under any circumstances, merely to say that in the context in which Mr Cupovski brought forward the matter leads to a finding that the allegation is implausible. The implausibility of his claim is heightened by the absence of either cogent or corroborative detail on the subject and his allegation on the subject therefore taints the totality of his evidence and accordingly I do not accept any part of it. Mr Cupovski came to the Commission on an Order issued upon application by the Applicant and his evidence was not the subject either of a written witness statement or written proof of evidence. While I am not critical of the Applicant for that circumstance, the fact that there was no prior written document outlining the matters that would be put to the Commission means that the prospect emerges that the statement he made is a recent invention. I note as well that the allegation is not dealt with in Ms Wirth's investigation report and consider it likely in the overall circumstances of the matter that had those things actually been said to Mr Cupovski by Mr Kearsey they would have been reported to Ms Wirth.

LEGISLATION

[37] The legislative provisions which are relevant to this decision are set out in s.387 of the Act in the following terms:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC 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.”

CONSIDERATION

[38] Determination of whether Mr King's termination of employment was harsh, unjust or unreasonable requires each of the matters specified in s.387 to be taken into account.

[39] The Full Bench has summarised the approach that should be taken by the Commission to the criteria within s.387 in the following way; [37](#)

“[28] The following propositions concerning consideration as to whether there is a valid reason for dismissal for the purpose of s.387 are well established:

- a valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced; [38](#)
- a reason would be valid because the conduct occurred and justified termination; conversely the reason might not be valid because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour); [39](#)
- it is not necessary to demonstrate “serious misconduct” or misconduct sufficiently serious to justify summary dismissal in order to establish a valid reason for dismissal; [40](#)
- the existence of a valid reason to dismiss is not assessed by reference to a legal right to dismiss [41](#) (so that, for example, where summary dismissal has occurred, it is not necessary to determine whether the right of summary dismissal was legally available); and
- the criterion for a valid reason is not whether serious misconduct as defined in reg.1.07 has occurred, since reg.1.07 has no application to s.387(a) (although a finding that misconduct of the type described might well ground a conclusion that there is a valid reason for dismissal based on the employee's conduct). [42](#)“ (original references)

[40] I will deal with each of the criteria within s.387 in turn.

(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)

[41] Determination of whether there was a valid reason for a person's dismissal involves an examination of whether the reason given is “sound, defensible or well founded”, within the overall context of the employment relationship;

“At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must “be applied in a practical,

commonsense way to ensure that'' the employer and employee are each treated fairly, see what was said by Wilcox CJ in *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, when considering the construction and application of s 170DC." [43](#)

[42] Having been dismissed for misconduct, the Commission is first required to find whether on the balance of probabilities the alleged misconduct actually occurred. [44](#) In doing so, the Commission will take into account the need to be properly satisfied of the proofs of the conduct; without applying a standard of proof higher than the balance of probabilities.[45](#) The question of whether the alleged conduct took place and what it involved is to be determined by the Commission. However 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.[46](#) The Commission will also take into account the need for honesty on the part of the applicant during the course of an investigation.[47](#)

[43] In relation to Mr King's conduct I am satisfied that on balance of probabilities from the evidence before me that:

- Mr King approached Mr Anriquez on four occasions over two days about being a member of the AMWU;
- Mr Anriquez declined to be a member of the union and requested to be left alone;
- When Mr Anriquez declined to be a member of the AMWU Mr King showed outward signs of anger and frustration and made comments to Mr Anriquez about his employment future and that he may be isolated in the workplace;

[44] I am also satisfied that when Mr Anriquez's allegations were put to Mr King that he was not completely truthful with Concept Wire Industries or with Ms Wirth, the external investigator either about the number of times that he approached Mr Anriquez's or the content of those conversations. I am also satisfied that Mr King was not entirely candid with Concept Wire Industries about the responses that Mr Anriquez had given in the conversations Mr King had with him.

[45] A finding about whether in the overall circumstances Concept Wire Industries had a valid reason for Mr King's dismissal requires the balancing of several considerations given the somewhat unique circumstances of the interaction between Mr King and Mr Anriquez which led ultimately the Mr King's dismissal. In this regard I take into account the following matters:

- Prior to and at the time of Mr King's approaches to Mr Anriquez about membership of the AMWU Mr King was an enthusiastic supporter of the union and its industrial goals and objectives as might be applied to his workplace. He was plainly within his workplace rights to assist in the union's endeavours to organise the workplace and more particularly he was plainly within his workplace rights to approach Mr Anriquez about joining the union as well as doing so as persuasively and passionately as he could, within the bounds of what might be considered reasonable conduct. He was also more likely than not within his right to approach Mr Anriquez on the subject more than once and even in the face of an initial rebuff. People tend to reflect on previous discussions and can be open to further approaches. Those things, in and of themselves, are important industrial rights well-recognised by the Commission.

- On the other hand Mr Anriquez held an equally important workplace right being the right to decline to join the AMWU when asked by Mr King. He also held the right not to be subjected to workplace bullying in any form.
- For its part Concept Wire Industries was obligated to ensure a safe workplace free from workplace bullying and, in order to do so, was obliged to act in some way upon any complaint received about matters of workplace bullying. At the time it received the complaint from Mr Anriquez, it needed to establish whether or not what he claimed to have occurred in fact did occur and whether any sanction should be applied in respect of any person whose conduct was found wanting.
- It went about assessing those things by putting Mr Anriquez's allegations to Mr King and seeking his response, and then seeking the matters be externally investigated. The problem the Respondent faced, as the primary decision maker, was that the conduct complained of was denied, and not witnessed beyond the main protagonists. The complainant was very adamant about what had happened, and the person against whom the allegations were directed was equally adamant that the allegations that were the subject of the complaint were simply wrong.
- Ms Wirth's investigation report discloses a meticulous and balanced investigation process. Some investigation reports seen by the Commission in this jurisdiction fail to get to the heart of such a situation and rarely undertake a true balancing of the evidence seen by them. In the case of Ms Wirth's investigation report she records the process by which she interviewed nine people including Mr King; then made findings on the balance of probabilities of matters of evidence; and finally made findings about the overall import of the evidence.
- The interviews for the investigation were conducted by the time far closer to the actual end and a hearing in this matter. Reasonably memories would likely have been fresher at the time and Ms Wirth findings could more reliably be made.
- Ms Wirth's report was then provided to Mr Bartlett who considered its findings, ultimately concurring with them, who then moved through the process referred to above for the consideration of Mr King's dismissal.
- Although Concept Wire Industries is not a small business employer within the meaning of s.23 of the Act, it is nonetheless small, employing no more than 20 employees at the time Mr King was dismissed. The significance of the size of the business is twofold. In the first place a manager such as Mr Bartlett is less likely than the manager of a larger business to be removed from things that happen on the production floor and is more likely to be in a position to see, hear and understand a greater range of actions and behaviours than might otherwise be the case. It is also the case that

managers in an enterprise that have only 20 employees may potentially be less likely to be in a position to query professional advice they are given on subjects they may not regularly deal with.

[46] Because of my findings about Mr King's conduct, and the matters referred to above, the finding is available to the Commission in the context of Concept Wire Industries workplace that at the time it dismissed Mr King the Respondent held a valid reason for his dismissal.

(b) whether the person was notified of that reason

[47] The evidence establishes that Mr King was notified of the reasons for his termination.

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[48] For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that there is a valid reason for dismissal. [48](#)

(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

[49] There was no refusal by Concept Wire Industries for Mr King to have a support person in any discussions that were had about the future of his employment. Accordingly this factor is a neutral consideration in my decision.

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal

[50] Mr King was not dismissed because of unsatisfactory performance and so this factor is also a neutral consideration in my decision.

(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

[51] As set out above, Concept Wire Industries is a small business, albeit not within the definition of the term in the Act. Notwithstanding its size, there is no evidence before the Commission that such impacted on the procedures it followed in effecting the dismissal of Mr King.

(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

[52] Similarly there is no evidence that the absence of dedicated human resource management specialists or expertise in Concept Wire Industries' enterprise likely impacted on the procedures that followed in effecting Mr King's dismissal.

(h) any other matters that the FWC considers relevant

[53] The Commission does not consider there to be any other matters requiring to be dealt with in this decision.

CONCLUSION

[54] For the reason that it has been found Concept Wire Industries had a valid reason for Mr King's termination of employment and that there are no other factors which would lead to a finding that Mr King's termination was otherwise unfair, it is my finding in this matter that Mr King was not unfairly dismissed.

[55] As a result Mr King's application for unfair dismissal is dismissed and an order to that effect is issued at the same time as this decision.

COMMISSIONER

Appearances:

Mr David Vroland for the applicant

Mr Thomas Page for the respondent

Hearing details:

2017.

Melbourne:

17 May.

[1](#) Exhibit R3, Witness Statement of Marcus Bartlett, [2].

[2](#) Exhibit A3, Witness Statement of Anthony King, [11].

[3](#) Ibid [17]-[19].

[4](#) Ibid [22].

[5](#) Exhibit A2, Witness Statement of Paul Chirgwin, [5].

[6](#) Exhibit A3, [23]-[24].

- [7](#) Ibid [25]-[34].
- [8](#) Ibid [35].
- [9](#) Exhibit R10, Witness Statement of Yuri Anriquez, [8].
- [10](#) Ibid [18].
- [11](#) Ibid [3].
- [12](#) Ibid [4].
- [13](#) Ibid, [5] – [6].
- [14](#) Ibid, [7].
- [15](#) Ibid [8].
- [16](#) Ibid, Attachment YA-1
- [17](#) Ibid.
- [18](#) Exhibit R11, Witness Statement of David Kearsey, [6] – [7].
- [19](#) Ibid, [11] – [14].
- [20](#) Hearing audio, 28 April 2017, at around 3:17.
- [21](#) Hearing audio, 17 May 2017, at around 2:14.
- [22](#) Exhibit A3, Attachment AK-2
- [23](#) Exhibit R11, [18]
- [24](#) Ibid, [20] – [22].
- [25](#) Ibid, [22].
- [26](#) Exhibit A3, [54].
- [27](#) Second audio recording from 25 October 2016, at around 2:30.
- [28](#) Exhibit A3, [60] – [61]
- [29](#) Employer Response Form, F3, p18.
- [30](#) Ibid.
- [31](#) Exhibit A4, Investigation Report, p.12.

- [32](#) Exhibit A2, Witness Statement of Paul Chirgwin, [10].
- [33](#) Exhibit A3, [63] – [66].
- [34](#) Ibid [69].
- [35](#) Exhibit A3, Attachment AK-5,p.2.
- [36](#) First audio recording from 25 October 2016, at around 29:25.
- [37](#) *Titan Plant Hire Pty Ltd v Shaun Van Malsen* [\[2016\] FWCFB 5520](#).
- [38](#) *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.
- [39](#) *Edwards v Giudice* [1999] FCA 1836; (1999) 94 FCR 561 at [6]-[7].
- [40](#) *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWCFB 1033](#) at [32]; *Annetta v Ansett Australia* (2000) 98 IR 233 at [9]-[10].
- [41](#) *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWCFB 1033](#) at [32]; *He v Lewin* [2004] FCAFC 161; (2004) 137 FCR 266 at [15].
- [42](#) *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWCFB 1033](#) at [33]-[34]; *O'Connell v Wesfarmers Kleenheat Gas Pty Ltd* [\[2015\] FWCFB 8205](#) at [22]-[23].
- [43](#) *Selvachandran v Peteron Plastics* (1995) 62 IR 371 at 373.
- [44](#) *Edwards v Giudice* (1999) 94 FCR 561 [6]-[7].
- [45](#) *Budd v Dampier Salt Ltd* (2007) 166 IR 407 at [15]; with reference to *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.
- [46](#) *King v Freshmore (Vic) Pty Ltd* (unreported, 2000) Print S4213, [24].
- [47](#) *Streeter v Telstra Corp Ltd* (2008) 170 IR 1.
- [48](#) *Chubb Security Australia Pty Ltd v Thomas Print* S2679 [41].

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