Stevenson and Greenstyle Pty Ltd and Penshurst Pty Ltd t/as Atama Furniture [2002] NSWIRComm 292 (14 November 2002)

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NEW SOUTH WALES INDUSTRIAL RELATIONS COMMISSION

CITATION : Stevenson and Greenstyle Pty Ltd and Penshurst Pty Ltd t/as Atama Furniture [2002] NSWIRComm 292

FILE NUMBER(S): 6500

HEARING DATE(S): 01/07/2002, 02/07/2002, 19/08/2002

DECISION DATE: 14/11/2002

PARTIES:

APPLICANT:

Edward John Stevenson

RESPONDENT:

Greenstyle Nominees Pty Ltd and Penshurst Investments Pty Ltd t/as Atama Furniture

JUDGMENT OF: Sams DP

LEGAL REPRESENTATIVES

APPLICANT

Mr E Stevenson appeared for himself

RESPONDENT

Mr R L Gibson

Director, Penshurst Investments Pty Ltd

CASES CITED: Western Suburbs District Ambulance Committee v Tipping

(1957) AR (NSW) 273

Byrne & Anor v Australian Airlines (1995) 61 IR 32

Outboard World v Muir (1993) 51 IR 167

Bankstown City Council v Paris (1999) 93 IR 209

Antonakopoulos v State Bank of New South Wales (1999)

91 IR 385

D & R Commercial v Flood [2002] NSWIRComm 88

Wilson v Department of Education and Training [2000] NSWIRComm 20

Helprin v Westfield Limited & Anor (1996) 68 IR 25

Nicholls and Central Sydney Area Health Service (unreported) Sams DP, IRC4131 of 1999, 25 August 2000

Herbert and Warrah Ltd [2001] NSWIRComm 109

Stephan and R L Whyburn and Associates [2000] NSWIRComm 154

Abdullah Al-Shennag v Bankstown City Council Civic Services Group [2002] NSWIRComm 150

Vincent v Le Cornu Furniture and Carpet Centre Pty Ltd (1996)

71 IR 227

Coghlan v D & D Advertising (unreported, Connor C, IRC6028 of 2001, 15 July 2002

LEGISLATION CITED: Industrial Relations Act 1996

JUDGMENT:

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INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

CORAM: **SAMS DP**

14 November 2002

Matter No IRC01/6500

EDWARD JOHN STEVENSON AND GREENSTYLE PTY LTD AND PENSHURST PTY LTD t/as ATAMA FURNITURE

Application by Edward John Stevenson re unfair dismissal pursuant to section 84 of the Industrial Relations Act 1996

DECISION

[2002] NSWIRComm 292

1 Mr Edward John Stevenson ("the applicant") filed a claim on 2 October 2001 of alleged unfair dismissal, pursuant to Pt 6 ch 2 of the *Industrial Relations Act* 1996 ("the Act"). The applicant was employed as a sales person by Greenstyle Pty Ltd and Penshurst Pty Ltd t/as Atama Furniture ("the respondent"), from 11 October 1999 until his resignation on 11 September 2001. The applicant claimed he was forced to resign after being denied an opportunity to respond to certain allegations made against him by the respondent.

2 Conciliation proceedings were convened by the Commission on 19 November 2001. Both parties were unrepresented. Mr Ralph Gibson, a director of Penshurst Investments Pty Ltd, appeared for the respondent. The matter could not be settled. Accordingly, the Commission made a finding of unsuccessful conciliation pursuant to s87 of the Act. A directions hearing was listed on 13 December 2001 and the arbitration listed for 21 and 22 May 2002.

3 After the filing of the evidence, Mr Gibson, by notice of motion, sought leave to file further affidavits. Leave was granted at a hearing on 27 May 2002. This required new dates to be set for the arbitration. The applicant was also granted leave to reply to any new evidence relied upon by the respondent.

4 The arbitration proceeded over three days. The applicant relied on his own evidence and that of two former employees of the respondent, Mr Bob Hales and Mr Steve Craddock. Mr Gibson relied on his own evidence and that of Mr Peter Messerle, East Coast Sales Manager; Mr Brian Fawkes, Production Supervisor (Perth); Mrs Janet Fuller, Administration Supervisor (Sydney) and Ms Christine Tilbrook, National Administration Manager (Perth).

Case for the applicant

5 The applicant had sixteen years' experience in the furniture industry. He said that in August/September 1999 he was "*head hunted*" by Mr Ron Fawkes (the respondent's then sole owner) and offered the position of New

South Wales State Manager of Atama Furniture. The applicant said he had resigned a secure position and commenced employment with the respondent in October 1999.

6 In this position the applicant claimed to have had a "*hands on*" management role. His salary was $40,000, plus a 1 per cent commission on all sales over $100,000 per month generated in Sydney. He was provided with a mobile phone and company vehicle. The applicant described himself as co-manager in the Sydney office with Mr Steve Fawkes the other co-manager (nephew of Ron Fawkes). The applicant said his role was to supervise staff (numbering four to six), sales and marketing activities, assisting in assembly and despatch, liaising on product pricing, delivery matters, accounts and commissions.

7 In cross examination, the applicant agreed there was no mention, in any correspondence, that he was either a co state manager or a sales manager.

8 In July 2000 the applicant's retainer was reduced to $26,000 and his commission increased to 3 per cent on his own sales. The applicant complained that this was done without any discussion, consultation or agreement. The respondent informed the applicant on 1 August that the reasons for the change were that he was not fulfilling sales expectations and there were concerns with his temperament after personality clashes had occurred with other staff.

9 On 8 August 2000 the applicant advised the respondent that the changes to his terms of employment were unacceptable. Mr Gibson informed the applicant on 9 August as to the reasons for the changes; again highlighting his attitude to other staff. The applicant was advised to accept the offer or his refusal would be taken as a resignation. The applicant claimed to have responded to management by addressing the issues raised and denying he had any problems with other staff.

10 Mr Ron Fawkes and Mr Gibson replied by memo questioning the applicant's earlier representations as to his sales figures. His targets had not been achieved. The memo highlighted particular incidents involving conflict with other staff. Management expected a material improvement in his relationships with the staff. A revised package was proposed which included $40,000 retainer, 3 per cent commission on sales generated over $30,000 a month and vehicle and mobile phone provided.

11 The applicant acknowledged his new role as sales representative and said he continued to work in a productive manner. At this time, he said he became concerned that Mr Gibson was intent on removing him from employment.

12 The applicant referred to ongoing problems with the payment of sales commission and stated that the person responsible for payment, Christine Tilbrook was "*autocratic*". He had complained to her in Perth, by phone, in early June 2001. After this call, Mr Gibson spoke to the applicant. The applicant believed Mr Gibson was infuriated over his criticism of management. However, the applicant said when he phoned Ms Tilbrook he was only concerned with staff morale and the arbitrary attitude to commission payments.

13 On 20 June 2001 Mr Gibson visited the Sydney office and informed the applicant and another employee, Bob Hales, that their remuneration packages were to be changed. The applicant said this was done without any consultation or agreement.

14 In July 2001 Mr Peter Messerle was appointed East Coast Sales Manager. The applicant was astounded that he had not been given the courtesy of an introductory phone call to Mr Messerle. Mr Messerle asked employees to fill in a number of forms. The applicant refused, stating that he regarded the forms as an invasion of privacy. In any event, Mr Messerle had not pursued these matters.

15 In early August 2001 the company moved to new premises at Silverwater. At this time the applicant said he was writing about half the state wide business. In cross examination, the applicant was asked who made this assessment of his sales performance. He said it was his own view and no one else's.

16 At about 6.30pm on 29 August Mr Messerle phoned the applicant at home and asked to see him at the airport. The applicant refused and insisted on knowing what Mr Messerle wanted to talk to him about. Mr Messerle said that Mr Gibson was sending him a second warning letter for unacceptable behaviour towards staff and clients.

17 The applicant stated that he was not provided with any details, nor was he given any opportunity to argue his version of events. He was denied an opportunity to defend or explain himself. He said he felt persecuted and was denied natural justice. Mr Gibson's memo had been placed in a file on the applicant's desk. He did not regard it as an official warning. He believed Mr Gibson would do anything, or believe anything, in order to facilitate his dismissal.

18 On 31 August 2001 the new Sydney office manager, Mrs Janet Fuller, raised an issue in regard to the format used in the respondent's quotation documents. The applicant said it was agreed that he, Bob Hales and Mrs Fuller would discuss the matter. However, Mrs Fuller changed the format of

her own volition. The applicant complained to her about omissions in the document and the lack of consultation. Mrs Fuller complained to Ms Tilbrook about the applicant's behaviour during this conversation. The applicant apologised to Mrs Fuller a week later.

19 On 11 September Mr Messerle called a meeting with the applicant and asked for his resignation. The applicant was handed a memo highlighting the complaints against him. The applicant sought to defend himself and said he was being "*shafted for a minor office disagreement*" (the Fuller incident). He agreed to resign and did so.

20 In cross examination the applicant was asked about the complaints received from other staff. In respect to Danielle Douglas he said that, as a manager, he had cause to discipline her on numerous occasions. She had resented this.

The applicant was asked about complaints from Mr Messerle as to hanging up the phone on him, refusing to follow directions and his aggressive manner. The applicant denied these allegations. He was asked about complaints made by Mrs Fuller. He said that Mrs Fuller was a "*plant*" in the company with an agenda to get rid of him.

21 Mr **Bob Hales** was employed by the respondent from November 1999 to February 2002. He said he was forced to resign after being continually blamed for matters over which he had no control. He claimed Mrs Fuller had interfered in his work and was the principal antagonist in his forced resignation.

22 Mr Hales denied ever contacting Brian Fawkes or Ralph Gibson to complain about the applicant's behaviour towards himself or customers. Mr Hales said he had no knowledge of any incident in which the applicant yelled or swore in the workplace or abused customers in the showroom or over the phone. Mr Hales said, if he had made comments about the applicant, they were "*not intended to be used by other persons or parties as a basis of me complaining about anyone"*.

23 Mr Hales said that the applicant's behaviour was always professional and courteous. He believed Mr Gibson was determined to get rid of the applicant. In any event the applicant had no opportunity to defend himself. Mr Hales stated that he had never witnessed, nor was he aware at any time that the applicant was aggressive, abusive, rude, confrontational or intimidatory toward any fellow staff member or customer.

24 Mr Hales gave evidence of the phone conversation in June 2001 between Christine Tilbrook and the applicant. Mr Hales said the applicant did not

abuse, threaten or intimidate Ms Tilbrook. He said "*she was the last person to make such a complaint*".

25 Mr Hales overheard a conversation between Joanne Zervadse from the Four Point Sheraton Hotel and the applicant. He said the applicant was courteous and controlled. Mr Hales said he never mentioned this conversation to Mr Gibson.

26 Mr Hales gave evidence of the disagreement between the applicant and Mrs Fuller over the quotation format. He said the applicant was firm, but courteous, and at no time was he abusive or aggressive.

27 In cross examination, Mr Hales was questioned about a number of "*remarkable coincidences*" in the language used in both his and Mr Craddock's affidavits. Mr Hales said he had no comment to make. In re examination, Mr Hales said that the applicant had typed his affidavit.

28 Mr **Steve Craddock** said he did not phone Brian Fawkes or Ralph Gibson, at any time, to complain about the applicant's behaviour. He did not witness, nor was he aware of any abusive, confrontational or aggressive behaviour of the applicant towards any staff or customers. Mr Craddock maintained that he had no knowledge of the Joanne Zervadse incident and had not discussed the matter with Mr Gibson on 24 August 2001. At no time had he ever told Mr Messerle that he was having problems with the applicant's behaviour.

29 Mr Craddock said that any remarks he made about the applicant were not complaints and were not intended to be used by anyone as a complaint or taken as a complaint by anyone. He gave no authority to anyone to complain about the applicant on his behalf.

30 Mr Craddock denied having received an abusive voice mail call from the applicant and did not complain to Ms Tilbrook about the applicant's behaviour.

31 Mr Craddock said he was never counselled by Mr Messerle. However, he was shown a warning letter issued to him on 21 September 2001, to which Mr Craddock replied that he did not accept this letter as a counselling. He was given no opportunity to respond to, or explain, the allegations against him.

32 Mr Craddock said that he did not witness, nor was he aware that the applicant had been abusive or aggressive towards Mrs Fuller. He found the applicant to be a willing worker who treated him as a mate and had helped him to understand his rights and responsibilities at work.

33 In cross examination, Mr Craddock was asked about the similarities between his affidavit and Mr Hales'; to which he replied that he had no comment.

Case for the respondent

34 Mr **Gibson** gave evidence that Atama Furniture was formed on 1 July 2000. It is owned in partnership by Greenstyle Nominees Pty Ltd and Penshurst Investments Pty Ltd, and both are 50 per cent shareholders. Mr Gibson is a director of Penshurst and Mr Philip Fawkes is a director of Greenstyle. The business is based in Malaga, Western Australia and has sales and distribution offices in Sydney and Melbourne. It has around forty-eight employees, the majority of whom are based in Perth.

35 At the time the applicant was hired, Mr Gibson said that the Manager of the Sydney office, Mr Stephen Fawkes (nephew of Mr Phil Fawkes) was intending to leave Atama. The applicant was told he may be considered for the position.

36 Around July 2000 Mr Stephen Fawkes, in a memo to Mr Gibson, expressed concern with the applicant's sales performance and behaviour towards staff and customers. Mr Gibson spoke to the applicant by phone on 28 July 2000. Mr Gibson asked him to modify his behaviour and informed him his salary was to be restructured to reflect his individual sales performance. A memo was sent on 18 August setting out the revised structure. It also referred to concerns about the applicant's behaviour. He was warned his future employment would be reviewed if problems continued with his behaviour.

37 Mr Gibson said there were only two full time salespersons in the Sydney office between August 2000 and June 2001 - the applicant and Bob Hales. In the six months ending June 2001 the applicant contributed 20 per cent of the total sales, and 30 per cent in the following quarter. Mr Gibson said it was hoped the applicant's sales would improve, but this was not the main issue. It was the applicant's confrontational and aggressive manner in carrying out his duties which was of concern.

38 On 2 July 2001, Mr Peter Messerle was appointed to the position of East Coast Sales Manager, responsible for Sydney and Melbourne. On 11 July, Mr Gibson said he received a call from Mr Messerle in which he complained about a call he had received from the applicant. Mr Messerle said the applicant was aggressive, he had refused to do what was requested and had informed him that he was intending to take Mr Gibson to court over his terms of employment. Mr Messerle later met the applicant in Sydney and counselled him over his behaviour.

39 On 30 July, Christine Tilbrook rang Mr Gibson to complain about a call she had received from the applicant on 27 July. She said the applicant had made disparaging comments about management and was extremely aggressive. Mr Gibson rang the applicant and told him not to speak to other staff in a manner likely to cause distress.

40 On 24 August, Mr Brian Fawkes (production supervisor in Perth and the brother of Stephen) asked for a meeting with Mr Gibson to discuss complaints he had received from Bob Hales and Steve Craddock about the applicant's behaviour toward them and customers.

41 Mr Gibson said he spoke to Mr Craddock who told him that he was tired of being verbally abused by the applicant. The applicant had recently left abusive messages on his voicemail. He had witnessed the applicant acting in an abusive manner towards another employee, Jo-anne Beringer, and customers. He also spoke of a conversation involving the applicant and Ms Zervadse of the Four Points Sheraton Hotel.

42 Mr Gibson contacted Mr Hales by phone. Mr Hales told him he had witnessed the applicant being rude to customers. He also mentioned the Zervadse incident. Mr Gibson then rang Ms Zervadse. She said the applicant was rude and had spoken to her in an aggressive manner.

43 On 28 August, Mr Messerle advised Mr Gibson of a complaint from a Sydney customer about how the applicant had spoken to him. Mr Gibson discussed the matter with Phil Fawkes. It was decided to issue the applicant with a second and final warning. As the applicant was away from the office, Mr Messerle placed a warning letter discreetly in the applicant's work area. Mr Messerle spoke to the applicant on 30 August and counselled him over his behaviour. The applicant responded by threatening legal action. He claimed to be victimised.

44 Mr Messerle phoned Mr Gibson on 3 September advising that Janet Fuller had been upset by an incident with the applicant on 31 August 2001. Mr Gibson spoke to Mrs Fuller. She said she was surprised and upset with the applicant's behaviour and felt intimidated by him.

45 Ms Tilbrook was in Sydney in the week of 3 September. She felt the atmosphere was very tense. She had also witnessed an incident between the applicant and Mrs Fuller, in which the applicant was confrontational and behaved in an aggressive manner.

46 Mr Gibson and Mr Brian Fawkes discussed the situation again on 3 and 6 September and with Mr Messerle by phone. It was decided the applicant should be dismissed.

47 Mr Messerle met the applicant on 11 September and gave him a letter of termination. The applicant was offered an opportunity to resign and he did so.

The applicant's reply

48 It is convenient, at this point, to refer to the applicant's affidavits replying to Mr Gibson's evidence.

49 The applicant said he did not regard the letters sent to him as warning letters or counsellings. He said at no time did he intimidate, verbally abuse or behave in an aggressive/confrontational manner towards any staff member, customer or potential customer.

50 In respect to the Zervadse conversation, the applicant said it was Ms Zervadse who became agitated and indignant when she asked to deal with Mr Hales. He told her it was "his territory" and he terminated the call by placing the handset on the receiver.

51 The applicant said he had an amicable work relationship with Mrs Fuller. The incident on 31 August was a minor disagreement. He had not abused, intimidated or threatened her.

52 The applicant said he had a friendly and productive relationship with Ms Tilbrook. He was amazed that the warning letter raised a problem with her which he believed had been resolved. The applicant said that he did not have a phone conversation with Christine Tilbrook on 27 July 2001.

The applicant said he had never criticised or denigrated other staff to Ms Tilbrook.

53 The applicant stated that at no time did he participate in, or receive any counselling from Mr Gibson, Mr P Fawkes or Mr Messerle. He was given no opportunity to inquire into the nature or validity of the complaints made against him or offered an opportunity to explain or defend himself.

54 The applicant said that neither Ms Tilbrook nor Mr Steve Fawkes, ever raised complaints from staff in Sydney. He said the office environment was cordial and informal. The applicant denied ever being aggressive to Mr Hales or Mr Craddock and had never left an abusive voice message on Mr Craddock's phone.

55 The applicant had phoned Mr Brian Fawkes in Perth on many occasions to complain about stock issues. On these occasions he said Brian Fawkes was often abusive and aggressive and had threatened him with physical

violence on a number of occasions. The applicant said he didn't take these threats seriously.

56 The applicant said he refused to fill out various forms sent to him by Mr Messerle as he had never met him. He rang Mr Messerle to tell him Mr Hales, Mr Craddock and himself were not impressed with his approach. He informed Mr Messerle of his own management background and experience in getting people to co-operate.

57 At the meeting with Mr Messerle on 17 July, Mr Messerle told the applicant "he had been told things about him". The applicant told Mr Messerle of his work experience and how he was "*headhunted*" by Atama. The applicant left the meeting with the impression that Mr Gibson had told Mr Messerle that the applicant "*was a problem who had to go*". The applicant said that Mr Messerle had never mentioned counselling over customer complaints or his behaviour.

Respondent's further evidence

58 In cross examination, Mr Gibson agreed that the original employment agreement did not refer to the applicant as a salesperson.

59 Mr Gibson denied that his file notes had been created about non-existent events.

60 Mr Gibson gave evidence of his due diligence visit to the respondent on 3 May 2000, when he observed the applicant yelling and swearing at the back of the warehouse. Mr Steve Fawkes had told him this wasn't unusual.

61 Mr Gibson agreed there were no face to face negotiations with the applicant about changes to his remuneration package. Mr Gibson denied that the letter of 9 August 2000 was a threat to the applicant. Rather, management wanted to bring the issue of the applicant's remuneration to a conclusion. He agreed it might be seen as an ultimatum. Mr Gibson was asked why the original proposal was reversed and the applicant's retainer of $40,000 reinstated. He said this was the result of a process of negotiation.

62 Mr Gibson agreed that the applicant had not been offered retraining, but he certainly had been counselled. He said there was no need for a formal procedure. Mr Gibson agreed that, although he signed the letters of warning of 18 and 29 August 2001, it was left to Mr Messerle to discuss them with the applicant.

63 In the memo of 18 August 2000 entitled "Employment Agreement", Mr Gibson agreed there was no mention of the applicant being warned.

64 Mr Gibson referred to Ms Danielle Douglas' letter of resignation and his phone call to her in which she had complained about the applicant's behaviour. Mr Gibson agreed that he had not asked the applicant to respond to Ms Douglas' complaints.

65 Mr Gibson said that when he received complaints from Brian Fawkes of what other persons (including Mr Craddock and Mr Hales) had told him, Mr Gibson individually phoned those named to verify the complaints which they did. Mr Gibson didn't ask for written confirmation.

66 Mr Gibson said he also rang Ms Zervadse to confirm her complaint against the applicant. She did so. Mr Gibson accepted the applicant was not informed at the time, of the name of the customer who had complained.

67 In respect to the incident with Mrs Fuller, Mr Gibson agreed he did not ask for any written confirmation of her complaint. Mr Gibson agreed he had not asked the applicant for an explanation of this incident. Nevertheless, it had been confirmed by Ms Tilbrook.

68 Ms Chrstine **Tilbrook** gave affidavit and oral evidence by video link from Perth. Ms Tilbrook was National Administration Manager and had worked for the respondent for six and a half years.

69 She said over the past few years she found the applicant to be quite aggressive and difficult to deal with. He used foul language and never missed an opportunity to say something derogatory about other staff members. In oral evidence, she described his phone calls as "*rude and abrupt*". Ms Tilbrook said she didn't tell the applicant she was uncomfortable because she didn't want to aggravate him further.

70 Ms Tilbrook gave evidence of the phone call from the applicant on 27 July 2001 concerning commission payments. She said he was extremely aggressive and used foul language when speaking about other staff. She had tried to placate him. Ms Tilbrook complained to Phil Fawkes and Mr Gibson about the applicant's behaviour.

71 Ms Tilbrook said that she had received complaints from Sydney staff Danielle Douglas, Natalie Dreha and Jo-anne Beringer about the way they were treated by the applicant. She had no notes of these complaints. She had not seen any written complaints from other employees.

72 Ms Tilbrook visited Sydney in the first week of September 2001. The applicant had asked her if she was there "*to whip the new girl into shape*" (Janet Fuller). Ms Tilbrook said the purpose of the visit to Sydney was to assist Mrs Fuller, not observe and report on the applicant. She emphatically

denied being asked by anyone to observe the applicant and report on his behaviour.

73 During the Sydney visit Ms Tilbrook observed the applicant treat Mrs Fuller in a contemptible manner. He was rude and belligerent and sought to belittle her in front of other staff. Ms Tilbrook said the mood was very uncomfortable. Ms Tilbrook had asked Mrs Fuller about it and she said she and the applicant had an argument about quotes the week before. He had been very abusive. In oral evidence, Ms Tilbrook said that the applicant was very intimidatory. He pushed the quote in Mrs Fuller's face and used a pen to poke at the page. Mr Craddock and Mr Hales witnessed this incident. Ms Tilbrook said she spoke to them both about the applicant's behaviour. They both described his behaviour as "*over the top at times*" and he was pretty hard to work with.

74 Ms Tilbrook had told Mr Gibson of her concerns with the applicant's behaviour by phone during the week. She had not raised her concerns directly with the applicant. Ms Tilbrook did not believe it was her role to counsel the applicant. It was Mr Messerle's responsibility.

75 Ms Tilbrook agreed she had never kept records of her phone conversations with the applicant about other staff members. She had not told other employees what the applicant had said about them because she didn't engage in office gossip. However, she did inform Mr Phil Fawkes about these conversations and Mr Gibson about Ms Douglas' complaints.

76 Mr Brian **Fawkes** has been employed by Atama Furniture for five and a half years in the Perth office. Mr Fawkes gave evidence that he had received numerous complaints, over a long period, from staff in Sydney concerning the applicant's behaviour towards staff and customers. He referred in particular to the resignation of Danielle Douglas. Her main reason for leaving was the applicant's behaviour. He also referred to complaints from Christine Tilbrook. Mr Fawkes said he kept no notes of these complaints and had not asked the employees to put their complaints in writing.

77 Mr Fawkes said he received lots of telephone calls from Bob Hales and Steve Craddock complaining about the applicant; almost every week in the first eight months of 2001, and sometimes two or three times a week. Mr Fawkes kept no notes of these calls. Mr Fawkes said he didn't have the express permission of Mr Hales and Mr Craddock to repeat their complaints to other persons. He didn't need their permission. He believed Mr Hales was well aware of what he intended to do with the complaints.

78 While visiting Sydney in August 2001 to reorganise the warehouse in the move from Auburn to Silverwater, Mr Fawkes said he witnessed the

applicant's aggressive attitude towards Mr Hales and Mr Craddock. Mr Craddock had received an abusive voicemail from the applicant. Mr Craddock rang the applicant and told him not to speak to him like that again. Mr Fawkes said Mr Craddock was angry and had told him that this behaviour was a common occurrence.

79 Mr Fawkes witnessed the applicant yelling and swearing at Mr Hales in the warehouse. Mr Hales told Mr Fawkes this was standard practice for the applicant. He was "*rude, abrupt and quite often aggressive*".

80 While in Sydney, Mr Fawkes said Mr Hales and Mr Craddock spoke to him during and after work hours about many incidents involving the applicant, including abusing customers. He referred to the Zervadse incident which he heard about from Mr Craddock and Mr Hales at a barbecue at Mr Craddock's home. Their stories were consistent. Mr Fawkes agreed he had not seen the applicant acting aggressively towards customers while he was in Sydney.

81 On returning to Perth, Mr Fawkes reported his concerns to Mr Gibson. He said the applicant's attitude was "*detrimental to the company*". Mr Fawkes did not believe it was his duty to raise these concerns with the applicant. He said his brother, as the Sydney Manager, spoke to the applicant.

82 Mr Fawkes said he made it quite clear how he felt about the applicant. However, no one in management had asked him to convey information which would be used to terminate the applicant's employment. He had not been sent to Sydney "*to spy on*" the applicant.

83 Mr Fawkes agreed that he had threatened the applicant with dismissal, but had never physically threatened him. Mr Fawkes said he was not threatened by the applicant even though the applicant had tried to intimidate him.

84 Mrs Janet **Fuller** was the Sydney office administration supervisor at Atama Furniture. Two weeks before commencing employment she visited the office and "ran into" the applicant in the car park. In a five minute conversation, he proceeded to tell her of his contribution to the company's success and asked her if she was the "*new girl starting with us*". Mrs Fuller said she did not feel comfortable talking to him and found him rude and abrupt. She had not been warned about him.

85 On 27 August 2001, Mrs Fuller commenced employment. Her first impressions were that the office environment wasn't very comfortable or professional and was very much a "*boys' club"*. She said it was

"*dysfunctional*". She did not express any concerns to management at the time, as it was a new job.

86 The next day the applicant mentioned to her that he typed his own quotations. She said he took great pleasure in letting her know his background and his resumé.

87 On 30 August, Mrs Fuller spoke to Bob Hales about standardising the quotation document in order to make it look more professional. Mr Hales told her the applicant wouldn't be happy.

88 After making the changes, the applicant approached Mrs Fuller and Mr Hales on 31 August and said "*How dare you change the quotation without consulting me?*" Mrs Fuller said she tried to explain that it was a draft. However, the applicant would not listen and talked over her. The applicant threw his pen on the desk and stormed out. Mrs Fuller asked Mr Hales if she was being unreasonable. Mr Hales said the applicant "*always goes off if things don't go his way. He is always telling us how good he is.*" Mrs Fuller agreed the applicant did not scream, swear or bellow at her, had not stood over her or waved his arms around or bashed the furniture. Nevertheless, she felt "*intimidated*" by him.

89 Mrs Fuller advised Mr Messerle of the applicant's outburst twenty-four hours later. The issue was raised again when Ms Tilbrook visited the office in the first week of September. A week later the applicant apologised to her. He said his attitude was something she should get used to. Mrs Fuller said she accepted the apology, but still felt very uncomfortable around him.

90 Mrs Fuller said in the few weeks she worked with the applicant, no one had ever discussed a plan or agenda to remove him. However, as she had been hired to improve company systems and procedures, she felt that the applicant didn't want to know about any changes - it was active reluctance to anything she suggested.

91 Mrs Fuller gave evidence of a meeting with Mr Gibson and Mr Hales on 6 November 2001 concerning an allegation that Mr Hales had lied to customers. Mr Hales was counselled at this meeting.

Applicant's submissions

92 The applicant submitted that he was performing a management role and continued in this role, without complaint, until July 2000 when his retainer was reduced from $40,000 to $26,000. The applicant said this was the first attempt by management, particularly Mr Gibson, to remove him from

employment. The respondent had hoped he would "*spit the dummy and walk*".

93 There was no discussion, negotiation or counselling over such a dramatic measure. It was, he said, a blatant and callous action by Mr Gibson to force him out. Indeed, he was given an ultimatum to accept the change or he would be deemed to have resigned. His own response had been non-emotive.

94 On 22 August 2000 the applicant said he relinquished his management role and continued in a sales role with excellent results and with no complaints from customers or staff.

95 The applicant referred to the call to Ms Tilbrook in June 2001 chasing up commission payments. He said even Ms Tilbrook's version of the conversation could not be described as abusive or aggressive. Changes to the commission payments were made as a result of his call. This demonstrated he had been constructive.

96 The applicant said that as a sales representative with limited resources there are often conflicts with customers. This is what happened with Ms Zervadse. He had not intended to offend her or be unco-operative. He was firm, but not aggressive. It was Mr Gibson who had pursued her for a statement, but then did not call her as a witness.

97 The applicant accepted that there was a conflict with Mr Messerle. He said this was because Mr Messerle claimed to have more experience than he actually had. Mr Messerle had never advised him of any complaints from staff or customers.

98 The applicant complained of the manner in which the 29 August 2001 letter from Mr Gibson was conveyed to him. He asked why the letter was not handed to him in person by it's author; why would Mr Messerle not discuss it with him and why was he not given any right of reply or asked to comment.

99 The applicant referred to his first meeting with Mrs Fuller. He said it was brief and Mrs Fuller was nervous. The applicant described his version of the incident with Mrs Fuller on 31 August 2001. Mrs Fuller had agreed that she, Mr Hales and himself would meet and agree on the new format. But Mrs Fuller went ahead on her own. The applicant said he did not shout, abuse, threaten, intimidate or persecute her. Mr Hales and Mr Craddock confirmed this. He had a right to question Mrs Fuller's action. He had subsequently apologised.

100 The applicant complained that Mrs Fuller's statement of the incident on 31 August 2001 was not made until 8 March 2002. Her contemporaneous diary note (Ex"8") makes plain the trivial nature of her complaint. Mrs Fuller's evidence was emotive and unsubstantiated opinion and fabrication. She could not have formed an unfavourable opinion of the applicant after a five minute conversation in the car park. Mrs Fuller had said she discussed the quotation format with Mr Hales on 30 August. He denied this conversation.

101 Mr Messerle had intended to dismiss him on 11 September 2001 without any right of reply or explanation. The applicant said he had resigned instead.

102 The applicant said that his supporting witnesses, Mr Hales and Mr Craddock, were not seriously challenged or questioned. During their evidence Mr Gibson was more interested in format, rather than substance. They had supported his position as to conversations and refuted claims of abusive or aggressive behaviour by him.

103 The applicant said Mr Gibson fabricated a file note of a conversation with him on 28 July 2001. Mr Gibson misrepresented letters of warning and counsellings. While Mr Gibson expressed concern about the applicant's behaviour, he did nothing about it himself. He relied on others to do so.

104 The applicant said Mr Brian Fawkes threatened him and wanted him sacked. Mr Hales and Mr Craddock denied outright ever complaining to Mr Fawkes about him. The applicant submitted that Mr Brian Fawkes' evidence was largely hearsay, fabrication and opinion. It was questionable.

105 The applicant said Mr Gibson spoke to a number of people about the Zervadse incident, but never bothered to speak to him.

106 The applicant complained that Ms Tilbrook made no reference in her affidavit to any incident with Mrs Fuller in September 2001. Ms Tilbrook had acknowledged that he had been the motivator for the creation of the commission payment schedule. She had never told him he made her feel uncomfortable.

107 The applicant criticised the admissibility of Mr Messerle's statement in that he was not available for cross examination.

108 The applicant questioned why Mr Gibson had not sought affidavits from Mr Phil Fawkes, Mr Ron Fawkes, Mr Steve Fawkes or any other of his co-workers or customers.

109 The applicant said Mr Gibson managed the business in "*a feudal manner*" and didn't like the applicant's hands on approach and extensive industry knowledge. He said Mr Gibson conspired with the assistance of others to terminate his employment without natural justice. He had no right of reply to unsubstantiated allegations. He wasn't counselled. He was denied procedural fairness.

110 The applicant said he was judged by people from interstate who visited Sydney infrequently and judged him from afar. He had remained with the respondent under duress because of difficult personal and financial circumstances.

Respondent's submissions

111 Mr Gibson's submissions dealt firstly with the management structure of the respondent. He had acquired a 50 per cent share in the company on 1 July 2000. At that time the business was reviewed and a number of changes implemented. Mr Gibson stated that a business's key asset is its people - employees must display honesty, integrity and an ability to work as a team. It is intolerable for any business to have employees who create conflict, who treat customers badly or who have agendas inconsistent with the culture and goals of the business.

112 Mr Gibson said that the applicant had a history of complaints made against him by fellow employees and customers regarding his aggressive and confrontational style. The company had an obligation to act to protect its other employees and the business itself.

113 Mr Gibson acknowledged that the respondent had an obligation to act reasonably to ensure its actions were not knee jerk, biased or without foundation. It had done so and the applicant had been fairly treated.

114 Mr Gibson argued that if the applicant had performed as well as he maintained and he was the "lynchpin of the office", then the respondent was acting diametrically against its own interests by seeking his resignation. However, the reality was very much different.

115 Mr Gibson said the applicant was never employed in a management role. Mr Gibson referred to the re-negotiation of the applicant's contract in August 2000 which was to dispel any misconception about his role and warn him to moderate his behaviour. Mr Gibson put that the applicant's sales performance before and after August 2000 was mediocre at best.

116 Even before 1 July 2000, Mr Gibson had witnessed the applicant behaving in an aggressive manner. He said matters came to a head between

July and September 2001. Mr Messerle counselled the applicant on three separate occasions during this time. Ms Tilbrook had complained about an abusive phone call and he (Mr Gibson) counselled him. Mr Brian Fawkes had numerous complaints from staff about the applicant's abuse of them and customers. Citing the Zervadse incident, Mr Gibson independently checked with all persons Mr Fawkes mentioned - Ms Zervadse, Mr Craddock and Mr Hales. Their feedback was entirely consistent.

117 Mr Gibson said the applicant had received four separate letters advising him his behaviour was unacceptable (1 August 2000, 9 August 2000, 18 August 2000 and 29 August 2001). Two of the letters warned him he faced dismissal if he didn't modify his behaviour. The applicant had been verbally counselled on another five occasions. The evidence of Mrs Fuller and Ms Tilbrook is consistent with these counsellings having occurred.

118 Mr Gibson said that comments in the applicant's file notes are an interesting insight into the applicant's thought processes. He refers to Mr Messerle as a "*con man*" and Mrs Fuller as a "*plant*".

119 Mr Gibson categorically denied any conspiracy to remove the applicant. The decision had actually caused some significant short term financial pain. However, the decision was absolutely necessary. The respondent could no longer tolerate the risk to fellow employees and customers.

120 Mr Gibson referred to the evidence of Mr Craddock and Mr Hales. He said they were both "*economical with the truth*" and their evidence contained curious and remarkable coincidences. Their evidence should be treated as unsafe.

121 Mr Gibson submitted that the respondent had not acted harshly, unjustly or unreasonably. The applicant wanted to push to see how far he could go so as to goad the respondent into dismissing him as grounds for him taking legal action.

122 The applicant had not been denied procedural fairness. He had received numerous verbal and written warnings. He was aware of the consequences if he didn't change his behaviour and was given ample opportunity to put forward his version of events. He was offered resignation as a face saving exercise.

123 In reply, the applicant said that Mr Gibson had continually referred to "*complaints*" from customers. However, even on the respondent's own evidence there was only one alleged customer complaint (Ms Zervadse). If he was as bad as Mr Gibson made out, the applicant would have had no customers.

124 The applicant said he only received one letter of warning - 29 August 2001. The other three were too general and did not provide specific details of the complaints against him.

125 The applicant reiterated that he was in a co-management role after verbal advice from Mr R Fawkes and Mr P Fawkes.

CONSIDERATION

The Principles

126 The applicant contends that he was forced to resign, in that he was given an ultimatum by the respondent to do so, or face the alternative of being dismissed. Thus, it was said, the resignation constituted a constructive dismissal.

127 As I understand the state of the evidence, the respondent did not cavil with this characterisation of the termination of employment. Accordingly, I accept that the applicant was constructively dismissed on 11 September 2001. The Commission's jurisdiction under Pt 6 ch 2 of the Act to entertain his claim of alleged unfair dismissal is, therefore, enlivened.

128 Given this starting point, the next question to be considered is whether the dismissal of the applicant was "harsh, unreasonable or unjust" within the meaning of s84 of the Act.

129 It is, of course, incumbent on the applicant to discharge the onus of satisfying the Commission that his dismissal was "harsh, unreasonable or unjust" (see *Western Suburbs District Ambulance Committee v Tipping* (1957) AR (NSW) 273).

130 It is now well settled industrial law that each of the words "harsh, unreasonable and unjust" have their own discrete meaning and not all three descriptions of a dismissal are necessary for a finding of unfairness. In other words, a particular dismissal might be found to be "harsh" but not "unreasonable" or "unjust". This notion arises from the oft quoted authority in *Byrne & Anor v Australian Airlines*(1995) 61 IR 32 where the expression "harsh, unreasonable or unjust" was considered in an Award clause. In their joint judgment *McHugh* and *Gummow* JJ said at p72:

It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it

was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.

131 This notion was further discussed in *Outboard World v Muir* (1993) 51 IR 167 where a Full Commission said:

First we deal with the argument for the appellant that the Commission erred by applying the wrong test in connection with the dismissal: 'unfair' rather than 'harsh, unreasonable or unjust' dismissal. We agree with Mr Reitano's submission in this respect that the reference by the Commissioner to "unfairness" did not represent any misunderstanding of the correct test but was merely the use of a shortened form of expression intended to embrace the three relevant words. Whilst we recognise that there may be a natural tendency (recognised in the use even by the advocate for the Company before the Commissioner of the term 'unfair') to use the shortened form, we consider that it is preferable that a member of the Commission utilise the precise words provided by s246, rather than the catch-all heading, particularly when expressing the basis for a finding that a dismissal is within one or more of the heads provided by the section. We take this view because, even though there may be some circularity in the full phrase 'harsh, unreasonable or unjust', we detect scope for variation of meaning which may be critical to the determination of a particular matter and may be obscured by the use of the substitute term "unfair". Different but not wholly dissimilar words, "unfair", "harsh", and "unconscionable", are used in s275, power of the Industrial Court to Declare Certain Contracts Void, of the 1991 Act. In relation to those words, then appearing in s88F of the 1940 Act, the Commission in Court Session (*Perrignon*, *Cahill* and *Dey* JJ) in *A & M Thompson Pty Ltd v Total Australia Ltd* [1980] AR (NSW) 399 at 418 *Cahill* J (delivering a separate judgment) said:

The duty of the Commission is to reach a conclusion on the issues of whether the subject transaction is 'unfair', or 'harsh' or 'unconscionable'.

It has been said that those words are a 'tautological trinity' (*Davis v General Transport Development Pty Ltd*) [1967] AR 371) but we prefer to take the view that there is a perceptible difference between the meaning of the term 'unfair' and that of the terms 'harsh' and 'unconscionable'. What is unfair may not be so unfair as to be 'harsh'. But, whether this view be correct or not, once the transaction is found to be unfair the Commission may proceed to exercise its very wide power.

In much the same way, we consider that, while strict definitions of 'harsh', 'unreasonable' and 'unjust' may produce a degree of circularity of meaning, turning on the notion of 'fairness', it may be in a given case that a dismissal may be viewed as coming within the ambit of one of the three adjectives but not the others. To avoid the possibility of misunderstanding or error, the tribunal, when making that primary finding, should state explicitly the basis on which it is made.

A more recent authority reaffirming the distinction between the words and requiring a positive and specific finding is found in *Bankstown City Council v Paris* (1999) 93 IR 209:

The Commissioner found that the dismissal by the Council of Mr Paris was 'harsh, unreasonable or unjust'. This phrase, contained within s84, is an important key to jurisdiction and does require some specificity of finding. As has been observed by the Commission on numerous occasions, a dismissal may be capable of being unreasonable but not harsh, or harsh but not unjust, other permutations may apply. In the present case, however, it seems to us that the dismissal of Mr Paris was capable of meeting not one or the other of those descriptions but each of them. Therefore, nothing turns upon the expression adopted by the Commissioner. We would observe that in a case where the conduct of the employer might satisfy one but not all of those heads, a positive and specific finding should be made.

132 It is trite to observe that no two cases will ever be exactly alike. Hence, the Commission is required to examine the facts and circumstances of each case and decide whether one or more of the words "harsh, unreasonable or unjust" can be applied to a particular dismissal.

Procedural considerations

133 There is abundant authority for the proposition that unfairness may be visited upon a dismissed employee both as to the basis or merits of the dismissal and the process leading to dismissal. Put another way it may be that dismissal was reasonably open to the employer, but the employer went about it in an unfair way.

134 For the relevant authorities on this matter I refer again to *Byrne & Anor v Australian Airlines* at p72:

The distinction between procedure and substance is elusive. This is so even in those fields of private international law, the statute law dealing with limitations of actions and the effect of repeal upon accrued rights, and the Statute of Frauds, where it has an entrenched operation (217). In our view, it

is unhelpful and contrary to the tenor of the Award to introduce it into cl.11(a).

That is not to say that the steps taken, or not taken, before termination may not in a given case be relevant to consideration of whether the state of affairs that was produced was harsh, unjust or unreasonable. Thus, it has been said that a decision which is the product of unfair procedures may be arbitrary, irrational or unreasonable (218). But the question under cl.11(a) is whether, in all the circumstances, the termination of employment disobeyed the injunction that it not be harsh, unjust or unreasonable. That is not answered by imposing a disjunction between procedure and substance. It is important that matters not be decided simply by looking at the first issue before there is seen to be any need to enter upon the second**.**

Brennan CJ, *Dawson* and *Toohey* JJ concluded at p43:

Save for the prescription of periods of notice, cl 11 does not require the adoption of any particular procedure for the dismissal of an employee. However, it is clear that the use of an unfair procedure may result in a dismissal being harsh, unjust or unreasonable. For example, the failure to afford an employee the opportunity to explain apparent misconduct where there is an innocent explanation available would result in the dismissal of the employee being in breach of cl 11(a).

135 Two passages from *Antonakopoulos v State Bank of New South Wales* (1999) 91 IR 385 are also apposite. The Full Bench said at p389:

We agree with the conclusion of Hill J that procedural issues, that is failure to deal with the matter in a procedurally fair way, may, in certain cases, of themselves, constitute the basis for a determination that a dismissal is harsh, unjust or unreasonable. A failure to adopt a procedure which constitutes a breach of 'an essential prerequisite to, or inviolable limitation on, the exercise of the employer's right to dismiss' or a failure to afford procedural fairness which causes a 'substantial and irrevocable prejudice to the employee' will often vitiate the decision of an employer and warrant, in itself, a determination that the dismissal was harsh, unreasonable or unjust (and hence, establish the basis for a remedy under the Act). Further, a decision to dismiss made upon the basis of procedures which are unfair and where an innocent explanation or other appropriate explanation is reasonably available will normally constitute a firm basis for a determination that a dismissal, so effected, is harsh, unreasonable or unjust.

and later, at page 390:

While the findings of the Commission in *Buckman* focus on the issue of warnings, the observations apply also to broader tenets of procedural fairness contemplated in s88 and to matters such as those raised in these proceedings. We agree that there is no obligation in the Act to follow any particular procedure when effecting a dismissal. However, a failure by an employer to adopt appropriate procedures when effecting a dismissal, or a failure to follow procedures prescribed in an industrial instrument, or in procedures laid down administratively by an employer, may be properly taken into account by the Commission as part of the consideration of an application brought under s84. Further, as we have noted, where procedures are specified in an industrial instrument or by administrative action, a failure by an employer to apply, or to properly apply, those procedures may in appropriate cases, of itself, support a finding that the dismissal was harsh, unreasonable or unjust.

See also *D & R Commercial v Flood* [2002] NSWIRComm 88 and *Wilson v Department of Education and Training* [2000] NSWIRComm 20.

136 As mentioned in the above passage, the Commission's statutory basis for considering procedural issues is found in s88 of the Act:

88 In determining the applicant's claim, the Commission may, if appropriate take into account:

a) whether a reason for the dismissal was given to the applicant and, if the applicant sought but was refused reinstatement or re-employment with the employer, whether a reason was given for the refusal to reinstate or re-employ, and

b) if any such reason was given - its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment, and

c) whether a warning of unsatisfactory performance was given before the dismissal, and

d) the nature of the duties of the applicant immediately before the dismissal and, if the applicant sought but was refused reinstatement or re-employment, the likely nature of those duties if the applicant were to be reinstated or re-employed, and

e) whether or not the applicant requested reinstatement or re-employment with the employer, and

f) such other matters as the Commission considers relevant.

137 One can readily see that s88(f) does not limit the Commission to the matters referred to in the preceding subsections. The Commission is able to take into account such other matters which it considers relevant in determining a particular case.

138 In turning my mind to this matter, I have found the comments of *Marks* J in *Helprin v Westfield Limited and Anor* (1996) 68 IR 25 particularly apposite:

In these circumstances it is my opinion that fairness dictates that the applicant's employer should have afforded him some regular feedback as to his performance in terms of how that performance was measuring up against what was reasonably expected of him by the employer. This could be accommodated either by means of a formal assessment process or by means of an informal regular review.

In order to render the employment situation fair if(sic) would also have been necessary for the applicant's employer to counsel him about any perceived failure to measure up to any performance criteria, to warn him if his employment prospects were in jeopardy and to give him a reasonable time in which to take such steps as were open to him to improve his performance. As I have said above, all of these conclusions are arrived at by reference to the particular circumstances of this particular applicant as an employee of the first respondent.

139 As I will shortly explain, I believe the respondent here acted entirely consistent with the obligations on an employer as discussed in *Helprin*.

Unrepresented litigants

140 If ever there was a classic example of the difficulties faced by unrepresented litigants and the obligations on the Commission in such circumstances, this case must surely be it. I shall say more about the applicant's conduct later.

141 Both parties were unrepresented. This created more than the usual complications where, as is often the case, one party who is represented assists the orderly and efficient conduct of the proceedings.

142 At this juncture, I would refer to the principles the Commission is to have regard to in respect to unrepresented litigants. In *Nicholls and Central Sydney Area Health Service* (unreported) Matter IRC4131 of 1999, 25 August 2000, I said this:

Sadly, this case starkly demonstrated one of the major problems with cases involving unrepresented parties; namely, that such parties are usually so emotionally and subjectively involved that a rational and dispassionate approach to preparing for, and conducting a proper case, is all but a forlorn hope.

....

In view of these circumstances, it is appropriate that I should refer to the principles that the Commission should adopt in litigation involving an unrepresented party. The guiding principle is a simple one: "*to ensure all parties are afforded the benefits of the rules of natural justice*". For a helpful discussion of the term *'natural justice'* in the context of an unrepresented litigant see *Davidson v Aboriginal & Islander Child Care Agency* (*Ross* VP, *Watson* SDP and *Eames* C) Print Q0784, 12 May 1998.

While the principle of natural justice might seem simple enough, its application in an intensely emotional and difficult litigation is not always so. It is often a delicate balance involving a number of sensitive issues such as ensuring an unrepresented litigant is aware of his or her rights, ensuring the trial judge does not become an adviser or advocate and ensuring an orderly and sensible conduct of the proceedings.

Two authorities are apposite. In *Regina v Gidley*, 3 NSWLR 168, the Court of Criminal Appeal said:

The duty of a trial judge to ensure that every accused has a fair trial thus obliges him to give an accused who is unrepresented such information and advice concerning his rights as is necessary to put him in a position where he can make an effective choice whether he should exercise those rights, but the trial judge must make it clear that he is not advising the accused either that he should extend those rights or how he should conduct his case.

In *Regina v Zorad***,** 19 NSWLR 91, the New South Wales Court of Appeal held that:

1. An accused who elects to be unrepresented is not entitled because of that election to be given any advantage not enjoyed by a represented person.

2. The duty of a trial judge to give an unrepresented accused such information and advice as is necessary to ensure that he has a fair trial:

a) would include, if it became necessary, an explanation as to the form in which questions should be asked, but it is not to put the question in that form for the accused.

b) would include the giving of advice that, notwithstanding a ruling on the voir dire as to the voluntariness of admissions, the accused is permitted to raise the same factual matters before the jury: such advice is necessary to ensure that the unrepresented accused is put in a position where he can make an effective choice as to the exercise of his rights but does not extend to advising him how this may be done.

c) would include, where comment was going to be made in relation to the accused's failure to comply with the rule in *Browne v Dunn*, advice of the existence to that rule.

See also *Herbert and Warrah Ltd* [2001] NSWIRComm 109 and *Stephan and R L Whyburn and Associates* [2000] NSWIRComm 154.

143 In a recent appeal decision, *Abdullah Al-Shennag v Bankstown City Council Civic Services Group* [2002] NSWIRComm 150, where the appellant appeared unrepresented, the Full Bench said:

[6] It is fair to say, we think, that the appellant in these and other respects was assisted by the Commission with appropriate guidance and advice to the extent permissible by his self-represented standing (see *Vincent v Le Cornu Furniture and Carpet Centre Pty Ltd* (1996) 71 IR 227 for example), and was afforded ample time and opportunity at all stages to understand the requirements of the appeal process and to advance the arguments of his choosing.

144 For completeness, I cite the passage referred to by the Full Bench above in *Vincent v Le Cornu Furniture and Carpet Centre Pty Ltd*:

The Commissioner refused to let her re-open her case. We agree in the circumstances of this case with the Commissioner's action. There must be an end to litigation and in this case the applicant had had ample opportunity to make out and present her case. In fact, the Commissioner was at pains to make sure that she understood the process and he was generous in the guidance which he gave her as to the conduct of her case. The appellant made strong representations that the Commissioner erred in that he did not give the appellant all the help he should have given her as an unrepresented litigant. We do not share that view. Whether a person be represented or not, the responsibility for the conduct of their case remains with them. Whilst we agree that in the case of an unrepresented party the Commission should be prepared to assist with appropriate guidance and advice and give a measure of guidance as to the conduct of their case, that advice and guidance must not jeopardise or in any way compromise the independence of the Commission. Secondly, we share the Commissioner's doubts that her case would be materially advanced by her calling the respondent's witnesses.

145 The Commission is satisfied that the applicant was well aware of his rights and obligations under the Act. In fact, he informed the Commission that he had taken some legal advice. Despite the dubious relevance of much of the applicant's material, I am also satisfied that the applicant put before the Commission all of the material he considered relevant to his case.

146 On the other hand, he vigorously challenged the admission of much of the evidence sought to be admitted by the respondent. For abundant caution the Commission applied a different weight to the evidence of persons who the respondent chose not to call to give first hand evidence. For example, little reliance was placed on the statement of Mr Messerle who was unavailable for cross examination.

147 It is axiomatic that, had both parties been competently represented, this case would not have required three days of hearing. Nevertheless, it is not the role of the Commission to take responsibility for the manner in which the parties conduct their respective cases.

148 Be that as it may, I am well satisfied that the Commission afforded both parties - but most particularly the applicant - considerable and generous latitude in the conduct of their cases.

The Evidence

Mr Hales and Mr Craddock

149 Unfortunately, I have grave reservations as to the truth of the evidence of Mr Hales and Mr Craddock.

150 Their affidavits contained some remarkable and inexplicable similarities. While I accept that the applicant may have assisted Mr Hales and Mr Craddock in preparing their affidavits, in my view, it went much further than mere assistance. For example, both affidavits contain this most curious statement "*I asked no one, or gave no authority to anyone to complain on my behalf about Stevenson's behaviour*".

151 I would firstly observe that this statement sits rather oddly with their emphatic denials that they had never heard, or were aware of, the applicant behaving in an aggressive, rude or abusive manner to other staff or customers. I ask rhetorically, why would the witnesses offer a statement that they gave no one authority to complain about the applicant, if there was nothing to complain about?

152 More importantly, however, in both affidavits this curious statement uses precisely the same language. In my view, this raises a serious concern

that the witnesses, possibly at the behest of the applicant, colluded in respect to their evidence. I am strengthened to this conclusion by the demeanour of the applicant when the similarities in the evidence were pointed out to the witnesses. The applicant appeared to be very agitated and objected to the questioning.

153 Moreover, my conclusion is fortified by the answers both witnesses gave when asked if they could explain the similarities in their evidence. Their identical response was "*I have no comment to make*".

154 The Commission had further cause to doubt Mr Craddock's credibility when he gave evidence that he had never been counselled by Mr Messerle. When shown a warning letter of 21 September 2001, which Mr Craddock had himself signed, he rationalised the evidence by saying that he didn't regard warning letters as counselling. Such an explanation was errant nonsense. Mr Craddock was seeking to mislead the Commission.

155 For these reasons, the Commission believes that much of the evidence of Mr Craddock and Mr Hales was untruthful, misleading or evasive. Where their evidence conflicts with that of the respondent's witnesses it is the latter which is to be preferred.

156 I find accordingly.

157 Before leaving this matter I am moved to say I am puzzled as to what motivated Mr Craddock and Mr Hales to give such evidence. I accept the respondent's evidence that both had complained and had been the subject of the applicant's abuse and unacceptable behaviour and complained about it. It beggars belief as to why they would now be championing his cause.

158 However, there is one explanation which seems plausible. Both Mr Craddock and Mr Hales had an obvious "axe to grind". Both had resigned in unpleasant circumstances. The language they used in describing their alleged forced resignations is tinged with bitterness and resentment. Here was a chance to "get back" at the respondent. I regret to say that by doing so, they have seriously impugned their own characters and integrity.

Respondent's evidence

159 Ms Chrstine **Tilbrook** presented as a calm, sincere and honest witness. Ms Tilbrook did not have her affidavit in front of her. Her oral evidence, via videolink from Perth, was completely consistent with her written testimony. This fortifies my view that her evidence, where it conflicts with that of the applicant, should be preferred.

160 There was some controversy about the time and date of phone calls between Ms Tilbrook and the applicant about the commission payments. There is no dispute that the applicant spoke to Ms Tilbrook. The timing of the calls is irrelevant. What is relevant is the calls did take place and the content of the calls is evidence of the applicant's aggressive and abusive manner. Attempts by the applicant to take a serious point of credibility have no substance and are rejected.

161 I accept Ms Tilbrook's evidence that she had complaints about the applicant from Danielle Douglas, Natalie Dreha and Jo-anne Beringer and that she had raised these complaints with Mr S Fawkes and Mr Gibson.

162 I also accept Ms Tilbrook's explanation that she did not notate the phone calls of complaint because she had no authority to do so and didn't want to engage in gossip. It is ludicrous to expect that the administration manager would record every detail of every phone call about other employees' conduct or complaints. The pattern of the applicant's conduct was what mattered.

163 Mr Brian **Fawkes** was a confident and assertive witness. He plainly did not like the applicant and said so. However, I cannot accept that his personal views of the applicant were such that he would lie about his conversations with Mr Hales and Mr Craddock, both of whom emphatically denied ever complaining about the applicant.

164 As I have earlier expressed my doubts as to the truth of the evidence of Mr Craddock and Mr Hales, it follows that where their evidence conflicts with Mr Fawkes, it is his evidence which is preferred.

165 Mr Fawkes' evidence is entirely consistent with the respondent's other witnesses. It is accepted as corroborating the abusive and aggressive conduct and behaviour of the applicant.

166 Mrs Janet **Fuller** presented as a reasonable and believable witness. She had only been at Atama Furniture for five days before she recorded in her day diary that she "*had a run in with Ted Stevenson about changing the quotation layout*". She had asked Mr Craddock and Mr Hales if she had been unreasonable during the conversation. They had said the applicant was like that all the time and "*we have to put up with it every day*". Mr Craddock and Mr Hales both deny this conversation took place. I do not believe them.

167 Apart from my preference for Mrs Fullers' evidence, I ask rhetorically, what possible reason would Mrs Fuller have for making up such a conversation? It was recorded contemporaneously in her day diary. The

incident was reported to Mr Messerle and Ms Tilbrook. I have no doubt at all that this conversation took place.

168 Moreover if, as it was claimed by Mr Hales, the applicant was not aggressive or abusive to Mrs Fuller (or anyone else) why would the applicant feel the need to apologise for his behaviour; albeit some seven days later? This uncontested evidence satisfies me - if that be necessary - that the evidence of Mr Hales and Mr Craddock, that they had never witnessed the applicant being aggressive or abusive to other staff, was knowingly and completely untrue.

169 The applicant tried to make some obscure point about Mrs Fuller not complaining to Mr Messerle for some twenty-four hours after the 31 August incident. This nonsense took the applicant's case nowhere. Indeed, it sits rather oddly with his own admission that he took seven days to apologise to her.

170 When asked directly, Mrs Fuller said she felt intimidated by the applicant. I have little doubt that she did. In my view, she was perfectly entitled to complain about the applicant's behaviour and expect management to take appropriate steps to remove her discomfort.

171 Mr Gibson was placed in a rather difficult and often awkward position, He was a director of the respondent, a witness in the case and the respondent's advocate. Notwithstanding these difficulties, I found Mr Gibson to be a straight forward and honest witness. I have no doubt as to his credibility. It follows that where his evidence is directly in conflict with the applicant, Mr Hales and Mr Craddock, it is Mr Gibson's evidence which is to be preferred.

172 The applicant would have the Commission accept that Mr Gibson was intent on removing him from employment and that Mr Gibson was instrumental in a conspiracy to do so and instructed others to "*get the dirt on him*". In some ways, of course, the conspiracy theory is indicative of the applicant's sense of his own importance; here was the owner of the company spending so much time and effort to get rid of him.

173 However, it is my view, the claim is just plain "baloney". There is not a skerrick of evidence that Mr Gibson masterminded and covertly executed this whole episode.

174 Indeed, if there truly was a conspiracy, commencing in July 2000 when the applicant's remuneration package was altered, it seems proposterous that it took over twelve months before the "crunch" came. Seemingly the "conspirators" weren’t in much of a hurry!

175 Rather the reverse was the case. Mr Gibson was meticulous in corroborating complaints about the applicant with the persons who made them. He gave the applicant every opportunity to modify his behaviour.

176 Some might say that Mr Gibson displayed extraordinary patience in putting up with a situation in which there was a litany of complaints over a long period of time. He sought, without success to have the applicant change his behaviour. What more, I ask, could he have done?

177 I have not found it necessary to comment in detail, or rely on the untested statement of Mr Messerle. It is sufficient I think, to observe that his statement corroborates the experiences of those who did give oral testimony.

The evidence generally

178 Unfortunately, due to the fact that both parties were unrepresented, much of the evidence provided in both affidavit form and in the witness box was inadmissible - even on a most generous view of the latitude ordinarily afforded to unrepresented litigants.

179 The applicant's approach to cross examination of the respondent's witnesses was nothing short of self serving. It was repetitive and mostly irrelevant. He even cross examined witnesses on documents which he had objected to and which were not admitted into evidence. On other occasions, he cut off answers being given by the respondent's witnesses when he didn't like the response.

180 His cross examination was a disgraceful and time wasting exercise. The Commission's patience was sorely tested on many occasions during the proceedings.

181 The applicant's entire approach during the case was directed in such a way as to convey a view that he had done absolutely nothing wrong and everyone else was "*out to get him*".

182 It is simply beyond belief that the applicant would have maintained this view of himself in the face of overwhelming evidence to the contrary. It is tolerably clear from the documents tendered by both parties that the respondent was concerned about the applicant's conduct and behaviour for at least twelve months prior to his resignation and had raised these concerns on numerous occasions in writing and verbally.

183 The written warnings are demonstrably clear as can be seen from the following extracts from letters to the applicant:

1 August 2000

Along with this there has been concern that temperament and personality clashes may make management untenable. In this regard, we note the incident observed by Ralph Gibson on May 3 2000 and other clashes with administrative staff.

(Ex"E" Annexure D)

9 August 2000

I am advised of many occasions where your attitude to other staff members has resulted in significant conflict and distress. The manner in which you relate to others in the Sydney office leaves us in no doubt that you do not display the characteristics that are essential for a person to assume a managerial position.

(Ex"1" Annexure F)

18 August 2000

4. The feedback that we have been receiving on your relationship with other staff in the Sydney office is not consistent with what you have represented. We are aware of a number of disputes between you and other staff over the time you have been with the company. These include conflicts with Julie Hemphill (November 1999), Danielle Douglas (a number of occasions from November 1999), Matthew Thompson (June 2000) and Natalie Dreha (July 2000). Not only have these situations caused distress with some of the people involved, at times they have occurred in the presence of customers. This situation is totally unacceptable.

...

b) We expect a material improvement in the relationship you have with other members of the office. We will monitor this position closely and will not accept a continuation of the problems hat have been experienced in the past. Should problems continue which are demonstrably attributable to your behaviour, your future employment with the company will be reviewed.

(Ex"1" Annexure H)

29 August 2001

A number of matters have again been brought to my attention recently regarding your behaviour towards both staff members and customers.

You will recall previous discussions regarding the unacceptable nature of your behaviour at times and I bring your attention to a memo dated 18 August 2000 addressed to you in which certain matters of concern were outlined.

Since then there have been occasions when I have had cause to speak to you about your behaviour towards other staff. Specifically I received a complaint from Christine Tilbrook in June 2001 about the manner and language of a telephone conversation that you had with her. I rang you about this and told you that this would not be tolerated. I have also received complaints from other staff members from both Sydney and Perth.

I have just spoken to a potential customer who recently spoke to you by phone. This person was trying to make a general inquiry and describes you as having an aggressive and angry manner. You eventually hung up on this person and I was forced to apologise for your actions on behalf of the company. This person represents a major corporation and has no intention of dealing with this company again.

I am aware of other occasions where your behaviour towards customers has resulted in complaints being received.

You are now on notice that this behaviour is unacceptable and will not be tolerated. Any further reports of aggressive or rude behaviour to staff or customers with result in your immediate dismissal.

(Ex"1" Annexure L)

184 There were at least five other occasions when the applicant was verbally counselled.

185 Notwithstanding the clarity and frequency of the warnings, the applicant simply chose to ignore them. He made no attempt to alter his behaviour.

186 The applicant was expressly warned his employment was in jeopardy on 29 August 2001. It is rather strange that, on his own admission, he made not a single attempt to explain or defend himself until the dismissal meeting with Mr Messerle two weeks later.

187 This dismissiveness is in marked contrast to his earlier, frequent responses to communications from management. Yet here, when his future employment was plainly on the line, he does absolutely nothing for two weeks. He explained this delay by saying he was confused and Mr Messerle wouldn't have discussed the matters anyway. Such an explanation is rejected. In any event, it was Mr Gibson who had written the 29 August

letter. The applicant hadn't been reticent about contacting Mr Gibson on other matters before.

188 The applicant's explanations to these warnings was to say that he was not provided with any counselling or training about his behaviour. It goes without saying that no employee should require training on how to properly conduct oneself in the workplace, particularly with customers. Aggression, rudeness and confrontation are not matters for which retraining is either necessary or appropriate. *A fortiori*, when this principle applies to a salesperson.

189 In addition, the applicant further defended his conduct by insisting that there was no mention of warnings about behaviour in his employment agreement. Let me repeat again, it hardly needs to be spelt out, in writing, that an employee is required to behave in a decent, respectful and courteous manner without recourse to aggression or rudeness.

190 An even more absurd defence put by the applicant was that if the respondent had no contemporaneous notes of conversations with him or the complainants, then the conversations simply didn't happen. Such a claim is bizarre nonsense. Its absurdity is demonstrated by accepting the applicant's conspiracy theory. That is, the applicant would have the Commission believe that the respondent created an imaginary raft of memos, notes and letters over a twelve month period, involving complaints from customers and fellow employees, in order to force the applicant's resignation. This is just so improbable as to be laughable.

191 The applicant totally misrepresented his sales ability and then complained when he was found out. He said he was the most "*consistent sales person in the region*" and was "*writing half the state's business*". This was untrue. In reality this was no more than his own inflated opinion of himself. It begs the question as to why the respondent would want to get rid of such an "excellent" salesperson.

192 The applicant further misrepresented what his role was with the respondent on his CV, claiming to be either the co-state manager or the sales manager. Neither was the case.

193 Much of the respondent's evidence was refused admission. Nevertheless, I am satisfied on the basis of the totality of the evidence that there can be only one outcome in this matter.

194 The Commission finds that the applicant knew he was to be dismissed for persistent and ongoing aggressive and abusive behaviour towards staff and customers. He had received numerous warnings about his conduct and

chose to ignore such warnings. He opted to resign, rather than be dismissed (see *Coghlan v D & D Advertising* unreported, *Connor* C, IRC6028 of 2001, 15 July 2002).

195 Opting for resignation, of course, was entirely consistent with the applicant's delusions of self importance. This inflated view of himself was reflected in the constant sniping and derogatory remarks he made about other staff, including his superiors. He was offended that he wasn't consulted about every aspect of the business, including who was to be his superior.

196 In my view, the respondent demonstrated a commendable patience in tolerating the applicant's belligerent and aggressive behaviour for as long as it did. There came a point, however, where its patience, understandably, could not continue.

197 This claim of unfair dismissal has absolutely nothing to commend it. The respondent was not only entitled to take the action it did, but risked its ongoing business viability if it didn't.

198 There is simply no basis, either substantively or procedurally for this dismissal to be characterised as "harsh, unreasonable or unjust" within the meaning of the Act.

199 I have no hesitation, at all, in dismissing the application.

200 The proceedings are concluded accordingly.

Peter Sams

Deputy President

LAST UPDATED: 14/11/2002