This was an unfair dismissal case. The applicant had been dismissed from the Bankstown District Sports Club Ltd (the club) for alleged serious misconduct under its Code of Conduct provisions. He sought reinstatement to his position under section 394 of the Fair Work Act 2009 (Cth) (the Act).

The club is comprised of five venues and employs 460 employees and 800 contractors. The applicant was employed by the club on 24 June 2009 as a part-time sommelier in the Cellar Wine Bar at the club’s main venue in Bankstown. It was a term of the applicant’s Individual Transitional Employment Agreement (ITEA) with the club that he complied with the club’s policies and procedures, which included its Code of Conduct. The applicant had attended annual training in relation to the Code of Conduct on 26 August 2011.

He was dismissed on 9 March 2012 on the grounds of serious misconduct, alleged to be in contravention of the club’s Code of Conduct. The applicant was provided with 3 weeks pay in lieu of notice which corresponded to his entitlement to notice upon termination for other than serious misconduct pursuant to his ITEA. The dismissal followed an investigation undertaken by the club into the applicant’s conduct. The allegations that were the subject of the investigation were based on complaints made by another employee about the applicant’s behaviour towards him.

The behaviour alleged was that the other employee had been the subject of sexually inappropriate comments from the applicant, and bullying by him. The club’s investigation found that four out of five allegations were supported by evidence, and that those findings founded dismissal for serious misconduct. The tribunal agreed.

The Act requires that the tribunal should exercise its discretion in relation to an application for an unfair dismissal remedy pursuant to Part 3-2 (Unfair Dismissal) of the Act. Under the Act’s provisions, the applicant was a person who was protected from unfair dismissal pursuant to section 382 of the Act. This required the tribunal to consider sections 385 (definition of unfair dismissal), 386 (meaning of dismissed), and 387 (meaning of harsh etc) of the Act.

There was no dispute that the applicant had been dismissed so section 385(a) of the Act was satisfied. The tribunal therefore had to determine whether the applicant’s dismissal was harsh, unjust or unreasonable, and whether there had been a valid reason for dismissal under section 387 of the Act.

The affected employee’s evidence was that the applicant singled him out for attention, that the attention was unwanted and unwelcome, that he found the comments offensive and very rude and the experience gave rise to feelings of discomfort, embarrassment and anger. The applicant’s evidence was that he did not single out the affected employee, that he and the other employee engaged in light-
hearted banter, and that the other employee did not resist him or complain about him.

However, the club’s policies, procedures and Code of Conduct contained in its Employee Handbook described the kind of behaviour exhibited by the applicant as bullying and harassment. The tribunal found that, balancing the two versions of events, the applicant had made inappropriate comments to the other employee, and conducted himself in an inappropriate manner. The tribunal said that the applicant’s conduct had been damaging and had a negative effect on the safety and welfare of the affected employee. Therefore, his conduct contravened the club’s Code of Conduct, and was a valid ground for dismissal.

The applicant was aged 62, and perhaps unlikely to obtain another position. However, against those facts was the clear evidence of his inability to understand the requirements of the club’s Code of Conduct, despite training. In this respect the tribunal said (at [63]–[64]):

...the evidence...disclosed a mismatch between [the applicant’s] values and contemporary norms about what is acceptable in the workplace. Although he attended training he did not seem to comprehend this training. He displayed no contrition, no remorse, nor any indication that the ‘penny had dropped’. Indeed, he continued to deny the conduct and where he acknowledged it he passed it off as a joke. The Club’s concern that he presented a risk of reoffending is reasonable and for this reason a warning, even a final warning, would have been insufficient to discharge their obligations to other employees, and indeed patrons, to provide a safe place of work and entertainment. The Club demonstrated that it is aware of its responsibility in that it has adopted policies and conducted regular training concerning them. However the evidence disclosed inconsistency in the interpretation and application of the policies and procedures by leaders in the workplace and a review of the content and form of delivery of training is recommended. Until policy and procedure are embedded in the culture of an organisation, leaders will apply their own values and norms and mistakes will happen.

Despite this mild criticism of the club’s procedures, the tribunal held that the dismissal was not harsh, unjust or unreasonable, and therefore not unfair. This being the case, there was no need to consider a remedy for the applicant under Division 4 of the Act.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FWA/2012/7977.html

Implications of this case

The need for proper procedures relating to bullying, harassment and inappropriate conduct in the workplace is a serious matter for clubs and associations in the nonprofit sector, particularly if they are classified as ‘large’ employers. In this case, the club had such procedures in place, and they formed the basis to support its
contentions. Orders can be made for reinstatement or compensation for loss, where unfair dismissal is found.