DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal
v
Jodie Goodall
(C2016/4422)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT WELLS
COMMISSIONER JOHNS

SYDNEY, 4 NOVEMBER 2016

Appeal against decision [2016] FWC 4129 of Commissioner Saunders at Newcastle on 1 July 2016 in matter number U2016/678.

DECISION OF VICE PRESIDENT HATCHER AND DEPUTY PRESIDENT WELLS

Introduction

[1] Mt Arthur Coal Pty Ltd (Mt Arthur Coal) has lodged an appeal, for which permission to appeal is required, against a decision of Commissioner Saunders issued on 1 July 2016[1] and an associated order issued by him on the same day[2] (Order). In the Decision the Commissioner found that Mt Arthur Coal's dismissal of Mr Jodie Goodall was harsh, and that the reinstatement of Mr Goodall to his former employment as an Operator with Mt Arthur Coal was the appropriate remedy. The Order required the reinstatement of Mr Goodall and the maintenance of the continuity of service not later than 15 July 2016. Mt Arthur Coal's notice of appeal, which was filed on 8 July 2016, sought a stay of the Decision and Order pending the hearing and determination of the appeal. On 13 July 2016 the Commission (Hatcher VP) refused the application for a stay order, so that the position as we understand it is that Mr Goodall was reinstated shortly thereafter in accordance with the Order.

[2] The appeal was listed for hearing on 9 August 2016 in relation to the issue of permission to appeal only. On 15 August 2016 an email was sent by the Commission to the parties which relevantly stated:

> "The Full Bench has determined that permission to appeal should be granted in this matter, on the basis that it is considered that it is in the public interest that grounds 1(c) and (d) set out in paragraph 2.1 of the notice of appeal filed on 8 July 2016 be determined by the Full Bench. Full reasons for the decision to grant permission to appeal will be provided in the Full Bench's final decision in this matter."

[1] [2016] FWC 4129

[2] PR582258

[3] The full hearing of the appeal proceeded on 9 September 2016. Shortly after the appeal commenced, it became apparent that the parties were operating under the misapprehension that the grant of permission to appeal was confined to the two appeal grounds referred to in the email of 15 August 2016 (rather than those appeal grounds being the basis upon which it was considered that the grant of permission generally would be in the public interest). It may be accepted that there was a degree of ambiguity in the Commission's email which was responsible for this misapprehension having occurred. Accordingly the parties were given an opportunity to file further written submissions in relation to those appeal grounds they were unable to address at the hearing on 9 September 2016.

Factual background

[4] Mr Goodall commenced employment with Mt Arthur Coal on 16 May 2011. The incident which caused his dismissal occurred in the early morning of 11 November 2015 when Mr Goodall was drawing towards the end of a 12.5 hour night shift during which he had operated heavy equipment at Mt Arthur Coal's mine site in the Hunter Valley. Prior to that date Mr Goodall had an exemplary employment history, and his misconduct on that date constituted the only blemish on his record prior to his dismissal on 9 February 2016.

[5] Mr Goodall's misconduct came to the attention of Mt Arthur Coal's management as a result of an investigation into the use by employees and contractors of Channel 6 of its radio system as a "*chat channel*" during the night shift of 10-11 November 2015, and the allegation that some employees and contractors had used offensive language in the course of doing so. Channel 6 was meant to be used for training purposes only, and employees and contractors working in the pit were meant, as a safety measure, to remain contactable at all times on radio Channel 1.

[6] The investigation identified that a large number of employees had used Channel 6 as a "*chat channel*" on the night shift in question. This included Mr Goodall, who had been on the channel for a total of 110 minutes during his 12.5 hour shift. More seriously, a number of employees including Mr Goodall were recorded as having said a number of things on Channel 6 which were regarded by Mt Arthur Coal as inappropriate. In the Decision the Commissioner found that Mr Goodall had made the following remarks during the shift on Channel 6:

(1) At approximately 4:39 am on 11 November 2015, in response to comments by a colleague about the "*rear end*" of his truck getting "*banged up*", Mr Goodall said "*that's no good getting your rear end banged up*" and "*Parish would like it*".

(2) At approximately 4:52 am on 11 November 2015, when talking about a colleague, Mr Goodall stated that "*he'd probably like a good teabagging*".

(3) At approximately 4:53 am on 11 November 2015, during a conversation about Volkswagen Beetle cars, Mr Goodall stated that "*that's what, um, [Azn]*[3] *calls his beetle, a dung beetle*".

[3] Mt Arthur Coal interpreted this as a reference to "*an Asian"*, but the Commissioner at paragraph [37] of the Decision accepted Mr Goodall's evidence that he was referring to "*Azn*", a character on a television show called "Street Outlaw Farm Trucks" who refers to his Volkswagen Beetle car as "*the dung beetle*".

(4) At approximately 5:10 am on 11 November 2015, in response to a question about what book a colleague was reading, Mr Goodall stated "*that book on 50 ways to eat cock*".

(5) At approximately 5:10 am on 11 November 2015, in response to the comment "*since when have you been covering your arse, Bounder*", Mr Goodall stated "*probably when you're walking round in the bathhouse Parish*".

(6) At approximately 6:09 am on 11 November 2015, when talking about a colleague at the gym, Mr Goodall stated "*have your jatz crackers fall out?*"[4]

[7] Additionally, Mr Goodall made the following comments during the course of a conversation on Channel 6 with two other operators (which are identified as Speaker 4 and Speaker 5) as follows (with Mr Goodall's comments in bold):

"SPEAKER 5: Actually just on that, sorry to change the subject a little bit here. Hey slim are you… you goin to that to that Reclaim Australia rally?

MR GOODALL: Wouldn't mind goin to one but depends if we're workin

SPEAKER 5: No me missus she's like we're… we're goin to the one in em Cessnock there next Sunday they wanna build that mosque there in Kurri Kurri

MR GOODALL: I got a car show to go to at Dungog on Sunday I think but um yeah otherwise I'd go to it

SPEAKER 4: If I went to them sorta shows there… them Reclaim things they just get outta hand ey and I'll end up getting locked up

SPEAKER 5: Oh man I can't I can't oh yeah I can't handle it how Australians get walked on all the time now. I wish we had that bloody Putin bloke from Russia running our country

MR GOODALL: It's not just Australia it's friggin everywhere everyone's just bend over backwards for the Muslims

SPEAKER 5: Did you see that thing on 60 Minutes? Do you watch 60 Minutes Sunday night?

MR GOODALL: Na didn't no what's it about Putin?

SPEAKER 5: No they had this couple this two white Australian couple and um they met when the Cronulla riots were on anyway they they tried to get away form it like the Cronulla riot side of it, went to this pub. That night they didn't know what happened during the day they're walking home and 6 Lebs jumped out and bloody like em stabbed old mate and tried to bloody bash his missus or the chick he met and all this shit ey. Crazy

[4] Decision at [35]

> **MR GOODALL: Ah they had 1400 years of bloody inbreeding so they gotta be fucked up**
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> SPEAKER 4: They should have do what the national parks and wildlife do every year and what the government should. You know the National wildlife put out tags to professional shooters and just cull roos. They should the government should just put out tags to professional hitmen and just cull dirt bag Australians or you know, people that don't deserve to be in this country
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> SPEAKER 5: Oh Dez? You're all over it I'm hearin ya. No one the problem is the worst is people get too scared to say anything and that's why I take my hat off to that Reclaim Australia. They're not racist they're not talkin about race they're talkin about the religion and they're sayin everyone's had a gut full of it. We're just a complete gutful of how they just think they can just run the whole show change our way of life it's crazy
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> **MR GOODALL: Exactly yep**."

[8] It was Mr Goodall's comments as part of the above conversation which attracted the most attention in the appeal. These comments were not private to the participants, but could be heard by any employee or "contractor" (that is, an employee of a business contracted to provide labour to Mt Arthur Coal) on the night shift of 10-11 November 2015 who was tuned into Channel 6.

[9] It was not in dispute in the appeal that Mr Goodall was aware of and had been trained in the Code of Business Conduct (Code) of BHP Billiton, of which Mt Arthur Coal is a subsidiary. The Code prohibited behaving in a way that was "*offensive, insulting, intimidating*, *malicious or humiliating*", making "*jokes or comments about a person's race, gender, ethnicity, religion, sexual preference, age, physical appearance or disability*", assuming that "*acceptable behaviours are the same for every culture*", and the "*use of BHP Billiton resources to distribute offensive materials*", and required employees to "*treat everyone with respect and dignity*" and "*be prepared to adapt your own behaviour in response to feedback or when considering cultural considerations of another operational country*". There was also a separate requirement in Mt Arthur Coal's "*Surface Transport Management Plan*" (STM Plan) to ensure that usage of the radio system was in accordance with the Code.

[10] The matter was first raised with Mr Goodall by the Open Cut Examiners later in November 2015. When they did so, Mr Goodall apologised for both his use of Channel 6 to engage in chat and comments he made. He did not thereafter engage in conversation on Channel 6 at any time prior to his dismissal.

[11] As part of Mt Arthur Coal's investigation of the matter, Mr Goodall was required to attend a meeting with a manager and a supervisor (Mr Redman and Mr Shadbolt) on 8 January 2016, during which an audio recording of some of the conversations on Channel 6 on the night shift of 10-11 November 2015 in which he participated was played. The notes of the meeting record that Mr Goodall explained that he was on Channel 6 as a "*fatigue thing in the early morning*" and had been asked to go on the channel by another operator. He admitted that the conversation did not fit within the "*charter values*" of the company. The Commissioner

found that Mr Goodall also apologised for his conduct at this meeting. The notes of the meeting further disclose that Mr Goodall also said he was just "*mucking around*" and it was "*just blokes having a laugh*". Mr Redman asked Mr Goodall about the discussion he had about Muslims, and Mr Goodall said:

- Muslims were a subject that persons "strongly talk about" and "people know me and my thoughts on the matter";
- "Everything I said is true";
- when asked about executing Muslims, said he would not do it personally but did not have much of an issue with it, and "Muslims didn't have a problem with executing us";
- stated that there were big issues with Muslims and Islam in Australia and referred to the Lindt café siege.

[12] Mr Goodall also said that he did not consider the matter serious and it was "*BHPB's way of pissing people off and stripping morale off us*", and that the most extreme thing he said was "*fucked up*". At the end of the meeting Mr Goodall was informed that he was stood down pending the outcome of the investigation.

[13] On 19 January 2016 Mr Goodall was required to attend another meeting with Mr Redman and Mr Shadbolt. He attended in the company of a workplace representative of his union. During the meeting he apologised for his conduct on the 10-11 November 2015 night shift by saying words to the effect of "*I apologise*" and "*I am truly sorry*". On 20 January 2016 Mt Arthur Coal sent Mr Goodall a letter setting out the findings of the investigation, which were in summary that he had been on Channel 6 in breach of the STM Plan and had thereby risked the safety of himself and other workers, and had engaged in inappropriate conversation which contained terms that might reasonably be viewed as offensive, had demonstrated a lack of respect for other persons, contained comments which were sexual in nature and which might reasonably be viewed as offensive, and which contained comments and language that might offend people of a particular race or religion and which expressed and incited derogatory views of people of a particular race or religion, in breach of the Code and the "*BHP Billiton Charter Values of Sustainability, Integrity, Respect and Accountability*". It may be noted that, in particularising the actual comments made by Mr Goodall which were the subject of the findings, the letter included the following:

> "...In response to the comment 'we're just a complete gutful of how they just think they can just run the whole show change our way of life it's crazy, *you said 'Exactly, Yep'*."

That is, it was not alleged that Mr Goodall's comment was an affirmation of Speaker 4's comment concerning a "*cull*" of "*dirt bag Australians or ... people that don't deserve to be in this country*".

[14] The letter at its conclusion required Mr Goodall to show cause why his employment should not be terminated.

[15] On 27 January 2016 Mr Goodall sent a letter in response to the request that he show cause why he should not be dismissed. His letter included the following:

- He accepted that his behaviour was not appropriate, but he had heard similar comments to those he had made on a regular basis while employed at Mt Arthur Coal from other operators and from management. This included himself being referred to by a Supervisor as a "*fuckwit*".

- He had attempted to avoid fatigue on the 12.5 hour shift by keeping himself engaged in conversations on Channel 6, and he and his colleagues often "*talk rubbish*" to avoid fatigue.

- He held a particular view about terrorism and the threat it posed to Australia, and had on a number of occasions discussed his view in relation to Muslims with work colleagues who shared the same view. He was not aware of any Muslims working at the mine and, had a Muslim been employed on his crew, he would not have discussed his view on Channel 6.

- He was apologetic if he had offended anyone, which was not his intent, and undertook not to make such comments again on the two way radio.

- He valued his employment and sincerely apologised for the current position he had let himself get into.

- He had not been recently trained in the company policies regarding conduct, and if he was retained in employment he would undertake any further training that was deemed necessary.

[16] As earlier stated, Mr Goodall was dismissed on 9 February 2016. The termination letter issued to him on that date repeated the outcome of the investigation process as stated in the 20 January 2016 "show cause" letter. Its conclusion was:

> "I have taken into account your personal circumstances. However, your conduct was both unsafe and highly inappropriate. As such, the decision has been made to terminate your employment at Mt Arthur Coal immediately."

[17] Mr Goodall was paid three weeks' wages in lieu of notice and his accrued leave entitlements.

[18] Of the other two participants in the conversation involving Mr Goodall and concerning Muslims, one was an employee and the other was a contractor. The employee was also dismissed, and the contractor was barred from the site. Other employees who had participated in Channel 6 conversations during the night shift of 10-11 November 2015 were subjected to disciplinary sanctions short of dismissal.

[19] As a consequence of his dismissal, Mr Goodall was unemployed until mid-May 2016, and during that time he and his family faced financial hardship. He was subsequently able to find casual work with a labour hire company in the mining industry at a much lower rate of pay than he had enjoyed at Mt Arthur Coal.

The Decision

[20] In the Decision the Commissioner, after addressing the preliminary matters required to be considered under s.396 of the *Fair Work Act 2009* (FW Act), turned to the matters he was required to take into account under s.387. In relation to s.387(a), the Commissioner found that there was a valid reason for Mr Goodall's dismissal relating to his conduct on two bases. The first was that, while the Commissioner accepted that Mr Goodall had engaged in conversations on Channel 6 in order to combat fatigue and stay alert towards the end of a long night shift[5], his conduct in that respect was nonetheless in breach of Mt Arthur Coal's STM Plan and represented a risk to safety.[6] The second was that certain comments made by Mr Goodall during those conversations (which we have earlier set out) were inappropriate and in breach of the Code and the STM Plan. In this respect the Decision stated:

> "[40] The comments made by Mr Goodall set out in paragraph [35] above breached his obligations under the Code and the STM Plan in the following ways:
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> (a) he made comments which may reasonably be viewed as offensive;
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> (b) he demonstrated a lack of respect for other persons;
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> (c) he made comments which were sexual in nature and may reasonably be viewed as offensive; and
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> (d) he made comments and used language which may have offended people of a particular race/religion and which expressed and incited derogatory views of people of a particular race/religion.
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> [41] Mr Goodall's conduct in making inappropriate comments over the two-way radio system and thereby engaging in substantial breaches of his employer's policies gave Mt Arthur a sound, defensible and well founded reason for dismissal related to his conduct. Accordingly, I find that Mt Arthur had a valid reason to dismiss Mr Goodall related to his conduct in making inappropriate comments on the two-way radio system during the Shift."

[21] In relation to s.387(b) and (c), the Commissioner in substance concluded that Mr Goodall was afforded procedural fairness prior to his dismissal.[7] The findings made by the Commissioner in relation to s.387(d)-(g) were uncontroversial and it is not necessary to repeat them.

[22] In relation to s.387(h), the Commissioner was required to take into account any other matter which he considered relevant. The Commissioner identified six matters which he considered led to the conclusion that Mr Goodall's dismissal was harsh. The first was the length and quality of Mr Goodall's employment record with Mt Arthur Coal, which we have earlier described.

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[5] Decision at [30]

[6] Decision at [32]-[34]

[7] Decision at [51]-[54]

[23] The second was the gravity of Mr Goodall's misconduct. In relation to the safety risk posed by Mr Goodall's use of Channel 6 (and thus not being contactable on Channel 1), the Commissioner found that "... those risks were both real and not trivial, but they are fairly characterised as being towards the lower end of the scale...", and gave reasons for this conclusion.[8] In relation to that aspect of Mr Goodall's misconduct constituted by his inappropriate comments, the Commissioner said (footnotes omitted):

> "[67] Mr Goodall's conduct in making the comments referred to in paragraph [35] above over the two-way radio was clearly inappropriate. In considering the gravity of that conduct, it is necessary to have regard to the nature of the comments, the circumstances in which the comments were made and who they were directed at. In particular:
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> (a) Mr Goodall swore when making the comments on the two-way radio system. However, Mt Arthur concedes that profanities are commonly used at the Mine and more generally throughout the mining industry. The gravity of Mr Goodall's conduct in swearing over the two-way radio is at the very low end of the scale of seriousness;
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> (b) Mr Goodall made a number of crude, lewd and sexist comments on the two-way radio system. He did so in an attempt to be entertaining to his work mates. For example, Mr Goodall made the statement "that book on 50 ways to eat cock" in relation to a chicken recipe book of which he is aware with the title "50 ways to eat cock". Mr Goodall was attempting to be funny because he found the title of the cookbook to be humorous. Mr Goodall was engaging in what he regarded as banter and chat with a number of his work mates over channel 6 of the two-way radio system. They were stirring each other up and were seeking to be entertaining. Mr Goodall and his work mates exercised poor judgment in making such comments in the workplace. Their conduct in that regard was inappropriate and in breach of a number of Mt Arthur's policies. Disciplinary action of some kind was warranted. However, I would not regard such conduct on a single day at a mine site as being at the high end of the scale of serious misconduct. Such conduct was towards the lower end of the scale of seriousness; and
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> (c) Mr Goodall's comments over the two-way radio concerning Muslims were clearly inappropriate and in breach of a number of Mt Arthur's policies. This is the most serious aspect of the inappropriate comments made by Mr Goodall over the two-way radio system. In fact, Mt Arthur submitted that the factor which swayed it to terminate Mr Goodall's employment was not the making of lewd, sexist and crude comments, but the making of Islamaphobic comments. If Mr Goodall had directed his comments concerning Muslims to any particular employee or group of employees at the Mine, I would have regarded his conduct at the high end of the scale of seriousness. However, Mr Goodall did not direct his comments concerning Muslims to any person or group of people at the Mine. Mr Goodall was not aware of any Muslims working at the Mine, and he would not have made such comments if he was aware of any Muslims working at the Mine. His comments concerning Muslims represent an

[8] Decision at [66]

> expression by him of his personal views. He should not have expressed such views at the workplace, particularly over a two-way radio system where up to about 100 employees and contractors at the Mine could have heard and potentially been offended by the comments, whether or not they were Muslim. In fact, at least two employees complained to Mt Arthur management about the inappropriate comments made over the two-way radio system during the Shift. No evidence was adduced as to which parts of the comments caused the complainants to raise their complaints with management, but the comments by Mr Goodall about Muslims could well have been the catalyst for the complaints. Employees and contractors are entitled to attend work and not be subjected to commentary by other employees of a derogatory nature about particular religions or races. I regard Mr Goodall's expression of his own views about Muslims over the two-way radio during the Shift as being in the mid-range on a scale of seriousness."

[24] The third matter was that the personal and economic consequences for Mr Goodall of the dismissal were severe.[9] The fourth matter was that there were some mitigating factors in relation to Mr Goodall's misconduct, in particular that his anti-Muslim comments were made over a very short space of time. In this respect the Commissioner said (footnote omitted):

> "[69] ... Those comments were made by Mr Goodall in the space of a very short period of time (a couple of minutes, I infer from the transcript of the recordings) at about 6:25am, which was in the last hour of his 12.5 hour night shift. Having started the Shift at 6:30pm on the previous evening, it is likely that the effects of fatigue on Mr Goodall were most influential in his last hour or so of work on the Shift. In addition, all of the inappropriate comments made by Mr Goodall during the Shift took place in a period of about two hours, commencing at 4:39am on 11 November 2015. It is not alleged that Mr Goodall made such comments over the two-way radio system, or elsewhere in the workplace, at any other time during his employment at the Mine. Mr Goodall's misconduct in making the inappropriate comments on the two-way radio system from 4:39am until about 6:30am on 11 November 2015 can fairly be characterised as an isolated and temporary failure by him to act in accordance with the values and standards required of all employees and contractors at the Mine."

[25] The fifth matter was that, although it was not officially authorised, there had been a practice in which supervisors had participated to use Channel 6 as a chat channel, and to talk on the channel as a means of staying alert during a 12.5 hour shift. The sixth matter was as follows (footnote omitted):

> "[71] The sixth relevant matter is my assessment that Mr Goodall is, and was during the investigation into these matters, genuinely contrite and he accepts that his conduct during the Shift was inappropriate and unacceptable. I observed Mr Goodall give evidence in this matter. He is ashamed by his conduct. He is devastated by his dismissal and the significant consequences of it for him and his family. Mr Goodall knows that he "stuffed up; I made a mistake … I've learned my lesson". I accept his evidence in that regard. Mr Goodall came across as a truthful and reliable witness. He gave evidence in a direct and frank manner. He also made numerous (appropriate) concessions in answer to the propositions put to him in cross examination."

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[9] Decision at [68]

[26] In dealing with the issue of contrition, the Commissioner took into account what Mr Goodall had said at the meeting on 8 January 2016. As earlier stated, he made a positive finding that Mr Goodall had apologised for his conduct at this meeting.[10] As for the other comments made by Mr Goodall at this meeting, the Commissioner said (footnote omitted):

> "[78] Mr Redman was also concerned by a comment made by Mr Goodall in the meeting on 8 January 2016 to the effect that "this is BHP's way of pissing people off and stripping morale off us". I accept that Mr Redman had a legitimate reason to be concerned about this statement by Mr Goodall in the investigation process. The reason Mr Goodall made this statement was because he was informed in November 2015 that there may be an investigation in relation to what was said during the Shift. Mr Goodall was plainly concerned about the possibility of an investigation, but he heard nothing more about it until he was called in to a meeting on 8 January 2016 and the allegations were put to him. It was the two month delay and the fact that Mr Goodall was not told during that delay of the fact that the investigation was proceeding that caused Mr Goodall to be upset at the meeting on 8 January 2016. Mr Goodall's initial response was to perceive the eight week period as a deliberate strategy by Mt Arthur to delay the investigation. He did not know the amount of time it had in fact taken for Mt Arthur to undertake the analysis of which Operators were operating which vehicles and equipment at various times during the Shift and to have all the relevant radio recordings transcribed and assigned to the particular Operators working during the Shift. Mr Goodall's response was not one he should have made, but in the circumstances I am satisfied that his initial response in that meeting did not detract from the sincerity of his apology, his acceptance of his wrongdoing, or his promise not to engage in such conduct in the future.
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> [79] Mr Redman expressed concern about statements made by Mr Goodall during the investigation process in relation to Mr Goodall's views about Muslims. The context of these comments is important. Mr Redman asked Mr Goodall at the meeting on 8 January 2016 whether he would execute Muslims. Mr Goodall said that he would not. Mr Goodall also went on to say words to the effect that "it would not bother me if it did happen; Muslims do not have a problem with executing us". They were personal views Mr Goodall expressed, not to the workforce in general, or part of it, but in answer to a direct question from a manager in an investigation. The fact that Mr Goodall holds such views and gave an honest answer to a question from a manager during an investigation does not, in my opinion, detract from what I consider to be the genuine nature of his remorse for his conduct. I am satisfied that Mr Goodall now understands his obligation not to make comments in the workplace which will or may cause offense or demonstrate a lack of respect for others.
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> [80] Mr Redman construed Mr Goodall's statements on 8 January 2016 to the effect that (a) what happened on channel 6 during the Shift was "just blokes having a laugh", (b) "I believe my biggest fault is not being on channel 1", and (c) "the most extreme thing I said was 'fucked up'" as a failure by Mr Goodall to appreciate the seriousness of his conduct and caused Mr Redman to further doubt the sincerely of Mr Goodall's apologies. These comments by Mr Goodall need to be considered in context. Part of the context includes the fact that these comments were all made after Mr Goodall had

[10] Decision at [75]

> accepted, at the start of the meeting that his comments did not fit with Mt Arthur's "charter values". What Mr Goodall was seeking to point out was that he participated in conversations during the Shift with a group of employees, all of whom voluntarily engaged in what he believed to be banter and chat. Mr Goodall did not appreciate, at the time he participated in the discussions during the Shift, that other employees who may have been listening to the conversation on the two-way radio could have been, and were, offended by the comments made by Mr Goodall and his work mates, even though it is likely that none of the main participants in the discussion were offended at the comments directed at them. Neither Mr Redman nor Mr Shadbolt heard the conversations over the two-way radio during the Shift, but they were offended by them when they read the transcript of the recordings. Mr Goodall's appreciation of the offence that he could have caused to others at the Mine did not evidence itself until he submitted his response to the show cause letter. In that response, Mr Goodall did, in my view, evidence his appreciation of the offence comments of this kind could cause others at the workplace. For example, in his response Mr Goodall stated that he was "apologetic if I have offended anyone, however it was certainly not my intent." From my observation of Mr Goodall giving evidence in the proceedings, he continues to appreciate the offence such comments will or may cause to others. I am confident that Mr Goodall will not make such comments in the workplace in the future."

[27] The Commissioner rejected the argument advanced by Mr Goodall that he was treated inconsistently with other employees who engaged in comparable conduct. His ultimate conclusion was as follows:

> "[84] After considering each of the matters specified in section 387 of the Act, I am satisfied that Mt Arthur's dismissal of Mr Goodall was harsh, but was not unjust or unreasonable."

[28] In relation to remedy, the Commissioner gave consideration to a detailed submission advanced by Mt Arthur Coal that reinstatement should not be ordered because it had no trust and confidence in Mr Goodall, having regard (among other things) to his failure to accept responsibility for his conduct, the offence he caused, his disregard for Mt Arthur Coal's reputation, his offensive comments during the meeting on 8 January 2016 and his lack of apology or remorse at that meeting. The Commissioner's conclusions on this score were as follows (footnote omitted):

> "[88] ... it is necessary when assessing the appropriateness of an order for reinstatement to consider whether Mr Goodall has demonstrated sufficient understanding that his behaviour during the Shift was inappropriate and unacceptable such as to give rise to a sufficient level of confidence that conduct of that type will not recur if he is reinstated and the employment relationship will be viable and productive. For the reasons set out in paragraphs [65] to [80] above, I am satisfied that Mr Goodall has demonstrated enough self-awareness as to his conduct during the Shift to give rise to sufficient confidence that such conduct will not recur if he is reinstated. I am satisfied that there will be a viable and productive on-going relationship between Mr Goodall and Mt Arthur, and that Mr Goodall will be able by his future conduct to regain the trust of those employees and contractors he offended by making comments over the two-way radio during the Shift. I make these findings having considered the submissions made by Mt Arthur against reinstatement, as summarised in paragraph [86] above. I have addressed those matters in paragraphs [11] to [41] and [65] to [80] above.

> [89] I therefore consider that the appropriate remedy in this case is an order under s.391 of the Act reinstating Mr Goodall to the position in which was employed immediately before the dismissal, namely as an Operator. I also consider it appropriate to make an order under s.391(2)(a) to maintain the continuity of Mr Goodall's employment. However, I do not consider it appropriate to make any order for lost pay under s.391(3). This is because Mr Goodall must bear a substantial degree of responsibility for the financial consequences of his dismissal. The absence of an order for lost pay will also reinforce to Mr Goodall that his conduct during his the Shift was inappropriate and must not happen again."

Appeal grounds and submissions

[29] Mt Arthur Coal's notice of appeal contained nine grounds, but a number of grounds overlapped with each other. The first ground of appeal was, in substance, that the conclusion that the dismissal was harsh was illogical and irrational because, the Commissioner having found that Mr Goodall had "expressed and incited derogatory views" about Muslims, Mr Goodall's conduct could not be excused or mitigated on harshness grounds, and could not be subjected to a measure of seriousness or be found to be in the "mid-range of seriousness". In support of this appeal ground Mt Arthur Coal submitted:

- the "mid-range" finding was irrational, illogical and perverse, in that it proceeded on the flawed premise that conduct on the nature of that engaged in by Mr Goodall could be placed on a scale of seriousness, detracted from and ignored the objects of the FW Act, and defeated the purpose of Mt Arthur Coal's prohibitions on such conduct;

- it was irrational to assume that such conduct was less serious because it was not directed at any Muslim person, given that it was found to constitute incitement – that is, to engender bigoted views amongst non-Muslims; and

- the Commissioner's finding that the conduct was inappropriate was a "hollow statement that failed to truly characterise the seriousness of the misconduct in question".

[30] In a related appeal ground (Ground 6), Mt Arthur Coal contended that the finding that the matters considered pursuant to s.387(h) "outweighed" the findings made in relation to s.387(a)-(g) was unreasonable and/or plainly unjust and constituted a failure to properly exercise the discretion. It was submitted that where Mt Arthur Coal had introduced a policy to remove discrimination and bigotry from its workplace and to comply with legislative obligations in that respect, it was plainly unjust for it to be found that it had acted unfairly by dismissing an employee who had actively and knowingly engaged in prohibited conduct. It referred in this connection to the Full Bench decision in *Harbour City Ferries Pty v Toms*[11] in which a decision at first instance that a dismissal was unfair notwithstanding there was a valid reason for dismissal was overturned on appeal on the basis that the centrality of the need to comply with a fundamental workplace policy had not been considered. It submitted:

[11] [2014] FWCFB 6249

> "The Respondent's bigoted conduct was, and is, reprehensible in the workplace. Whatever his personal opinions, his bigoted incitement of derogatory views of Muslims in the workplace calls for a proper expression of opprobrium by the institution that is the peak industrial tribunal in Australia."

[31] Appeal ground 2 was that the Commissioner erred by taking into account irrelevant considerations, namely that Mr Goodall's comments were not directed to any particular persons and Mr Goodall was not aware of any Muslims working at the mine; that Mr Goodall's comments were made in a very short period of time; and that the comments were made over Channel 6 of the radio system. Appeal ground 3 was that the Commissioner erred by failing to take into account a relevant consideration, namely that to incite derogatory views of Muslims is to encourage other persons to hold those same derogatory views. Appeal ground 4 was that the Commissioner failed to carry out the statutory task required under the FW Act and/or failed to take into account relevant considerations by failing to consider the totality of the misconduct in aggregate, which constituted multiple breaches of multiple policies, and failing to give weight to the finding that there were valid reasons for dismissal. In relation to these grounds, Mt Arthur Coal submitted:

- the fact that the comments were made to co-workers thought to be non-Muslims aggravated rather than mitigated the conduct, because that was the essence of incitement, which the Commissioner failed to take into account;

- the fact that the conduct occurred over a short period, and occurred over what some described as a "chat channel" was not relevant to the proper characterisation of the conduct;

- the Commissioner considered the seriousness of discrete aspects of Mr Goodall's conduct, but not the seriousness of the totality of the conduct;

- the Commissioner should have first characterised the conduct objectively in its totality before considering, in light of the seriousness of the conduct, whether there was a valid reason to dismiss and then whether the dismissal was harsh having regard to all the circumstances.

[32] In appeal ground 5, Mt Arthur Coal contended that the Commission had made the following significant errors of fact:

(1) in paragraph [69] of the Decision that the effects of fatigue were most influential at the time Mr Goodall made his anti-Muslim comments, in circumstances where there was no evidence that fatigue was a causative factor and Mr Goodall did not stop work because of fatigue;

(2) in paragraph [71] of the Decision that Mr Goodall was genuinely contrite during the investigation, in circumstances where his comments at the meeting on 8 January 2016 (which we have earlier set out) did not indicate any contrition; and

(3) in subparagraphs (a), (c) and (d) of [40] that Mr Goodall's anti-Muslim comments "may" reasonably be viewed as offensive or "may" have offended, when on any objective view they were offensive.

[33] Related to the second of the above alleged errors of fact was appeal ground 7, in which it was contended that the Commissioner made a significant error of fact by failing to find that Mr Goodall had no insight into, and did not appreciate the severity of his conduct.

[34] Grounds 8 and 9 related to the order for reinstatement. Ground 8 contended that the Commissioner made a significant error of fact by finding that Mr Goodall would be able to regain the trust and confidence of those employees and contractors that he offended by his comments on Channel 6 by his future conduct. Ground 9 was that the finding that it was appropriate to reinstate Mr Goodall was unreasonable and/or plainly unjust having regard to the Commissioner's own findings about Mr Goodall's conduct, and the Commissioner thereby failed to properly exercise his discretion under s.391 of the FW Act.

[35] Mr Goodall submitted that:

- the Decision was not illogical or irrational in that it was not arbitrary or capricious, and Mt Arthur Coal's submission that the Commissioner should have used alternate reasoning did not meet the test for illogicality or irrationality;

- it was not irrational to place Mr Goodall's conduct on a scale of seriousness, since this was an approach well supported by previous decisions in which the requirement to assess the gravity of the misconduct was emphasised;

- it cannot be said that there was no logical connection between the evidence and the inferences or conclusion drawn by the Commissioner, nor that there was only one conclusion open on the evidence;

- for the same reasons it could not be said that the Decision was legally unreasonable;

- the Commissioner accepted that Mr Goodall's misconduct was serious, but he was entitled to assess its degree of seriousness in determining whether dismissal was a disproportionate response to that misconduct; in that context it was misdirected for Mt Arthur Coal to submit that the objective seriousness of the misconduct should have been treated as absolute;

- the fact that Mr Goodall's anti-Muslim comments were not directed to any person or group, and that Mr Goodall was not aware of any Muslims working at the mine was relevant to the Commissioner's consideration of the seriousness of the conduct for the purpose of determining harshness, as was the length of time that Mr Goodall spent making the comments;

- reading the decision as a whole and fairly, it was clear that the Commissioner did consider the totality of Mr Goodall's conduct, in that every aspect of the conduct was considered within the rubric of s.387;

- the finding that the effects of fatigue were most influential in his last hours or so working on the shift was well supported by a range of evidence before the Commissioner that long shifts involving work in the early morning gave rise to symptoms of fatigue which affected behaviour;

- likewise the conclusion that Mr Goodall was contrite was supported by evidence that he apologised for his conduct to Mt Arthur Coal on a number of occasions prior to his dismissal, and the Commissioner's conclusion that Mr Goodall's contrition was genuine was based on a credit finding of him as a witness which ought not be disturbed on appeal; and

- the Commissioner's assessment that Mr Goodall would be able to regain the trust of his co-workers was similarly founded on his acceptance of the genuineness of Mr Goodall's contrition and his demonstration of self-awareness concerning his conduct.

Consideration

Permission to appeal

[36] This appeal, having been brought against a decision made under Pt.3-2 of the FW Act, is one to which s.400 applies. Section 400 provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[37] In the Federal Court Full Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as "a stringent one". The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[12] A Full Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin,* identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[13]

[38] As earlier stated, we communicated to the parties on 15 August 2016 that we had decided to grant permission to appeal. We did so because two aspects of Mt Arthur's appeal raised a novel question, namely whether derogatory remarks in the workplace of the type made by Mr Goodall - that is, remarks which vilify persons of a particular religion - are

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[12] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46]

[13] [2010] FWAFB 5343, 197 IR 266 at [24] – [27]

capable of being assessed, like most forms of misconduct, on a range of seriousness, or whether they constitute a form of misconduct which is *sui generis* and must be considered in a distinct way. We considered that to be a novel question (at least in the way it was advanced in Mt Arthur Coal's submissions) that was likely to arise in other cases and in relation to which Full Bench guidance would be desirable. For that reason, we concluded that the grant of permission would be in the public interest.

Preliminary observations

[39] Before turning to Mt Arthur Coal's appeal grounds and the submissions advanced in support thereof, we consider it appropriate to make some preliminary observations about the Decision and the legal framework in which it was made.

[40] It verges on being trite to say that the task of determining whether the dismissal of a person who is protected from unfair dismissal was harsh, unjust or unreasonable involves the exercise of a discretion. That discretion is a wide one, constrained only by the requirement to take into account the matters specified in paragraphs (a)-(h) of s.387. Section 387(h) itself confers on the decision-maker a wide scope to take into account matters which he or she considers to be relevant. The determination of whether a dismissal is harsh, unjust or unreasonable requires the making of an evaluative judgment by the decision-maker. In those circumstances, no one consideration and no combination of considerations is necessarily determinative of the result, and the decision-maker has some latitude as to the choice of decision to be made. [14] The same principle applies to the making of a decision as to whether it is appropriate to grant the remedy of reinstatement in respect of a dismissal which has been found to be harsh, unjust and/or unreasonable.[15]

[41] In an appeal from a discretionary decision of this nature, an appellate tribunal is only authorised to set aside the decision if error on the part of the decision-maker has been demonstrated.[16] This error must usually be of one of the types identified in *House v The King* as follows[17]:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

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[14] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at [19] per Gleeson CJ, Gaudron and Hayne JJ

[15] *Anderson v Thiess Pty Ltd* [2015] FWCFB 478

[16] Ibid at [21]

[17] [1936] HCA 40; (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

[42] It follows that an appellate tribunal is not authorised to set aside a discretionary decision on the basis of a preference for an outcome different to that determined by the first instance decision-maker. In this connection, the High Court said in *Norbis v Norbis*[18]:

> "The principles enunciated in *House v. The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

[43] Nor is appealable error demonstrated by a contention that the decision-maker should have given more or less weight to a particular consideration. In the High Court decision in *Gronow v Gronow* Aickin J (with whom Mason and Wilson JJ agreed) said: "It is however a mistake to suppose that a conclusion that the trial judge has given inadequate or excessive weight to some factors is in itself a sufficient basis for an appellate court to substitute its own discretion for that of the trial judge".[19] It is only where a relevant matter has been given no weight because it was not considered at all that error in the exercise of the discretion will be demonstrated.[20]

[44] In the Decision the subject of challenge in this appeal, the Commissioner considered all of the matters he was required to take into account under s.387. There was no factual dispute about the actual conduct - that is, the inappropriate comments made by Mr Goodall on Channel 6 on 11 November 2015 - that caused his dismissal, so in at least that respect there was no suggestion of any significant error of fact. The Commissioner upheld as valid under s.387(a) the reasons given by Mt Arthur Coal for its dismissal of Mr Goodall. There was no issue taken with the findings made pursuant to s.387(b)-(g). With respect to s.387(h), the Commissioner identified the additional matters he considered to be relevant, and gave detailed reasons as to why they were relevant and favoured the conclusion that the dismissal was harsh. Having found that the dismissal was harsh, the Commissioner ordered reinstatement, the primary remedy under the FW Act.

[45] The conclusion that Mr Goodall's dismissal was harsh does not on its face appear to be surprising, outlandish or counter-intuitive. Although it was not in dispute that Mr Goodall misconducted himself on 11 November 2015, this was the only instance of misconduct in an employment history which lasted almost five years and was otherwise entirely unblemished. There was no evidence that any actual harm was caused by Mr Goodall's conduct apart from offence that was taken by the manager and supervisor who conducted the investigation into it. There can be no doubt that the personal and financial consequences of the dismissal for Mr

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[18] [1986] HCA 17; (1986) 161 CLR 513 at 518-9 per Mason and Deane JJ

[19] [1979] HCA 63; (1979) 144 CLR 513 at 537

[20] See *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [58] and the authorities cited there.

Goodall were severe, and there was no challenge in the appeal to the Commissioner's findings in this respect.

[46] The fact that an employee has been dismissed because of the making of derogatory comments about persons of a certain religion in or in connection with the workplace has not in other cases prevented a conclusion that the dismissal was unfair in all the circumstances. There are two pertinent examples of this. The first is *Anderson v Thiess Pty Ltd*.[21] In that case Mr Anderson was dismissed after he had disseminated anti-Muslim propaganda through his employer's workplace email system. He had previously been told, at least informally, not to send emails about Muslims. Notwithstanding that it was found that there was a valid reason for dismissal, the conclusion reached was that the dismissal "was harsh because of its consequences for the personal and economic situation of Mr Anderson" and "unreasonable because the conclusion that the misconduct engaged in by Mr Anderson was wilful on the grounds that he had been previously warned about it, was not reasonably open on the material before the employer".[22] Reinstatement was refused, substantially on the basis of "Mr Anderson's complete lack of contrition and his refusal to accept any culpability for his actions or the serious implications that sending the email had"[23], and he was awarded compensation. Mr Anderson appealed against the decision on remedy, but failed to obtain permission to appeal.[24]

[47] The second is *Joseph Johnpulle v Toll Holdings Ltd*.[25] In that matter the applicant for an unfair dismissal remedy, Mr Johnpulle, had engaged in conversation at work with a fellow employee who was Afghani in ethnic origin and made comments of a taunting nature which sought to link the fellow employee and the religion of Islam with killing and the Taliban. Mr Johnpulle had previously engaged in conduct of this nature and had been informally warned about it. This conduct was characterised as intended to "harass, vilify and victimise", and was found to constitute a valid reason for dismissal.[26] Notwithstanding this the dismissal was found, having regard to all the circumstances including the applicant's service, age and the impact of the dismissal, to be harsh because of the personal consequences of the dismissal and the severity of the punishment given the absence of any sanctions for the earlier instances of his conduct.[27] Notably the decision made this comment about the issues raised by the application:

> "[89] My decision in this matter has been very carefully considered. The evidence suggests that there is either a lack of awareness by Mr Johnpulle of appropriate workplace conduct or a disdain of the need to treat others at work with respect and to be sensitive to cultural, religious and ethnic backgrounds. It seems to me that these are matters which require regular reinforcement in a diverse workforce. Just as Mr Johnpulle would be appalled if his co-workers made assumptions about his background, so he must understand that it is totally inappropriate to make assumptions about others.

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[21] [2014] FWC 6568

[22] Ibid at [76]

[23] Ibid at [81]

[24] *Anderson v Thiess Pty Ltd* [2015] FWCFB 478

[25] [2016] FWC 1507

[26] Ibid at [37], [39]

[27] Ibid at [93]-[94].

> [90] Cultural and ethnic awareness however are not things that happen by the writing of policies. It is through training and raising and discussion of issues that knowledge is gained, understanding is reached and tolerance found."

[48] The outcome in the Decision here therefore cannot be regarded as significantly disharmonious with cases of a similar nature.

[49] It cannot reasonably be suggested that the Decision can be read as in any way condoning or excusing Mr Goodall's conduct, and the submissions to that effect advanced by Mt Arthur Coal are rejected. As earlier stated, the Commissioner found that Mr Goodall's conduct constituted a valid reason for his dismissal. His comments, particularly the anti-Muslim comments, were described by the Commissioner as inappropriate, unacceptable, offensive, and as expressing and inciting derogatory views of people of a particular race or religion.[28] The dismissal was not found to be unjust or unreasonable, only harsh. No order for lost pay was made in Mr Goodall's favour on the basis that he bore a substantial degree of responsibility for his dismissal and in order to ensure he understood that his conduct was inappropriate and could not be repeated, and this amounted to an effective penalty upon him of some tens of thousands of dollars.

[50] With these preliminary observations in mind we turn to the specific grounds for Mt Arthur Coal's appeal.

Appeal grounds 1 and 6

[51] Irrationality and illogicality have emerged from the concept of unreasonableness as a ground for judicial review of administrative discretionary decision-making. In the High Court decision in *Minister for Immigration and Citizenship v SZMDS*[29], Crennan and Bell JJ, in relation to judicial review of a decision made under s.65 of the *Migration Act 1958*, set out the principles applicable to this ground of judicial review:

> "[130] In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

[28] Decision at [40], [88]
[29] [2010] HCA 16; (2010) 240 CLR 611

> [131] What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion."

[52] In relation to the particular decision under consideration, Crennan and Bell JJ went on to say:

> "[135] On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent's claims. There was. ..."

[53] Although we are dealing here with an appeal by way of re-hearing and not an application for judicial review, we consider that we should apply the principles set out above with respect to Mt Arthur Coal's invocation of irrationality and illogicality in its first appeal ground.

[54] It is uncontroversial that the Commissioner was, in the exercise of his discretion, required to make an assessment of the gravity of Mr Goodall's conduct. What Mt Arthur Coal challenges is the process of reasoning by which the Commissioner went about this task - namely, by attempting to place the particular conduct in a range or scale of seriousness - and the outcome this process of reasoning produced. In the case of the anti-Muslim comments, which was the aspect of Mr Goodall's conduct which ultimately caused Mt Arthur Coal to decide to dismiss him,[30] the Commissioner compared Mr Goodall's conduct to a hypothetical case where an employee made Islamophobic comments directly to a fellow worker or workers at the workplace (who were, presumably, Muslim). The Commissioner then characterised Mr Goodall's conduct by way of contrast as involving the expression of personal views which should not have been ventilated in the workplace, especially over a radio system where potentially large numbers of workers might have heard them. He then concluded, on the basis of that comparison, that Mr Goodall's conduct was in the mid-range of seriousness.

[30] Decision at [67(a)]

[55] We consider there was room for a logical and rational person to adopt the Commissioner's process of reasoning, and to reach the conclusion that he reached using this process of reasoning. The concept of comparing a case of conduct of a particular nature to other actual or hypothetical instances of conduct of a similar nature in order to assess its degree of seriousness is a well-known one. It is, for example, commonly used by courts in assessing criminal and civil penalties to be imposed, and is a process of logic that may be applied in sentencing for the most grave of criminal offences. It is also a familiar concept in the unfair dismissal jurisdiction. For example, in the Full Bench decision in *B, C and D v Australian Postal Corporation*[31] the majority applied that process of reasoning in relation to misconduct in the form of bringing pornography into the workplace:

> "[64] The nature of material that will come within descriptors such as "inappropriate", "unacceptable" or "pornographic" and the like will present as a spectrum. The lines of delineation between appropriate and inappropriate or acceptable and unacceptable are not sharp because they are broad, even amorphous, terms in respect of which reasonable minds might differ. Emailing pornography to a friend or other willing recipient is objectively a less serious breach of policy than emailing pornography to unwilling recipients or for the purposes of harassment."

[56] We do not consider that there is anything intrinsically different about inappropriate workplace comments which involve religious vilification which precludes the adoption of a comparative analysis approach in order to assess its seriousness. That is not to say this is the only process of reasoning to be used, but only that it is one approach that might be taken by a logical or rational decision-maker.

[57] Nor do we consider that the actual comparison made by the Commissioner was illogical or irrational. It is reasonable to conclude, for example, that for an employee to personally direct anti-Muslim comments at a fellow employee who is known to be of the Islamic faith is objectively more serious than the expression of anti-Muslim opinions to fellow employees who are known to hold similar views, even where that is done in a manner (as Mr Goodall did) where the opinions may be heard by other employees who may be offended by them, because in the former case there is likely to be both the intention and effect of degrading, belittling or humiliating a particular individual, while in the latter case such an intention and effect are less likely. A recent example of the postulated worst-case scenario in this analysis (in the context of racist, threatening and obscene comments) is the decision in *Sayers v CUB Pty Ltd*[32], where it was found that an applicant's use of "offensive language and verbal abuse" including "an offensive, degrading and racial slur" towards another employee of Hispanic origin was found to constitute a valid reason for dismissal[33], and despite the fact that the applicant had 15 years' service, an unblemished record and was remorseful, it was also found that his dismissal was not unfair. Permission to appeal against this decision was refused.[34] Similarly in *Seaman v BAE Systems Australia Logistics Pty Limited*[35] 15 years' service, an unblemished record, remorse and severe financial and personal circumstances did not render the applicant's dismissal for calling a colleague of Italian/Maltese extraction a "*fucking nigger*" on two occasions unfair.

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[31] [2013] FWCFB 6191; 238 IR 1

[32] [2016] FWC 3428

[33] Ibid at [126]

[34] [2016] FWCFB 5499

[35] [2011] FWA 7005

[58] It is not suggested that reasonable persons undertaking this type of comparison would necessarily arrive at the same conclusion as the Commissioner. However it was available to a logical and rational decision-maker to reach that conclusion. It was not a capricious or arbitrary one.

[59] Mt Arthur Coal's submission that the Decision was irrational and illogical centred on the fact that the Commissioner had described Mr Goodall's conduct as constituting "incitement".[36] Engaging in incitement against a particular religious group in the workplace is undoubtedly a serious matter. However we do not consider that there is a proper basis for the proposition that engagement in such conduct leading to dismissal necessarily precludes the conclusion that the dismissal was harsh, unjust or unreasonable. There is nothing in the objects of the FW Act which supports that proposition, and indeed to deal with an unfair dismissal remedy application with that proposition as the *a priori* assumption would be inconsistent with the requirement in s.387 to take into account whether a dismissed employee has been afforded procedural fairness (paragraphs (b) and (c)) and all other matters which the Commission member considers relevant (paragraph (h)), and with the object in s.391(2) to provide both procedurally and substantively a "*fair go all round*" to all parties.

[60] In any event, we consider that the evidence demonstrates that Mr Goodall only engaged in "incitement" in a confined sense. Mr Goodall and the two other persons who engaged in the anti-Muslim conversation may be said to have incited each other, but only to confirm and reinforce the bigoted views which they already held. Mr Goodall was clearly recklessly indifferent to the fact that what he and the others were saying could be heard by anyone tuned into Channel 6 at the time, which was potentially a large number of persons, but we do not consider that the evidence supports the proposition that Mr Goodall intended to "incite" such third persons.

[61] Accordingly we consider that there was nothing illogical or irrational about the Commissioner's assessment of the seriousness of Mr Goodall's conduct.

[62] Mt Arthur Coal's appeal ground 6 invoked what is sometimes referred to as the "second limb" of the *House v The King*[37] test for error in discretionary decision-making, namely that the decision under appeal was unreasonable and plainly unjust and permitted the inference to be drawn that the decision-maker failed properly to exercise the discretion invested in him. In relation to appeals brought on this basis, the Full Bench in *King v Catholic Education Office Diocese of Parramatta*[38] said (footnotes omitted):

> "[41] ...It is only where the outcome is demonstrated to be wholly outside the range of outcomes reasonably available to the first instance decision-maker that the "manifest injustice" ground of error will allow an appeal to be upheld without specific error being identified. In the unfair dismissal context, if not generally, this will only occur in rare cases."

[63] Much of what was put in support of this appeal ground overlaps with appeal ground 1, and we reject it for the same reasons. We consider it was reasonably available for the

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[36] Decision at [40(d)]

[37] (1936) 55 CLR 499

[38] [2014] FWCFB 2194; 242 IR 249

Commissioner to conclude that the six matters he identified in relation to s.387(h) justified the conclusion that the dismissal was harsh. That Mt Arthur Coal had introduced a policy prohibiting the type of conduct in which Mr Goodall engaged could not by itself preclude the conclusion that Mr Goodall's dismissal was unfair. As was stated by the Full Bench majority in *B, C and D v Australian Postal Corporation*, while "a substantial and wilful breach of a policy will often, if not usually, constitute a 'valid reason' for dismissal", nevertheless "[a]ny notion that a clear and knowing breach of policy will *always* provide a valid reason for a dismissal that will not be harsh, unjust or unreasonable, no matter the employee's length of service and other circumstances, is inconsistent with basic principle. Every case must be assessed by reference to its particular circumstances."[39] *Harbour City Ferries Pty v Toms*[40], which was cited by Mt Arthur Coal, does not stand for any contrary proposition; it was a case decided having regard to its relevant circumstances. It was not even the case here that the policy that Mr Goodall breached by making his anti-Muslim remarks, namely the Code, took a "zero tolerance" approach which mandated dismissal as the only penalty. It stated that "*Corrective actions depend on the seriousness of the breach and other relevant circumstances*", and nominated "*discussions with supervisors or managers about desired behaviours*", "*a verbal or written warning*" and "*suspension*" as possible disciplinary sanctions alongside dismissal.

[64] Appeal grounds 1 and 6 are therefore rejected.

Appeal grounds 2, 3 and 4

[65] Some of the matters raised by the appeal grounds we have already considered and rejected in relation to appeal grounds 1 and 6. We have already stated that the approach taken by the Commissioner in his assessment of the gravity of Mr Goodall's conduct was not irrational or illogical, and the conclusion which he reached was reasonably available to him. In the context of the analysis, we do not consider that it was irrelevant for the Commissioner to take into account that Mr Goodall's remarks were not directed at anyone in the sense that they were not aimed at offending a targeted individual; that was a consideration which had a rational connection to the seriousness of the conduct. For the same reason, we do not consider it to have been irrelevant that the misconduct involving the anti-Muslim comments took place over a couple of minutes in the course of a period of service which lasted almost five years, or that Mr Goodall engaged in "chat" on Channel 6 to ward off the effects of fatigue in accordance with a well-established practice. We have earlier dealt with the issue of incitement, and we do not accept that this necessarily had to be taken into account in the way it is framed in Mt Arthur Coal's submission.

[66] We do not agree with the requirement postulated in Mt Arthur Coal's submissions that the "totality" of Mr Goodall's conduct had to be considered prior to the Commissioner engaging upon whether there was a valid reason for dismissal and then whether the dismissal was harsh. Mt Arthur Coal had given discrete reasons for Mr Goodall's dismissal based upon various aspects of his conduct. That being the case, it was appropriate for the Commission in relation to s.387(a) to consider each reason given and assess whether it was a valid reason for dismissal. The Commissioner found that each reason given was a valid one, so that there was no need for the Commissioner to then proceed to assess the validity of the reasons in their totality. In relation to s.387(h), the Commissioner had a broad discretion to take into account

[39] [2013] FWCFB 6191 at [36], [48]-[51]

[40] [2014] FWCFB 6249

those matters which he considered relevant. In the exercise of that discretion, the Commissioner considered the gravity of each and every aspect of Mr Goodall's misconduct, being the safety risks posed by his use of Channel 6, his swearing, the various "crude, lewd and sexist comments" he made[41], and the anti-Muslim comments. We consider that was a process of analysis that was reasonably available for the Commissioner to undertake having regard to the different character of each aspect of Mr Goodall's conduct. There is no one process of analysis that s.387(h) either expressly or by implication requires the Commission to undertake, nor is there any basis for an appellate Full Bench to impose a "decision rule" requiring the discretionary decision-making process to be undertaken in a particular way.

[67] Appeal grounds 2, 3 and 4 are rejected.

Appeal grounds 5 and 7

[68] Mr Arthur Coal's appeal grounds 5 and 7 allege errors of a factual nature. We have earlier set out the three factual errors alleged in ground 5. We will deal with each of these in turn.

[69] The first alleged error is that there was no factual basis for the statement made by the Commissioner in paragraph [69] concerning the effect of fatigue. We disagree. The precise statement the Commissioner made bears repeating "[h]aving started the Shift at 6:30pm on the previous evening, it is likely that the effects of fatigue on Mr Goodall were most influential in his last hour or so of work on the Shift".[42] We consider that this inference was reasonably drawn by the Commissioner having regard to the fact that, in the last hour of his shift, he had worked through the night operating heavy equipment for a period in excess of 11 hours. As a matter of common sense, it is reasonable to infer a likelihood that there would be some effects of fatigue by that time, and that they may influence behaviour. The inference is strengthened by Mr Goodall's evidence that he found it necessary to engage in chat on Channel 6 to stay alert and combat the effects of fatigue. It is also confirmed by Mt Arthur Coal's Fatigue Management Procedure, which refers to the need to manage fatigue during the early hours of the morning because of "*the natural tiredness that even well-prepared shift workers can experience in these hours*", and the evidence of other persons concerning the effects of working 12.5 hour night shifts. The statement made by the Commissioner was not made as a positive finding but only as an expression of a likelihood, and the Commissioner did not find that fatigue actually caused or excused Mr Goodall's conduct in respect of the anti-Muslim comments, but treated it as a contextual circumstance.

[70] The second alleged error was that the Commissioner found that Mr Goodall was genuinely contrite during the investigation. We do not consider that there was any such error once it is understood that what Mr Goodall had to apologise for was not his anti-Muslim opinions, which he was entitled to hold however bigoted they were, but for expressing those views at work on a radio channel that was accessible, potentially, to a large number of fellow workers. Mr Goodall apologised for his conduct at the initial discussion with the Open Cut Examiners in November 2015, at the first investigation meeting with Mr Redman and Mr Shadbolt on 8 January 2016 and in the second meeting on 19 January 2016, as well as in his subsequent response to the show cause letter. More importantly Mr Goodall's conduct demonstrated his contrition and acceptance of wrongdoing; after the matter was first raised

[41] Decision at [67(b)]

[42] Decision at [69]

with him by the Open Cut Examiners in November 2015, he did not engage in any conversation on Channel 6 thereafter.

[71] Mt Arthur Coal's contention of error in this respect rests on the other things which Mr Goodall said at the meeting on 8 January 2016, which we have earlier set out. The Commissioner dealt with these matters comprehensively, in the context of considering Mr Goodall's contrition, in paragraphs [77]-[80] of the Decision, which we have also earlier set out in full. It is not necessary to say much more than that we consider the Commissioner's analysis to be correct. In particular, without derogating from the totality of the Commissioner's analysis, the anti-Muslim opinions which Mr Goodall expressed at this meeting were, as the Commissioner explained, expressed in response to what was in substance an invitation from Mr Redman to discuss the views he had heard expressed in the recording of the Channel 6 conversation. Mr Goodall thereupon gave voice to his regrettable and bigoted views in a frank and forthright fashion. That was not inconsistent with his contrition for expressing such views on Channel 6.

[72] The third alleged error (or errors) was that the Commissioner found that the anti-Muslim comments "may" reasonably be viewed as offensive or "may" have offended, not that they were objectively offensive. We consider this submission to be merely a matter of semantics. On a fair reading of the Decision, it is clear that that the Commissioner treated Mr Goodall's anti-Muslim comments as offensive.

[73] Ground 7 contends that the Commissioner erred by failing to find that Mr Goodall had no insight into, and did not appreciate the severity of, his conduct. This ground is substantially based on Mr Goodall's conduct at the meeting on 8 January 2016, which we have already discussed. Insofar as it relates to the evidence which Mr Goodall gave at the hearing before the Commissioner concerning his contrition, we have already set out in full the findings which the Commissioner made about this evidence in paragraph [71] of the Decision. This included a finding that Mr Goodall accepted that his conduct during the 10-11 November 2015 night shift was inappropriate and unacceptable. The Commissioner, having the advantage of seeing and hearing Mr Goodall give his evidence as it unfolded in its entirety, accepted that evidence as truthful and reliable. We do not consider that Mt Arthur Coal has demonstrated any proper basis to conclude that the Commissioner erred in making these findings or that he should have made findings to the opposite effect.

[74] Grounds 5 and 7 are rejected.

Appeal grounds 8 and 9

[75] Appeal grounds 8 and 9 are related to the order for reinstatement. Ground 8 contended that the Commissioner made a significant error of fact by finding that Mr Goodall would be able to regain the trust and confidence of those employees and contractors that he offended by his comments on Channel 6 by his future conduct. Ground 9 was that the finding that it was appropriate to reinstate Mr Goodall was unreasonable and/or plainly unjust having regard to the Commissioner's own findings about Mr Goodall's conduct, and the Commissioner thereby failed to properly exercise his discretion under s.391 of the FW Act.

[76] The principles applying to the consideration of the grant of reinstatement as a remedy were comprehensively discussed in the Full Bench decision in *Nguyen v Vietnamese*

Community in Australia.[43] That decision identified the restoration of trust and confidence as being a significant but not the sole or even a necessary criterion in the determination of whether reinstatement is appropriate, and defined the concept of trust and confidence as being "that which is essential to make an employment relationship workable".[44] Whether trust and confidence can be restored is to be assessed objectively on the basis of all the relevant circumstances, and not on the basis of subjective opinion.

[77] To describe a finding made in relation to whether trust and confidence can be restored upon reinstatement as one of fact, as Mt Arthur Coal does in its submission, is problematic. A finding of that nature is necessarily conjectural, as it involves to a significant degree an assessment about what is likely to happen in the future, and is better characterised as being in the nature of an evaluative judgment. It is therefore akin to the exercise of a discretion and should be approached as such in an appeal.

[78] The primary issue which arose for consideration before the Commissioner in respect of remedy was whether there were proper grounds for confidence that Mr Goodall would, if reinstated, never again engage in conduct of the type which occurred on the night shift of 10-11 November 2015. That confidence was what was necessary to make the employment relationship workable. As we have already stated, the Commissioner with the advantage of having seen and heard Mr Goodall give his evidence was persuaded that he had a sufficient understanding that his conduct was inappropriate, unacceptable and not to be repeated. Nothing which has been put to us by Mt Arthur Coal has articulated a proper basis for the Commissioner's findings in this respect to be disturbed on appeal. That being the case, there was a reasonable and rational basis for the Commissioner to conclude that Mr Goodall would be able to regain the trust of his colleagues and thereby re-establish a viable working relationship.

[79] Mt Arthur Coal's submission that the decision to reinstate was "plainly unjust" substantially relied on the same propositions advanced to support its submissions that the conclusion that the dismissal was harsh was illogical, irrational, unreasonable and unjust. It is rejected for the same reason. Once the Commissioner found the dismissal to be harsh, and that it would be practicable to restore trust and confidence and thereby re-establish a viable working relationship, it was reasonably open to him to conclude reinstatement was appropriate and to make an order to that effect. It was equally reasonably open to him to decline to make any order to compensate Mr Goodall for the remuneration lost as a result of the dismissal in order to reinforce that his conduct had been inappropriate and could not be repeated.

[80] Grounds 8 and 9 of the appeal are rejected.

Conclusion

[81] Mt Arthur Coal has not succeeded in demonstrating that the Decision was attended by appealable error. Therefore we order that the appeal is dismissed.

DECISION OF COMMISSIONER JOHNS

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[43] [2014] FWCFB 7198

[44] Ibid at [23]-[24]

[82] I have had the opportunity to read the reasons for decision of Vice President Hatcher and Deputy President Wells in draft form. Unfortunately, I find myself unable, with respect, to agree with the majority in dismissing the appeal.

[83] I agreed with the majority that permission to appeal should be granted for the reasons stated in the joint judgment of the majority.

[84] For my own part, for the reasons below, I would allow the appeal and quash the decision of the Commissioner at first instance.

[85] On a rehearing I would not disturb the findings made at first instance by the Commissioner in relation to s.387(a)-(g) of the FW Act. However, I would not find that the termination of Mr Goodall was harsh, unjust or unreasonable. It was none of them. Consequently, on a rehearing, I would dismiss the application for an unfair dismissal remedy.

[86] This is more than me expressing a preference for a different outcome. The ultimate outcome, i.e. the reinstatement of Mr Goodall to his employment, was unreasonable and plainly unjust when considered in the light of the duty to ensure a "fair go all round" is accorded to both the employer and the employee concerned.[45]

[87] The nature of the *House v King* error required has been cited often,

> "*It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellant court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case although the nature of the error may not be discoverable, the exercise of discretion is reviewed on the ground that a substantial wrong has in fact occurred*."[46]

[88] The submissions of the parties also traversed "illogicality" and "irrationality" as a basis for appellate review. In *Minister for Immigration and Citizenship v SZMDS* that basis was explained as follows,

> "*[A] decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and inferences or conclusions drawn.*"[47]

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[45] s. 381(2) FW Act

[46] (1936) 55 CLR 499 at 505

[47] [2010] HCA 16; (2010) 240 CLR 611, [135]

[89] With respect, the Commissioner at first instance, in my opinion, failed to properly exercise the discretion reposed in him. He took into account irrelevant matters in relation to the comments made by Mr Goodall and failed to take into account relevant matters about the known adverse impact of discrimination in the workplace.

[90] Further, the Commissioner's findings that the gravity of:

a) the risk to Mr Goodall's safety and the others at the Mine was at the lower end of the scale;[48]

b) Mr Goodall's crude, lewd and sexist comments were towards the lower end of the scale of seriousness;[49] and

c) Mr Goodall's comments regarding Muslims in the mid-range on a scale of seriousness,

were not findings that, with respect, a logical or rational person could reach.

[91] This is not a case of a difference of degree, impression or empirical judgment. There is extensive literature[50] about the effects of discrimination, including in the workplace. Making jokes or comments that are inherently Islamophobic and homophobic is likely to negatively affect the mental health of people in the workplace ranging from anxiety to depression. The Commissioner should have taken "judicial notice" of the same.

[92] It is for this very reason that Mt Arthur has a Code of Business Conduct that expressly prohibits behaving in a way that is "offensive, insulting, intimidating, malicious or humiliating", making "jokes or comments about a person's race, gender, ethnicity, religion, sexual preference, age, physical appearance and disability." In implementing the policy, promulgating it and conducting training for its employees (including Mr Goodall) with the aim of eliminating discrimination in the workplace, Mt Arthur was fulfilling its obligations as an employer under Federal and State legislation to ensure that its workplaces are free of discrimination and harassment.

[93] In the face of a substantial and willful breach of that policy, Mt Arthur took the matter seriously, and ultimately concluded that it was a valid reason for termination that was not otherwise harsh, unjust or unreasonable. Requiring Mt Arthur to reinstate Mr Goodall in this context is plainly unjust. Mt Arthur took decisive action to eliminate Islamophobia and homophobia in its workplace. It should have been commended for its action, not punished by being required to take Mr Goodall back.

[94] In my opinion the comments categorised as crude, lewd and sexist comments were downplayed in their characterisation. The references to "getting your rear end banged up" and to "Parish would like that" and "50 ways to eat cock", covering your arse "when you're walking round in the bathhouse with Parish" were homophobic. The Commissioner failed to properly characterise the (so called) crude, lewd and sexist comments as homophobic.

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[48] [66]

[49] [67](b)

[50] See the numerous publications here http://www.humanrights.gov.au/publications-home/all

[95] Further, the Commissioner failed to attach an appropriate level of seriousness to these homophobic comments in circumstances where Mr Goodall directed them at a particular individual, namely, Mr Parish. Mr Goodall singled out and directly targeted Mr Parish with these homophobic slurs. In this context, a finding that the "conduct was towards the lower end of the scale of seriousness" cannot, with respect, be taken seriously.

[96] The reference to "teabagging" was a reference to a sexual act of male domination used to humiliate a sexual partner. It has been written that,

> "*Tea bagging is not always carried out consensually, such as when it is done as a practical joke, which, in some jurisdictions, is legally considered sexual assault or sexual battery*."[51]

[97] The Commissioner failed to properly characterise the teabagging comment as an incitement to engage in a sexual assault.

[98] When the crude, lewd and sexist comments are properly characterised any suggestion that they are at the "lower end of the scale of seriousness" is, with respect, irrational.

[99] Turning then to the Islamophobic comments the Commissioner could have taken "judicial notice" of the psychological damage caused by the same. For example in 2003-2004, the Human Rights and Equal Opportunity Commission conducted a series of national consultations with Arab and Muslim Australians, culminating in the publication of the Ismaξ report in 2005. That report found that,

> "*The biggest impact of prejudice on Arab and Muslim Australians is a substantial increase in fear. 'Scared', 'isolated', 'uncomfortable', 'vulnerable' and 'alienated' were words commonly used by consultation participants to describe individual responses to racial abuse…*"[52]

[100] When Mr Goodall's deeply offensive and Islamophobic comments are properly considered, it cannot logically follow that the comments where "mid-range". Mr Goodall's conduct was a substantial and wilful breach of Mt Arthur's policy. As the Commissioner correctly found Mr Goodall "expressed and incited derogatory views of people of a particular race/religion". The subsequent down-grading of the gravity to "mid-range" beggars belief. The fact that Mr Goodall was motivated by prejudice should have been an aggravating factor.

[101] The Commissioner correctly found that "up to 100 employees" could have heard Mr Goodall's comments and that "at least two employees complained to Mt Arthur management about the inappropriate comments made over the two-way radio system during the shift."[53] However, the Commissioner then found that, because Mr Goodall did not direct "his comments concerning Muslims to any particular employee or group of employees at the Mine", the conduct was at a lower end of the scale seriousness. The fact that Mr Goodall "was not aware of any Muslims working at the Mine" was also relied upon by the Commissioner to mitigate the seriousness of the conduct. In my opinion, Mr Goodall's careless disregard for whether, out of the 100 people who might have heard his comments, might be Muslim and be

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[51] https://en.m.wikipedia.org/wiki/Teabagging

[52] http://www.humanrights.gov.au/publications/isma-listen-chatper-3

[53] [67](c)

offended by them, should have been an aggravating factor and rendered the conduct more than a mid-range breach.

[102] The findings of the Commissioner that other mitigating factors included that the comments were made in a brief period of time, at the end of a long shift when the effects of fatigue were likely to have had some influence, also, with respect, defy logic. The brevity of Mr Goodall's offensive comments was irrelevant. Further, there was no evidence before the Commissioner that fatigue explains Islamophobic and homophobic comments. The link that the Commissioner drew between fatigue and an explanation for the Islamophobic comments was not a logical conclusion.

[103] In addition to the mischaracterisation of Mr Goodall's comments, there was a failure on behalf of the Commissioner to consider all of the comments in their totality. Each of the examples of Mr Goodall's conduct were considered by the Commissioner in isolation. A fair reading of his decision does not disclose that the Commissioner considered the misconduct in its totality (or in aggregate). He was required to do so and he failed to do so. His failing in this regard was a further error on his behalf that should attract interest at the appellate level. If the Commissioner had properly exercised his discretion he would have assessed each of the comments made by Mr Goodall more seriously, found that the totality of the conduct constituted serious misconduct and not determined that the other factors mitigated against the same and rendered the termination harsh.

[104] The consequence of each of the Commissioner's failings was his decision to reinstate Mr Goodall. On any analysis this was a manifestly inadequate consequence for Mr Goodall's substantial and wilful breach of Mt Arthur's policies. As such the decision falls within that special category of a *House v King* error set out above. Quashing the decision at first instance would also make it consistent with the decision of the Full Bench of this Commission in *Harbour City Ferries Pty Ltd v Toms*[54] where the applicant in that matter also engaged in deliberate disobedience of policy and, on appeal, the application for an unfair dismissal remedy was dismissed.

[105] For these reasons I would allow the appeal and uphold appeal grounds 1(c), 1(d), 2(a), 2(b), 3(a), 4(a), 5(a), 6 and 9.

ORDER

[106] The order of the Full Bench, by majority, is that the appeal is dismissed.

VICE PRESIDENT

Appearances:

[54] [2014] FWCFB 6249

Y. Shariff of counsel with *S. Millen* solicitor for Mt Arthur Coal Pty Ltd.
A. Slevin of counsel with *J. Short* from the Construction, Forestry, Mining and Energy Union for *J. Goodall.*

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