



DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Farstad Shipping (Indian Pacific) Pty Ltd T/A Farstad

v

Mr Jurgen Rust
(C2017/4118)

Mr Jurgen Rust

v

Farstad Shipping (Indian Pacific) Pty Ltd T/A Farstad
(C2017/4121)

DEPUTY PRESIDENT GOSTENCNIK

DEPUTY PRESIDENT CLANCY

COMMISSIONER SAUNDERS

MELBOURNE, 10 OCTOBER 2017

Appeals against decision [2017] FWC 3426 of Commissioner Bissett at Melbourne on 5 July 2017 in matter number U2016/14464; in C2017/4118 permission to appeal granted; appellable error established (failing to take into account relevant considerations); appeal upheld; decision quashed; matter remitted to member to rehear; C2017/4121 appeal moot in light of outcome in C2017/4118; permission to appeal refused.

[1] Captain Jurgen Rust (Captain Rust), who is 62 years of age, was, until his dismissal on 15 November 2016 employed by Farstad Shipping (Indian Pacific) Pty Ltd (Farstad) as a Master Mariner, that is, a ship's captain. He was dismissed on serious misconduct grounds. In the capacity of Master, Captain Rust was responsible for the overall management and safe navigation of the vessel of which he was captain. At the time of his dismissal, Captain Rust had completed more than 15 years of service with Farstad.

[2] During September 2016, Captain Rust was rostered off duty (he was working a five week on, 10 week off roster). On or about 28 September 2016, Captain Rust was contacted by a senior human resources officer of Farstad and asked whether he was willing to assist on the vessel *Far Sirius* and sail as a supernumerary, for the purpose, as he understood, of mentoring a new Master. Captain Rust agreed to do so.

[3] Captain Rust flew to Karratha to commence his shift as a supernumerary on the *Far Sirius*. The next morning, before boarding a bus which was to transport him and other crew members to the vessel, Captain Rust, along with other crew members, was subjected to a random alcohol test. Captain Rust failed the test in that his blood alcohol concentration (BAC) level exceeded that set out by Farstad's policies and he was not permitted to board the

bus. Captain Rust was subsequently provided with a show cause letter and, following an investigation, his employment was terminated on the date and grounds set out above.

[4] Captain Rust lodged an application under s.394 of the *Fair Work Act 2009* (Act) in the Fair Work Commission (Commission) for an unfair dismissal remedy. The application was considered by Commissioner Bissett, who by decision issued on 5 July 2017¹ (Decision) determined that the dismissal of Captain Rust was harsh and thus unfair. As to any remedy consequent on the unfair dismissal, the Commissioner determined that an order for reinstatement was not appropriate and determined to issue further directions which would allow the parties to file material relevant to the question of the amount of compensation, if any, that should be ordered.

[5] By its amended Notice of Appeal Farstad appeals the Decision. Captain Rust has also lodged a Notice of Appeal and appeals that part of the Decision in which the Commissioner determined that an order for reinstatement was not appropriate. In both cases, permission to appeal is required and will not be given unless it is in the public interest to do so.²

The Decision

[6] After setting out some preliminary matters, the Commissioner commences her consideration of the application by outlining that which is described as “the 2014 incident”. That incident involved a letter of complaint received by Farstad from the crew of the vessel *Far Scimitar* of which Captain Rust was then Master. The letter of complaint contained an allegation that at a safety committee meeting held on 22 March 2014 during which there had been a discussion about manning levels appropriate for connect and disconnect anchor handling operations, Captain Rust had said that “he would rather see an IR injured or killed rather than bump the rig”. Captain Rust was interviewed about the allegation on 11 April 2014 and denied the allegation. Nearly two months later he was provided with a copy of the investigation report into the allegations in which it had been concluded that the allegation had been substantiated but that Captain Rust had not acted in breach of the safety obligations nor behaved in a manner unbecoming a Master.

[7] The Commissioner then sets out the following matters in relation to the 2014 incident:

“[14] On 13 June 2014 Captain Rust consulted his doctor and was diagnosed with depression. He was prescribed Pristiq, an anti-depressant medication.

[15] Following the investigation Captain Rust was directed, against his wishes, to re-join the *Far Scimitar* with the same crew on 30 July 2014. He did so and worked with Mr Ribergaard on a daily basis. Captain Rust says that this was difficult as Mr Ribergaard continued to be obstructive and intolerant of him.

[16] Captain Rust took the next swing off to deal with the “psychological consequences and stress experienced as a result of the suspension and the investigation.” He says that his treatment for depression continued until about November 2014 and in December 2014 he ceased taking medication for it.

¹ [2017] FWC 3426

² See s.400(1) of the Act

[17] Captain Rust returned to the *Far Scimitar* in December 2014 and completed his duty on 19 January 2015 in Geraldton. He says that it was then, whilst waiting for flights home at a local hotel that Mr Ribergaard verbally abused him and lunged at him. Captain Rust says that Mr Ribergaard had to be physically restrained by others.

[18] Captain Rust was subsequently asked for, and provided, a report on the conduct of Mr Ribergaard with respect to this incident.

[19] In October 2015, at the invitation of Captain Hall, the General Manager Operations, Captain Rust put in writing his concerns about the absence of an effective resolution of his suspension and the investigation and report in relation to the March 2014 incident. He did not receive any response to his correspondence.”³

[8] Next, the Commissioner outlined some background circumstances leading to the administration of the random alcohol test on 6 October 2016. The test administered at 6:15am registered a BAC of 0.047. The test administered some 15 minutes later registered a BAC of 0.044. The Commissioner then considered the investigation initiated by Farstad to determine whether Captain Rust had breached relevant and applicable Farstad policies.

[9] At [43] – [59], the Commissioner discusses and summarises the relevant and applicable Farstad policies, noting that Farstad’s *Drug and Alcohol Policy (Offshore)* outlines the acceptable levels for drugs and alcohol; that the acceptable alcohol level is 0.02mg/100ml; that joining crew will be tested on crew change day; that the policy allows for random testing; and that a person returning a positive result will be subject to disciplinary procedures which may include dismissal. At [49], the Commissioner observes that:

“[49] With respect to prescription and over the counter drugs, the Offshore policy requires that:

38. Employees using prescribed drugs should ask their doctor or chemist what affects a drug or medication may have, and if there is a risk of it causing impairment. A doctor’s letter regarding the effect of a drug must be obtained outlining any limitation on normal duties and presented to Farstad. Farstad will maintain confidentiality. However, the Master of the Vessel must be informed.

39. All prescribed drugs brought on board a Vessel are required to be declared to the Master before signing on. In the case of a Master, they will need to declare this to the Ship Manager or equivalent before joining.”

[10] At [51]-[52], the Commissioner discusses Farstad’s *Group - Fit for Work Policy* and observes:

“[51] The *Group - Fit for Work Policy* defines “[f]it for work” as meaning “a person is in a state to perform their assigned tasks competently and in a safe manner without impairment due to drug and/or alcohol use, physical injury or functional fitness.”

[52] The policy acknowledges that Farstad has a responsibility to “take reasonable steps to protect employees...in the workplace should they, or others, be under the

³ [2017] FWC 3426 at [14] – [19]

influence of drugs and/or alcohol.” It achieves this by a “[z]ero tolerance to non-prescribed drugs and alcohol in the work site, meaning the Company will not accept any content of alcohol or drugs in breath, urine or blood” and through “[a] process for disciplinary action for violation of this Policy”.”

[11] The Commissioner then summarises the salient terms of Farstad’s *Employee’s Code of Conduct (Offshore)* noting that:

[53] The Code of Conduct requires seafarers to remain “capable at all times of performing any duty” required of him/her. It states that “there is a zero blood alcohol level requirement which means not exceeding a blood alcohol concentration of 0.02 grams per 100 millilitres at all times.”

[54] The Code provides that a breach, depending on the seriousness, may result in a warning, a reprimand or dismissal.⁴

[12] At [55] – [59], the Commissioner discusses Farstad’s *APAC Drug and Alcohol Testing and Searching Procedures* noting that the procedure allows for random drug and alcohol testing; that it provides that a minimum of 50% of a crew compliment plus one will be tested per visit; that it allows for random testing on crew change days; and that it provides that the return of a non-negative result “is regarded as serious misconduct which will result in disciplinary action that may include dismissal.” The Commissioner also observes that:

“[55] The Preamble to the APAC Drug and Alcohol Testing and Searching Procedures states that:

Farstad Shipping APAC is committed to providing a safe and healthy work environment. As part of providing a safe and healthy work environment, Farstad aims to ensure that its employees and contractors (third party included) are fit for work, and that visitors to its worksites are safe and do not pose a threat to the safety of others.

Fit for work means a state of physical, mental and/or emotional health, which enables a person to perform their duties in a manner that does not carry a risk of endangering the health and safety of themselves or others... For the purpose of this Procedure, a person will not be fit for work where the prescribed drugs and alcohol limits referred to in this documents [sic] have been exceeded by that individual, unless otherwise described.

...

[59] The testing procedure requires that employees ensure prescription or over the counter drugs is taken safely and is required to:

- Ascertain from their medical practitioner or pharmacist possible side effects of the medication that may impact on the performance of work;

⁴ *ibid* at [53] – [54]

- Take the medication as directed by a medical practitioner or as advised by the manufacturer;
- Notify the vessel Master of any medication which is suspected could affect safety or performance;
- Report any side effects of the medication to the Master and prescribing medical practitioner where possible;
- Advise the master, HR Officer or Employee Health Manager of the specific medications as they may show a positive drug test result.”⁵

[13] The Commissioner next turned to consider the medical treatment that Captain Rust received for depression. The Commissioner noted that Captain Rust had been prescribed antidepressant medication and at [63] – [67], the Commissioner set out some of the medical evidence that had been given during the proceeding as follows:

“[63] Dr Chatfield gave evidence that:

- Captain Rust was prescribed Pristiq in June 2014. The prescription was repeated between June 2014 and December 2015;
- The patient notes indicate that Captain Rust advised his doctor in December 2015 that he was no longer taking Pristiq;
- The manufacturer’s notes for Pristiq advise doctors to advise their patients to avoid alcohol whilst taking Pristiq;
- In July 2016 Captain Rust saw Dr Ledbury who placed him on a three month trial of Fluoxetine, an anti-depressant;
- The manufacturer’s notes for Fluoxetine indicate that its possible side effects include insomnia and fatigue and that common side effects include sleep problems, restlessness and poor concentration and could affect judgement and coordination and that alcohol should be avoided;
- Excessive drinking could make side effects worse although she did not agree that there was multiplier effect.

[64] Dr James Wright is a Consultant Psychiatrist. He examined Captain Rust on 20 February 2017.

[65] Dr Wright agreed that the most common adverse reaction to the drug Pristiq include nausea, sometimes dizziness but not necessarily insomnia. He agreed that, as a general principle a person being treated with anti-depressants should be monitored and observed for any clinical worsening, suicidality and unusual changes in behaviour. He agreed that drinking could possibly cause a worsening of side effects of Pristiq.

[66] Dr Wright said he would be concerned if a patient on anti-depressants drank 10 full strength beers of an evening but more so because of the impairment it would have on the effectiveness of the treatment.

⁵ ibid at [55] and [59]

[67] Dr Wright says that Captain Rust had what appeared to be an adjustment disorder arising out of what Captain Rust considered to be unfair allegations in 2014. Whilst he had returned to work a “lingering bitterness” remained and a chance encounter with one of the parties to the 2014 incident caused a recurrence of his symptoms. This, he said, led Captain Rust to consume too much alcohol.”

[14] Next, the Commissioner observes that Farstad’s code of conduct and policies in relation to drugs and alcohol focus on prevention and safety in the workplace; that there was no dispute that Captain Rust was required to be fit for work when he commenced work; but that there was a dispute as to when Captain Rust actually commenced work.⁶ The Commissioner noted that Captain Rust was first tested for alcohol at 6.15am, before breakfast and at the hotel where the crew were accommodated; that the second test was at 6.30am; that the test was conducted on a crew changeover day; that given the time at which the transporting bus was expected to leave the hotel and travel approximately 27 kms to the location of the vessel, the time taken to pass through security, Captain Rust expected that he would finally have entered the supply base at around 7.45am to 8.00am on the day he was tested.⁷

[15] As to the dispute about when one commences work for the purposes of the requirement that an employee be fit for work, the Commissioner set out the competing evidence as follows:

“[76] Mr Homsey also gave evidence that the relevant workplace (for the purposes of drug and alcohol testing) is the supply base and the vessel but also includes crew change activities because this is “not a non-company activity”. An employee must be fit to undertake his duties and this occurs when he first engages with his crew.

[77] Mr Scott’s evidence is that an employee must be fit for work when they are “embarked to go to join the vessel”. Mr Scott explained that embarking was the stage where the individual board the crew-change bus that would take them to the supply base where they would then board the vessel.

[78] Mr Scott also gave evidence that, as a salaried employee, the day of joining the vessel is a work day, from that day an employee is accruing leave (which declines when they are not rostered on to work) and it is expected that an employee is fit for work at this point.”⁸

[16] The Commissioner next made some critical findings. First, as to the question whether Captain Rust was in breach of Farstad’s policies at the time that he was tested, the Commissioner made the following findings and observations:

“[80] Although some refinement might need to be made to Farstad’s testing procedures and the time at which testing is carried out, I am satisfied that Captain Rust was tested in accordance with the policies of Farstad. Those policies allow for testing on crew change days. The day Captain Rust was tested was a crew change day.

⁶ [2017] FWC 3426 at [68] – [71]

⁷ *ibid* at [72] – [74]

⁸ *ibid* at [76] – [78]

[81] At the time Captain Rust was tested (at both 6.15 am and 6.30 am) he had a blood alcohol concentration in excess of the limits prescribed by Farstad and clearly set out in its policies. To this extent he was, at that time, in breach of policy.

[82] The policies require that Captain Rust be fit to undertake his assigned duties. Certainly Captain Rust could not have done so at the time of testing and there is a real question as to whether he would have been fit at the time he boarded the crew change bus (30 minutes after a 0.044 reading), arrived at the supply base or boarded the vessel.

[83] Whilst I am satisfied that, at least at the time of boarding the crew change bus, Captain Rust had commenced duties and, at this time at least, was required to comply with the drug and alcohol policy, I am also satisfied that Farstad was operating within its policy to test Captain Rust (and others) when they presented for breakfast on the crew change day.

[84] That Captain Rust was present on crew as a supernumerary is irrelevant to whether he was on duty or not or required to comply with policies or not. He was part of the crew of the *Far Sirius*. He was a Captain, he had responsibilities. I accept that I cannot know what Captain Rust's BAC reading may have been at 7.00 am at the time of boarding the bus but this does not change that he was tested on crew change day and he failed to meet the policy requirements.

[85] Having found this I would observe (with no criticism) that it would appear the policies of Farstad require some clarity with respect to when duty does commence and the appropriate time for testing on crew change days (for example pre or post a meal) to ensure that testing occurs close to the commencement time as possible.

[86] This however does not help Captain Rust. His problems did not start because he was tested at 6.15am, they started the day and night before.”⁹

[17] Secondly, as to the 2014 incident, the Commissioner found that:

. . . it would appear that Farstad failed to properly close off the 2014 incident. It did not properly convey any final decision to Captain Rust in 2014 or in 2015 when it sought further information from him. This is a failing on behalf of Farstad. It is not reasonable that an employee have such a matter not closed off and, in this case, it has had consequences.¹⁰

[18] Thirdly, as to whether there was a valid reason for the dismissal, the Commissioner concluded that Captain Rust's conduct provided a valid reason for dismissal and in so doing, the Commissioner reasoned as follows:

“[94] Captain Rust provided BAC readings which were in excess of the levels prescribed by Farstad and conveyed to employees in the various policies of Farstad.

[95] I am satisfied that the conduct of Captain Rust must be considered in context. The context with respect to this conduct of Captain Rust is that he was feeling anxious and

⁹ *ibid* at [80] – [86]

¹⁰ *ibid* at [87]

stressed because of his encounter with Mr X. It is not clear, however, why Mr X generated these feeling (he was, after all, the person who apologised for the language at least of Mr Ribergaard in the 2014 incident) but no evidence was adduced on this matter. I therefore accept Captain Rust's evidence of the effect of the encounter. However, in having had this reaction there were a number of courses of action open to Captain Rust. He could have refrained from drinking, he could have contacted the relevant manager and advised he was not able to work due to ill health because of the anxiety or he could have advised the next day that he could not report for duty because he was unwell. He did none of these. Instead, on arrival in Karratha, he consumed another eight beers (taking his total for the day to 10) in circumstances where he knew he was required to report for work the next day, he was aware of the policy requirements of Farstad and knew he may be tested for drugs and alcohol.

[96] Captain Rust had a number of opportunities and plenty of time to decide what he would do. He was not in the circumstance where there was no time between seeing Mr X and attending for work.

[97] It must be decided whether, in these circumstances, Captain Rust's conduct in having breached the policies of Farstad, presents a valid reason for dismissal.

[98] The policies do not mandate dismissal for a breach and do allow for some lesser penalty and for education and rehabilitation. That the policies allow for such is a relevant consideration although do not, on their own, abrogate from the seriousness of Captain Rust's conduct.

[99] Captain Rust worked in a safety critical industry. He was about to embark on a sea-going vessel where he had duties to perform and could have been called on to perform all duties as Master if directed to. In such circumstances the gravity of his conduct cannot be ignored.”¹¹

[19] Fourthly, the Commissioner concluded at [102] of the Decision that Captain Rust was advised of the reason for the dismissal prior to the decision to dismiss him from employment was taken. Fifthly, at [106] – [107] of the Decision the Commissioner concluded that Captain Rust had been given an opportunity to respond to the reason for the dismissal prior to the decision to terminate his employment had been taken. Sixthly, at [108] of the Decision the Commissioner found that there was not an unreasonable denial of access to a support person by Captain Rust. Seventhly, the Commissioner concluded that the matter of any warnings about unsatisfactory performance was not relevant since the reason for the termination of Captain Rust's employment was not for unsatisfactory performance.¹²

[20] Eighthly, the Commissioner concluded at [110] of the Decision that Farstad is a large organisation with dedicated human resources staff and these matters did not adversely impact on the procedure followed in effecting the dismissal.

[21] The Commissioner then turned to consider whether there were any other matters that were relevant to take into account in deciding whether Captain Rust's dismissal was harsh, unjust or unreasonable. It appears clear from the Commissioner's reasoning at [111] – [117], that the Commissioner identified a number of matters to be relevant. First, amongst these was

¹¹ *ibid* at [94] – [99]

¹² *ibid* at [109]

Captain Rust's age which at the time of the Decision was 61 years. Secondly, that he was the sole income earner for his family. Thirdly, Captain Rust's record as a Master, in that, amongst other things, he demonstrated a methodical and exemplary approach to his job and to safety. Fourthly, that the 2014 incident had never been closed off by Farstad's management. Finally, that Captain Rust had been taking antidepressant medication for periods between June 2014 to December 2014, and for a three month period commencing July 2016, that he did not report his usage of antidepressant medication to Farstad, and that this was a breach of Farstad's *Offshore Drug and Alcohol Policy*.

[22] It is apparent also that the Commissioner took into account the circumstances leading to the heavy drinking the day before Captain Rust was to commence duty and the fact that it was not apparent that any other disciplinary outcome short of dismissal was considered by Farstad. The Commissioner then set out some of her reasoning as to how these matters are to be weighed as follows:

“[118] There is an unfortunate chain of events that ended when Captain Rust consumed too much alcohol on 5 October 2016. It started with the failure of Farstad to properly close off the 2014 incident resulting in stress and anxiety for Captain Rust. At the same time as not providing Captain Rust with a decision as to what actions it intended to take in response to the report of the 2014 incident it placed him back into the same workplace in which the incident had occurred with the same crew, including Mr Ribergaard with who he continued to have conflict.

[119] Farstad again failed to close the matter off when Captain Rust wrote to Captain Hall about the matter in 2015. It is not clear what the intention of Captain Hall was in requesting the correspondence from Captain Rust but it does seem to have built up his hopes that the matter would be closed out only to again find that it was not.

[120] The trail ends with a chance encounter between Captain Rust and Mr X in Perth, the resultant increase in anxiety in Captain Rust and his decision to consume alcohol that day.

[121] In addition to these matters I have taken into account that Captain Rust was tested the second time at least 30 minutes before he was required to present to board the crew change bus. Whilst I accept that Captain Rust was aware he could be tested that morning it is not clear to me why he was tested at a time when he was not presenting for work (he was going to have breakfast) which surely occurred when he presented to board the crew-change bus. If it is that an employee can be tested at any time on a crew change day this does create the absurd situation where a person could be tested many hours before presenting to board the bus at 7.00 am.

[122] It is not apparent that any other disciplinary outcome was considered for Captain Rust. Whilst I accepted above that Mr Scott considered Captain Rust's response prior to making the decision to dismiss him I am not convinced that he considered if rehabilitation (as is allowed under the *Offshore Drug and Alcohol Policy*) or any other penalty was a possibility. It appears that the consideration of penalty was binary – dismissal or not dismissal. In this respect the consideration was, in the circumstances, too narrow.

[123] I have also had regard to Captain Rust's record and the references provided for him.

[124] I have considered Captain Rust's apparent failure to advise Farstad of the medications he was taking. Whilst it is clear such medications should be reported, the limited evidence on this aspect of Farstad policies suggests it is observed more in the breach than otherwise. I accept the evidence of the doctors who appeared in the matter that the consumption of alcohol whilst on the medications is more likely to affect the effectiveness of the medication rather than have an adverse impact on Captain Rust's ability to do his job. Having said this it would appear that education on the effect of medications at work and the purpose of reporting is required. Ultimately, I draw no adverse inferences from this matter."¹³

[23] Ultimately, the Commissioner concludes that Captain Rust's dismissal was harsh¹⁴ and thus unfair.¹⁵ In so doing, the Commissioner said:

“[126] Whilst I am satisfied that Captain Rust did engage in the conduct alleged – that is, he breached the requirements of the drug and alcohol policy, I am satisfied, on balance, that the decision to dismiss him was, in the circumstances harsh.

[127] My finding that the decision to dismiss Captain Rust was harsh should not be seen as any vindication of Captain Rust's conduct. He is a very experienced Master. He has worked for Farstad for 16 years. Were it not for the failure of Farstad to close off the 2014 incident my findings may well have been different.

[128] Aside from some need to clarify when on crew change day testing may be done I have no criticism of Farstad or its policies or its commitment to ensuring compliance with those policies.”¹⁶

[24] Next, the Commissioner turned to consider the question of remedy. The Commissioner concluded that an order for reinstatement was not appropriate for the following reasons:

“[132] It is the case that a loss of trust and confidence must be objectively assessed. It is also the case that loss of trust and confidence is a common reprise amongst employers when an employee is found to have been unfairly dismissed by the Commission and reinstatement is sought.

[133] In this case I am satisfied that Farstad has grounds to claim that it has lost trust and confidence in Captain Rust.

[134] Captain Rust breached a series of Farstad's policy in relation to his blood alcohol concentration on 6 October 2016.

[135] It is apparent that Captain Rust has also, over time, failed to report to Farstad that he has been on medications reportable pursuant to Farstad's policies.

[136] Captain Rust held a senior position within Farstad. He is a Master and Captain of a sea-going vessel that can be away for weeks at a time. He is responsible for the

¹³ *ibid* at [118] – [124]

¹⁴ *ibid* at [126]

¹⁵ *ibid* at [129]

¹⁶ *ibid* at [126] – [128]

safety of the vessel and crew, pollution prevention and overall operation of the vessel. He works in a safety critical industry. In circumstances where Farstad must have confidence in its Masters I am satisfied, in these circumstances, that there are objective grounds on which Farstad has lost confidence in Captain Rust.”¹⁷

[25] The issue of an order for compensation as a remedy is yet to have been decided.

Permission to appeal

[26] An appeal under s.604 of the Act is an appeal by way of rehearing and the Commission’s powers on appeal are only exercisable if there is error on the part of the primary decision maker.¹⁸ There is no right to appeal and an appeal may only be made with the permission of the Commission.

[27] Section 400 of the Act applies to this appeal. 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.”

[28] In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 of the Act as “a stringent one”.¹⁹ The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.²⁰ In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission 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”²¹

[29] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence

¹⁷ *ibid* at [132] – [136]

¹⁸ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309 at [17] per Gleeson CJ, Gaudron and Hayne JJ

¹⁹ (2011) 192 FCR 78; 207 IR 177 at [43]

²⁰ *O’Sullivan v Farrer* (1989) 168 CLR 210 at 216-217 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; 207 IR 177 at [44] -[46]

²¹ [2010] FWAFB 5343; (2010) 197 IR 266 at [27]

of appealable error.²² However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.²³

[30] For the reasons that follow below, we are satisfied that Farstad has made out an arguable case of appellable error in relation to grounds 4 and 5 of its Notice of Appeal. Specifically, it is arguable that Captain Rust's failure to self-report his alcohol consumption before undertaking the alcohol breath test was not taken into account by the Commissioner. It is also arguable that in determining not to draw an adverse inference from the failure of Captain Rust to report to Farstad the taking of antidepressant medication was erroneous in that, having found that Captain Rust had breached Farstad's *Offshore Drug and Alcohol Policy*, that was a relevant matter which ought to have weighed against a conclusion that the dismissal was harsh.

[31] This is all the more arguable when it is apparent that this breach weighed against Captain Rust in the Commissioner's consideration of an order for reinstatement. In combination, these matters raise an arguable case that the Commissioner failed to take into account relevant considerations and thus an arguable case of the kind of error identified in *House v King*²⁴. In the result and having regard to the apparent significance of the 2014 incident in the weighing of relevant matters, it is arguable that there is an injustice sufficient to enliven the public interest. We therefore grant permission to Farstad to appeal.

[32] As will be apparent from that which follows, we have decided to uphold Farstad's appeal and to quash the Decision. For that reason, Captain Rust's appeal is moot and so it is not in the public interest to grant permission. Permission to appeal in that matter is refused.

Consideration of Farstad's appeal

Appeal grounds

[33] By its amended Notice of Appeal, Farstad identifies seven appeal grounds. We need only deal with two of the grounds identified (grounds 4 and 5), which are set out below:

4. The Commissioner erred in failing to take into account (or to give sufficient weight to) a relevant consideration, being the Applicant's decision:
 - (a) not to self-report under Farstad's applicable drug and alcohol policies; and/or
 - (b) to present as fit for work in circumstances where he knew (or should have known) that he was not fit for work within the meaning of Farstad's applicable drug and alcohol policies.

5. The Commissioner erred in failing to take into account (or to give sufficient weight to) a relevant consideration, being the Applicant's breaches of Farstad's

²² *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30]

²³ *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; (2001) 197 IR 266 at [26]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd T/A Mt Thorley Operations/Warkworth* [2010] FWAFB 10089; (2010) 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; 207 IR 177; *New South Wales Bar Association v McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663; (2014) 241 IR 177 at [28]

²⁴ (1936) 55 CLR 499

applicable drug and alcohol policies arising from his failure to report taking prescription medication between 2014 and 2016.

[34] We now turn to consider these grounds.

Ground 4

[35] In the context of considering whether there was a valid reason for the dismissal, the Commissioner considered some of the alternatives available to Captain Rust instead of reporting for duty and thus purporting to be fit for duty on 6 October 2016. At [95] of the Decision, the Commissioner makes the following observations:

“However, in having had this reaction there were a number of courses of action open to Captain Rust. He could have refrained from drinking, he could have contacted the relevant manager and advised he was not able to work due to ill health because of the anxiety or he could have advised the next day that he could not report for duty because he was unwell. He did none of these. Instead, on arrival in Karratha, he consumed another eight beers (taking his total for the day to 10) in circumstances where he knew he was required to report for work the next day, he was aware of the policy requirements of Farstad and knew he may be tested for drugs and alcohol.”

[36] We should observe at the outset that we do not agree with the Commissioner’s apparent acceptance that Captain Rust could have advised the “next day that he could not report for duty because he was unwell”. Captain Rust was not unwell on the day that he reported for duty. Indeed, Captain Rust’s evidence about how he was feeling on the morning of the test was as follows:

“You’d agree with me that when you woke up, you still felt a bit under the weather?---I woke up at 5 o’clock without hearing the alarm. I was in good shape that morning.

You were in good shape?---Yes.

Captain Rust, you blew at quarter past 6, when you were tested, you blew .047. That was an hour and 15 minutes after you woke up. Your body had an hour and 15 minutes to process an amount of alcohol and at 6.15 you blew .047. Your evidence is that at 5 am you were in good shape?---I was in good shape, yes.”²⁵

[37] In our view, it is not open on that evidence to suggest that Captain Rust could have not reported for duty because he was unwell. The available course for Captain Rust to have followed was to advise relevant Farstad management before reporting for duty that he had consumed 10 beers the day before and that he may not be fit for duty as required by Farstad’s policies. This he did not do. This is that which is described as self-reporting. During his oral evidence Captain Rust agreed that he could have self-reported but that he chose not to do so.²⁶

[38] This was a relevant consideration to be weighed in the balance in assessing whether the dismissal of Captain Rust was unfair, particularly in circumstances where Captain Rust was employed in a senior position and was responsible for ensuring Farstad’s policies, values

²⁵ AB 40, PN 178 – PN 180

²⁶ AB 40; PN 182 – PN 184

and procedures were promoted and implemented on any vessel of which he was the Master.²⁷ On the face of the Decision this matter does not appear to us to have been taken into account. That a relevant consideration is not taken into account is an appellable error. In a case where, as appears clear from [127] of the Decision, the result is finely balanced, that error becomes significant. We reject Captain Rust's submission that the contention that the Commissioner did not take into account Captain Rust's decision not to self-report cannot be maintained in light of [95] of the Decision. The matters to which reference is made therein and which are reproduced above do not speak to Captain Rust's consumption of alcohol as the reason that he was not fit for duty. They speak to matters which, on the evidence, would not have been a truthful explanation of the reason that Captain Rust was not fit for duty. That reason was the consumption of a large quantity of alcohol the day before he was required to report for duty. We are persuaded that appellable error, as we have described, has been made in the instant case. It follows that we are persuaded that ground 4 of the amended Notice of Appeal is made out.

Ground 5

[39] At [117] of the Decision, the Commissioner observed that Captain Rust had been on antidepressant medication from June 2014 and that he stopped taking this medication in December 2014. The Commissioner noted that in July 2016 following a mental health review, Captain Rust was placed on a three month trial of Fluoxetine. The Commissioner found that Captain Rust did not report to Farstad that he was taking these medications and that this failure was a breach of Farstad's *Offshore Drug and Alcohol Policy*.

[40] Earlier at [81] and [83], the Commissioner had concluded that at the time that Captain Rust was due to board the bus arranged as transportation, he was required to comply with the *Offshore Drug and Alcohol Policy* and that at the time that he was tested (at both 6:15am and 6:30am) Captain Rust's BAC was in excess of the limits prescribed and clearly set out in Farstad's policies. The Commissioner concluded to that extent at that time, Captain Rust was in breach of policy. Again at [126], the Commissioner expressed the view that she was satisfied that Captain Rust had breached the requirements of the policy.

[41] It is thus apparent that Captain Rust was dismissed because he had breached Farstad's *Offshore Drug and Alcohol Policy* on 6 October 2016 and the Commissioner so found. However, having also found, in effect, that between June 2014 and December 2014 and again from July 2016 and for a period of three months thereafter, Captain Rust did not report to Farstad his use of antidepressant medication and that this was a breach of Farstad's policy, the Commissioner decides, in respect of the question whether the dismissal was harsh, unjust or unreasonable, to draw no adverse inference. In other words, the prior breach of policy was a neutral consideration.

[42] We consider that in so doing the Commissioner erred in failing to take into account, that is, to consider and give appropriate weight, to Captain Rust's earlier breach of policy in not reporting to Farstad his use of antidepressant medication. It was plainly a relevant consideration. It was conduct which was of a similar kind to that which founded the reason for the dismissal, namely a breach of Farstad's *Offshore Drug and Alcohol Policy*. Given the periods described above, it was likely that it was a course of continuing conduct. Viewed in

²⁷ AB 625

this way there were two separate periods of that continuing course of conduct. The third occasion of policy breach occurred on 6 October 2016.

[43] That the earlier breaches were a relevant consideration to weigh against Captain Rust was in our view, correctly identified by the Commissioner in her consideration of whether an order for reinstatement was appropriate. It seems to us apparent at [135] that the earlier breaches of Farstad’s policies weighed against Captain Rust. Moreover, the Commissioner quite properly explains why this is so at [136] where the Commissioner noted the following:

“Captain Rust held a senior position within Farstad. He is a Master and Captain of a sea-going vessel that can be away for weeks at a time. He is responsible for the safety of the vessel and crew, pollution prevention and overall operation of the vessel. He works in a safety critical industry.”

[44] We consider that this observation applies with equal force to the consideration and assessment, in weighing whether a dismissal was harsh, unjust or unreasonable, of the fact that Captain Rust had on prior occasions failed to report his use of medication in breach of the very same policy that he breached on 6 October 2016 and which resulted in his dismissal.

[45] If the prior policy breaches are factors relevant to assessing whether there is a loss of trust and confidence, as the Commissioner apparently and we think properly, thought correct, and thus militating against the re-establishment of the employment relationship, we fail to see how those prior policy breaches can be a neutral consideration in determining whether the ending of the relationship in the first place was harsh, unjust or unreasonable. This is so regardless of the medical evidence as to the effect of the antidepressant drugs and the evident view of the Commissioner, that the reporting aspects of the policy are “observed more in the breach than otherwise.”

[46] Moreover, it seems to us that the earlier breach was a matter relevant to assessing whether there was a valid reason for the dismissal. We consider, having regard to Captain Rust’s seniority and responsibilities as Master, the prior policy breaches were themselves capable of constituting a valid reason for dismissal. The Commissioner did not give consideration to this issue in the Decision. Having concluded that the prior failure to disclose antidepressant drug use was a breach of the relevant policy, the Commissioner should have considered the significance of that finding on the assessment required by s.387(a). It is not to the point that the evidence led by Farstad at first instance did not rely on the earlier breach as a reason for the dismissal as suggested by Captain Rust in his submissions to us. The relevant question that arises when considering s.387(a) is whether “there was a valid reason for the dismissal related to a person’s capacity or conduct . . .”. The question will not be answered only by asking whether the reason relied upon by the employer was a valid reason.

[47] For these reasons, we consider that ground 5 of the amended Notice of Appeal has been made out.

Conclusion

[48] It follows from the above that there has been an error in the exercise of the Commissioner’s discretion by reason of the matters we have identified. In these circumstances and having regard to the significance of the errors in the exercise of the Commissioner’s

discretion,²⁸ it would be unsafe to allow the Decision to stand and the appropriate course is to uphold the appeal, quash the Decision and to remit the matter to another member of the Commission for rehearing.

Disposition

[49] For the foregoing reasons we have decided to:

- a) Refuse permission to appeal in C2017/4121;
- b) Grant permission to appeal in C2017/4118;
- c) Uphold the appeal in C2017/4118;
- d) Quash the decision in [2017] FWC 3426; and
- e) Remit the matter for a rehearing to Deputy President Clancy.



DEPUTY PRESIDENT

Appearances:

Mr A Pollock, Counsel for Farstad.

Ms L Doust, Counsel for Captain Rust.

Hearing details:

2017.

September 4.

Melbourne via VC to Brisbane.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR596021>

²⁸ *Minister for Aboriginal Affairs v Peko-Wallsend and Others* (1985-86) 162 CLR 24 per Mason J at 40, where his Honour held that: "Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision."