



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Richard Hyde

v

Serco Australia Pty Limited
(U2017/10615)

COMMISSIONER WILLIAMS

PERTH, 8 MAY 2018

Termination of employment.

[1] This decision concerns an application made by Mr Richard Hyde (the Applicant or Mr Hyde) under section 394 of the *Fair Work Act 2009* for an unfair dismissal remedy. The Respondent is Serco Australia Pty Limited (the Respondent or Serco).

Background

[2] In June 2017 Serco requested Mr Hyde show cause why his employment should not be terminated on medical grounds.

[3] Having received and considered his response by letter on 11 September 2017 Serco advised Mr Hyde that it had determined he could not then nor for an indefinite period fulfil the inherent requirements of a Custodial Officer at Acacia Prison and so his employment was terminated with pay in lieu of notice.

[4] The letter of termination referred to the report of his treating specialist Dr Vara Mukundala (Dr Mukundala) as follows,

“Dr Mukundala concludes that you cannot fulfil the inherent requirements of the job as a Prison Officer, stating “The right ankle joint had fused both clinically and radiologically. However, one should note that the movements of this joint level are completely abolished. Thereby, I would conclude that he would never be fit to perform his pre-injury duties at 100% level.” Dr Mukundala then adds, “In a case of emergency, he would definitely need aide from his colleagues as he would be unable to sprint/run on this fused ankle joint.”...”

Evidence and factual findings

[5] At the hearing evidence for the Applicant was given by Mr Hyde and Dr Craig White (Dr White) who is a Consultant Occupational Physician.

[6] Statements were also admitted into evidence from Mr Graham Carlson (Mr Carlson) who is employed by Serco as the Principal Officer at Casuarina Prison and Mr Paul Parsons (Mr Parsons) who is employed by Serco as a Prison Officer at the Eastern Goldfields Prison. Neither witness was cross examined.

[7] Evidence for the Respondent was given by Mr William Newell (Mr Newell) who is employed by Serco as the Health, Safety and Well-being Manager at Acacia Prison and Mr Ian Southerton (Mr Southerton) who is the People and Culture Manager – Assistant Director Human Resources for Serco.

[8] The evidence is that Mr Hyde commenced employment with Serco in about September 2009 as a Custodial Officer. From 2013 he at times also delivered training programs that covered various aspects of the Custodial Officer position.

[9] One of those programs was the Defensive Equipment Tactical Training (DETT). The DETT course includes training in the use of physical restraints and various other force options and techniques for dealing with prisoners as well as riot training, breathing apparatus training, fire-fighting techniques and prisoner escort methods.

[10] The DETT is a specific testing and training course that Serco requires every Custodial Officer to complete each year.

[11] In May 2015 Mr Hyde suffered an injury to his left knee during the delivery of a DETT course for new recruits.

[12] During the training a trainee tackled him from the side and the medial ligament of his left knee was ruptured. The tackle caused the medial ligament of his knee to be torn from the bone.

[13] Mr Hyde returned to work within approximately two weeks of the injury and resumed the full duties of his role within about three months of the injury.

[14] At the time he injured his left knee he had diagnosed osteoarthritis in his right ankle. After he injured his left knee, he experienced increased pain and stiffness in his right ankle.

[15] His right ankle condition continued to worsen and he consulted an Orthopaedic Surgeon, Dr Mukundala in March 2016.

[16] In May 2016, Mr Hyde approached Ms Alex Argiropulos (Ms Argiropulos), Serco's Return to Work Coordinator, to discuss his ankle fusion operation he was to undergo in June 2016.

[17] Mr Hyde made a request for restricted duties in the "movements" unit. The movements unit is an area where Officers direct prisoner movements within the prison via video. Whilst an Officer is working in movements, they do not have prisoner contact and perform mostly administrative duties. Custodial Officers are rotated into the movements unit as part of their overall duties.

[18] Serco temporarily placed Mr Hyde into the movements unit on an exclusive basis as a result of his non-work related condition; however, there is no capacity within the prison for a Custodial Officer to permanently work in the movements unit.

[19] After receiving advice from Dr Mukundala he had surgery to fuse his right ankle in June 2016.

[20] For many months leading up to his consultation with Dr Mukundala and the surgery, Mr Hyde says he continued to perform his role as Custodial Officer with his injured ankle and he was able to respond to code red situations during 2016 even though his ankle was stiff and painful.

[21] He returned to work on 17 August 2016 and was assigned to work restricted duties in the movements unit. He performed many of the usual duties as Custodial Officer, but performed a greater proportion of administrative duties and did not have any prisoner contact nor perform any training.

[22] As part of Serco's return to work program, Ms Argiropulos advised Mr Hyde that Serco required additional information from Mr Hyde's treating physician in respect of his medical condition and fitness for work.

[23] On 18 November 2016 Ms Argiropulos wrote to Dr Mukundala by email with Mr Hyde's consent seeking further information in relation to Mr Hyde's fitness for work. That email, which was copied to Mr Hyde, asked Dr Mukundala to examine Mr Hyde's ankle and to comment on four particular questions which concerned his suitability for performing his pre-injury duties, specifically defensive movements.

[24] Mr Hyde had his last post-surgery follow-up appointment with Dr Mukundala on 23 November 2016 and he asked Dr Mukundala if he would provide a medical certificate so that he could resume all of the duties of my role.

[25] On 24 November 2016 Serco received a medical certificate dated the same day issued by Dr Mukundala which simply stated,

"I certify that Richard Hyde is fit for work (full duties) from 24/11/2016."

[26] Ms Argiropulos met with Mr Hyde the same day and discussed whether Dr Mukundala had been provided with the questions Serco had asked to be answered regarding his fitness to perform the inherent requirements of his position as a Prison Officer. There was some discussion about Dr Mukundala requesting to be paid for a report on the questions being asked by Serco. By email the next day Mr Hyde was advised that Serco would follow this up with Dr Mukundala and they will get back to Mr Hyde in January 2017 after he had returned from a months' annual leave.¹

[27] Serco were concerned that Dr Mukundala had not answered the specific questions they had asked. Mr Hyde acknowledges that it may be the case that Dr Mukundala did not have the benefit of Ms Argiropulos email when he wrote the 24 November 2016 medical certificate.²

[28] In early February 2017, Serco issued a defence and control training "Physical Readiness Form" in advance of the annual defence and control or DETT refresher training.

The purpose of the Physical Readiness Form is to understand an individual's physical readiness to complete the mandatory refresher training.

[29] Mr Hyde completed the form on 3 February 2017.

[30] Part A and B of the form asks 11 questions regarding whether the Officer can do various tasks concerning walking, jogging, working in confined spaces, crouching and kneeling, lifting, dragging, running, climbing ladders and using a respirator. Mr Hyde answered yes to all questions except question 9 which asked whether he could run for 1 km, to which he answered "No".

[31] Separately in Part C of the form Mr Hyde had answered "Yes" to question 9 which asked whether he had "Arthritis/gout/stiff joints/joint injuries" and to questions 12, 13 and 14 which asked whether he had injuries to "shoulders/elbows/wrist or hand" or to "hip/knee/ankle or foot" or had "fractures or broken bones".

[32] He answered "No" to question 17 which asked whether he had a condition, disability or impairment that Serco should be aware of that may affect his ability to safely perform the assigned training.

[33] He answered "Yes" to question 18 which asked whether he believed he was physically fit to undertake all the assigned training duties.

[34] In Part D of the form Mr Hyde answered "Yes" to the question of whether he was on restricted work arrangements but did not answer the balance of the question which asked what those restrictions were.

[35] Mr Southerton's evidence was that because the defence and control refresher training must be completed as part of Mr Hyde's position, Serco elected to request a full medical report from Mr Hyde's treating practitioner to understand his ability to complete the defence and control training and perform the duties required as part of his position.

[36] In February 2017 Mr Hyde approached his treating General Practitioner Dr Afilaka and asked that he provide an assessment and certify if he was fit to resume the full duties of my role.

[37] Dr Afilaka had been his treating doctor for approximately seven years

[38] Mr Newell on about 3 February 2017 gave Mr Hyde a bundle of documents which Mr Hyde was to provide to Mr Afilaka for the purpose of his assessment.

[39] The bundle of documents were,

- A Position Description for Case Management Officer;
- A Position Description that relates to "Defence and Control" strategies that are part of his role;
- A Position Description that relates to training for Defence and Control;

- Three “Summary of Job Demands” documents that collectively set out the full range and frequency of duties that are required as part of his role.

[40] Mr Hyde consulted Dr Afilaka on 4 February 2017 and Mr Hyde provided the doctor with all the documents given to him by Mr Newell.

[41] Dr Afilaka provided a medical certificate dated 15 February 2017 which was provided to Ms Argiropulos on about 16 February 2017.

[42] That certificate³ states,

“Mr Richard Hyde has been examined by me.

He WILL BE FIT TO CONTINUE his USUAL OCCUPATION as detailed in his position description - as case management officer, he will be able to go through the defence and control training and defence and control - in field.”

[43] Sometime after this Mr Hyde attended a meeting with Mr Marc Lahad (Mr Lahad), Mr Newell, Ms Argiropulos and his Unit Manager, Ms Natasha O’Donnell during which he was advised that Serco were not willing to allow him to resume his full duties. Serco advised him they wanted to obtain an independent medical opinion.

[44] Mr Hyde’s evidence was that sometime later he was advised by Mr Lahad that Serco would be content with a report from his treating Orthopaedic Surgeon Dr Mukundala and so at the direction of Mr Lahad, he sent a fax to Dr Mukundala’s surgery to provide them with Mr Hyde authority to discuss his condition with Serco.

[45] Mr Hyde’s evidence was that other than this he had not met or communicated with Dr Mukundala following the last appointment he had with him on 23 November 2017.

[46] Mr Lahad sent an email to Dr Mukundala on 13 March 2017 which contained Serco’s request for a medical opinion regarding Mr Hyde’s fitness for work.⁴

“Subject: Request for Information - Richard Hyde Fitness to Complete Training and Role [SIC]

Classification: SERCO IN CONFIDENCE

Attention: Dr Mukundala

Re: Mr Richard Hyde, non-work related ankle injury.

Thank you for taking the time to review Richard for his non work related ankle injury. As you are aware Richard has been completing suitable duties at Acacia prison since 17/08/16.

Mr Hyde remains in a movements area of the prison which is a non-prisoner facing task, administrative based only. Since Richard has been back at work his range of movement in the ankle has increased, he does not experience pain but remains in

movements as he cannot have prison contact as he is unable to run nor respond with defensive movements if need be.

Defensive movements are minimal in the day to day tasks of an officers role but imperative to the role and all officers are required to be fit to undertake the inherent moves at any time. The remainder of an officers role is to case manage prisoners, admin and checking/searching type tasks. I have attached Richard's job description for your information which includes the physical requirements.

Serco is willing pay for the invoice and cost of the report that is written on Richard's behalf. Can you please forward me the invoice pertaining to the assessment below.

Could you please examine Richard's ankle along with the attached document and comment on the following:

- 1. Richard's suitability to perform his pre-injury duties specifically defensive movements & ability to have prisoner contact;*
 - a. If Mr Hyde is not currently fit to perform his pre-injury duties please indicate approximate timeframes for full recovery.*
- 2. Any side effects from treatment/medication that may impact his ability to perform his duties.*
- 3. Any current work restrictions Serco need to be aware of to safely accommodate Richard's ankle injury.*
- 4. Any other information Serco should be aware of regarding Richard's ankle.*
- 5. What is your opinion on Mr Hyde's ability to perform the DETT component of his role? Is he fit to undertake this training?*

If you could please provide your response in the form of a letter for Mr Hyde that would be greatly appreciated so I can assist in facilitating Richard with the correct duties."

[47] Dr Mukundala provided a medical report in response to Mr Lahad's request on 1 May 2017. Relevantly the report reads as follows,

"Post-operatively, he was initially put on a backslab and then went on to a fibreglass cast which stayed on for nearly five weeks or so. We then changed his cast to a CAM walker. Richard had followed all of the instructions diligently and had no problems post-operatively. On 18 November 2016, a CT scan had been performed on his right ankle to confirm the fusion and bony consolidation of the tibia talar joint.

On 23 November 2016, he had his last appointment with myself at Joondalup Health Campus. It was nearly six months since I operated on his right ankle. Clinically, the ankle joint was solidly fused. He did not have any pain in the joint both at rest and on weight bearing. He was walking comfortably doing most of his jobs. He only complained of mild discomfort just below the fusion level which corresponds to the

level of sub talar joint. We had mentioned that he had already got mild arthritis in this joint. As the pain levels are very minimal, I would not advise him to have any injection therapy. I had then referred him to hydrotherapy by a physiotherapy in order to improve his gait and range of movement of other joints other than the tibia talar joint.

I understand that Richard is currently performing his full duties at Acacia Prison. However, he is confined to non-prison facing tasks and administrative duties only. I have also noted that the range of movement of his right lower limb has improved. This is because he has got extra range of movement in other joints other than the ankle joint that has been completely fused. Richard has got a non-antalgic gait but he would find that whenever there is any need for running or sprinting, he would find it very difficult as the ankle joint is completely fused. I have also been informed that his defensive movements are very minimal in the day to day tasks as an officer.

Coming back to your specific questions:

1. **Richard's suitability to perform his pre-injury duties specifically defensive movements and ability to have prisoner contact:**
 - a. **If Mr Hyde is not currently fit to perform his pre-injury duties please indicate approximate timeframes for full recovery.**

Considering the whole picture on 23 November 2016, I am pretty confident that he has fully recovered from the major surgery he underwent. The right ankle joint had fused both clinically and radiologically. However, one should note that the movements of this joint level are completely abolished. Thereby, Richard would depend more on the flexibility of the other joints other than the ankle joint that has been fused. Thereby, I would conclude that he would never be fit to perform his pre-injury duties at 100% level. However, he would fit into taking part in defensive movements and get in touch with the prisoners as well. In a case of emergency, he would definitely need aide from his colleagues as he would be unable to sprint/run on this fused ankle joint. One has to remember that the gait on this fused ankle joint is not a normal gait. This surgery has been performed to relieve pain. The downside of his surgery is a loss of movement at the ankle joint level. Thereby,

I suggest that we need to compromise his pre-injury duties and I would highly recommend him to have a supernumerary around and respond to any emergency or defensive movements whenever they are needed.

2. **Any side effects from treatment/medication that may impact his ability to perform his duties?**

Currently, I note that he is not on any kind of medication for his pain. Thereby, I am pretty confident that he should be able to perform his duties without any side effects.

3. **Any current work restrictions Serco need to be aware of to safely accommodate Richard's ankle injury?**

As mentioned earlier, Richard would need help from his colleagues in the case of any emergency situation where sprinting/running and defensive movements are involved.

Besides this, I would also keep in mind the mild osteoarthritic changes in the sub talar joint which would progress in time to come.

4. Any other information Serco should be aware of regarding Richard's ankle?

As mentioned before, Richard is also suffering from mild osteoarthritis of the sub talar joint. This could progress in future as the proximal/tibia talar joint has already been fused and there would be more stress at this sub talar joint level which would lead to progression of osteoarthritis in the future. This would also entail him to have surgery done.

5. What is your opinion on Mr Hyde's ability to perform the DETT component of his role? Is he fit to undertake this training?

I would like to apologise that I am not fully aware of this DETT component. My guess would be that you are relating his role with emergency situations and to undertake training. I am quite happy for, Richard to take part in DETT training provided he is able to withstand this training in terms of pain tolerance.” (Underlining added)

[48] The parts of the medical report of Dr Mukundala (the Report) which concerned Serco are underlined above and in summary were that,

- The movements of this joint had been completely abolished.
- Mr Hyde would never be fit to perform his pre-injury duties at 100% level.
- In a case of emergency Mr Hyde would definitely need aide from his colleagues as he would be unable to sprint/run on his fused ankle joint.
- The suggested need to compromise his pre-injury duties and the recommendation for Mr Hyde to have a supernumerary around and respond to any emergency or defensive movements whenever they are needed.

[49] The evidence of Mr Southerton was that the findings in the Report were concerning to Serco as the position required Mr Hyde, as a Custodial Officer, to respond to highly volatile situations within the prison in a safe and effective manner. The position required each Custodial Officer to apply what they are taught in the DETT at any time and as required. The conclusions in the Report that Mr Hyde would need a supernumerary in an emergency situation would, in his view, be untenable on a day to day basis and could make a volatile situation even worse.

[50] It is not disputed that at the time of Dr Mukundala writing the Report he had not seen Mr Hyde since 23 November 2016.

The requirements of Mr Hyde's pre- injury position

[51] The requirements of the position Mr Hyde held before he injured his ankle are detailed in a number of Serco documents⁵ which are,

A Position Description for Case Management Officer:

This position description details various duties which involve supervision of prisoners. Relevantly under environmental factors this includes,

“The environment is primarily calm and ordered however they may without warning have to respond to a volatile situation providing defence and control or deal with medical emergencies; this is variable and unpredictable.”

“Overall Physical Demand Level: Medium – Heavy (heavy demands are minimal such as defence and control however are essential to being able to perform the role)”

A Position Description for Defence and Control – In Field:

This position description relevantly includes,

“Defence and Control strategies may be used by Custodial Officers in the execution of their duties where a prisoner becomes aggressive or encroaches on a Custodial Officers space...if the situation continues to escalate where customer dual offices use necessary force to restrict movement of the prisoner. Where there is continued escalation the Custodial Officer is required to resolve the situation, bringing the prisoners prisoner to a secure position where handcuff can be applied as required.

Situations may escalate quickly and Custodial Officers may be required to respond quickly to an incident with sharp sudden movements.

...

During off site visits only 1 to 2 officers may be available to undertake defence and control strategies as needed.”

“This may also be required during off site travel or visits where the Custodial Officer may need to respond in a public or unfamiliar area and ensure safety of all parties.”

A Position Description for Defence and Control Training:

This position description relevantly includes,

“During training movements and actions are within a controlled environment with gradually increasing use of force if officers become more competent.

The premise of training is to ensure a Custodial Officers ability to intercept, stabilise and control a situation which may arise with the prisoner.

Initial training is conducted over three days with a combination of theory and practical sessions each day. The training is 80% practical with Custodial Officers practising on each other. Custodial Officers also attend refresher training for two days annually.”

“Involves repetition and frequency of dynamic body movements against force over a two to (sic) day period.”

A document titled Summary of Job Demands, one for Case Management Officer, one for Defence and Control – in Field and one for Defence and Control Training.

These detail the range of job demands and the frequency each is required.

For each job demand the document specifies the average time across a full day a worker spends on this task as either, Occasional = 0 – 33%, Frequent = 34 – 66% or Constant = 67 – 100%. These frequencies, where applicable, follow the detail of the particular job demand below.

Relevantly these job demands include,

Case Management Officer:

“Defence and control – when undertaking manoeuvres; transfer of weight from one to two legs; lunging forward when restraining” Occasional = 0 – 33%

“Defence and control – May be required to escort prisoners with a degree of force. May be in wet weather conditions where ground can become muddy and slippery, running 50 m in short bursts. Can be rough trip hazards.” Occasional = 0 – 33%.

“Potential for exposure to confrontational situations e.g. hostile or aggressive prisoners”

Defence and Control – In Field:

“When approaching prisoner or escorting prisoner in restraint position when outdoors in compounds. May be in any weather conditions whilst applying force. May be required to run for a short period.” Frequent = 34 – 66 %.

Defence and Control Training:

“When undertaking manoeuvres; transfer of weight from one leg to 2 legs; lunging forward when restraining.” Constant = 67 – 100%.

“While completing training tasks, may complete short runs or walk within the facility” Occasional = 0 – 33%

[52] Whilst there was some debate amongst witnesses about how often some of these particular job demands arise there is no dispute that the documentation from Serco details the inherent requirements of Mr Hyde’s pre-injury position.

[53] Mr Hyde himself gave some evidence about these matters.⁶

[54] His evidence was that the general prison environment allows prisoners to move over large areas unrestricted and the prisoners may tend to act on impulse in an unpredictable way and they will take advantage of any opportunity that they can make use of. He agreed that he may find himself in this environment either on his own or with someone else and he may need

to apply the control and defence techniques and so may be exposed to danger. His opinion was that recognising this he believed he could do the job and his ankle would be fine.

[55] He agrees that the control and defence techniques are very much about maintaining balance and stability and his ankle is fundamental to balance and stability. He agrees that when he braces himself for balance and stability being able to flex his ankle is quite important for that.

[56] He agreed that the techniques that he is trained in are all about control, sudden lunges and sudden acceleration to achieve a particular aim with a prisoner. And he agreed that to get that propulsion to achieve the sudden forward lunge would involve some flexibility around the ankle.

[57] Mr Hyde also agreed that a part of the control and defence techniques is the controlled bringing down of a prisoner to the ground. He agreed that if he was trying to bring a prisoner down to the ground he may be taking the prisoners weight onto himself and that this weight would also be felt on the ankle and he agreed that being able to flex the ankle would be a large part of the taking down of the prisoner.

[58] It was put to Mr Hyde that if he found himself on the ground getting up from the ground in a dangerous situation with his fused ankle would have its own problems and his answer was that he did not have an issue with it and he has quite a lot of movability in his ankle. He agreed however that his treating Orthopaedic Surgeon has a different view.

[59] Mr Hyde agreed⁷ if he was reinstated to his pre-injury position he will invariably need to at times apply the control and defence techniques and he understands Serco is concerned about the risks to him in that situation but he feels he can do the job and that anybody who works there whether or not they've had an ankle fusion are subjected to the same risks.

[60] He agrees that in the work environment Prison Officers very much rely on other employees and to a point it is almost be life-and-death that people you work with do their jobs properly.

[61] With respect to running as a requirement of the position, the documentation above which details the inherent requirements does expressly include being able to run 50 m in short bursts and to run for short periods.⁸

[62] Evidence was given by a number of witnesses regarding what is required in an emergency situation which is known as a "code red".

[63] Mr Carlson's evidence was that the most common types of code red situations were associated with either staff or prisoner assaults or medical emergencies. In such circumstances the areas closest to where the alarms have been raised would dispatch staff immediately on foot. His evidence is there is no expectation that Officers would run in response to a code red. Similar evidence was given by Mr Parsons that Officers are not required to run in response to a code red but should move with haste.

[64] Mr Hyde's evidence was that it is not Serco's policy that Officers run at any specific pace in response to an emergency and it is emphasised that Officers should be mindful of hazards and move at a comfortable pace. In Mr Hyde's evidence he included an excerpt from

Serco's Occupational Health & Safety policy manual printed on 3 June 2007.⁹ Whilst I note this includes various statements about being cautious in responding to a code red it also says,

"Often when responding to a code red, officers will respond quickly to a situation which often involves running to another location.

...

Whilst running, the chances of losing your footing are increased." (Underlining added)

[65] Mr Hyde also referred to an email from 2009 which refers to an Officer sustaining fractures to his wrist having slipped whilst running in response to a code red.

[66] Considering all this evidence I find that that while Officers are not required by Serco to run, at times Officers do in fact run when responding to a code red emergency situation.

[67] The evidence is also that an Officer responding to a code red, when they arrive at the location, is expected to immediately be able as necessary to implement DETT in a safe and effective manner.¹⁰

[68] Mr Hyde's evidence was that his condition and fitness had improved significantly between 23 November 2016 and 1 May 2017. His evidence was that at November 2016 he was only able to run for short distances of less than 1 km but by April 2017 he was able to tolerate running for longer distances of approximately 1 km at a time and that his ability to run longer distances has continued to improve.¹¹

[69] On 3 June 2017, Serco issued Mr Hyde with a letter seeking further information from him regarding his fitness for work and capacity to undertake the inherent requirements of his role (the Show Cause Letter). The Show Cause Letter referred to the 1 May 2017 Report from Dr Mukundala and stated,

"Serco's view is that the report concludes that you cannot now perform the inherent requirements of your job. Any modifications that Serco needs to consider as a result of the report cannot be reasonably accommodated. Further, accommodations Serco could reasonably make would still leave you performing restricted duties, not your full range of duties.

Therefore, it is Serco's view that you are incapable of performing the inherent requirements of your job or any modifications thereof.

Consequently, you are now required to show cause by responding either in writing or in an interview with Serco, as to why your employment should not be terminated due to incapacity."

[70] The letter invited Mr Hyde to provide any comments in response in writing within 10 days.

[71] Mr Hyde was placed on a period of paid leave by Serco.¹²

[72] On behalf of Mr Hyde his union approached Serco and requested that the timeframe for his response to the Show Cause Letter be extended. Mr Hyde during this period had the assistance of his union in formulating his response to the Show Cause Letter.

[73] On 20 June 2017 Ms van der Merwe from Mr Hyde's union wrote to Serco on Mr Hyde's behalf and raised the issue of Mr Hyde getting a second medical opinion.

[74] Serco was agreeable to this happening and allowed more time for this to occur.

[75] However Mr Hyde, assisted by his union, decided not to get a second medical report.¹³

[76] Ultimately Mr Hyde did not obtain a second medical opinion for Serco to consider prior to Serco making the decision to dismiss him.

[77] Mr Hyde did provide a written response to the Show Cause Letter on 30 June 2017 and the union assisted him with this.¹⁴

[78] Mr Hyde's four-page response to the Show Cause Letter¹⁵ explained in detail the history of the matter. Mr Hyde complained that he had earlier received clearances to return to work from both Dr Mukundala and Dr Afilika. He states he believes Dr Mukundala does not have a complete understanding of the practical nature of his role which has led to his incorrect conclusion that he is unable to perform the inherent requirements of the job. Mr Hyde complains that his answers filled out honestly on the Physical Readiness Form for the DETT have been used against him and do not suggest that he is unable to safely complete the DETT refresher. Mr Hyde complains that he did not have an opportunity to discuss with Dr Mukundala his account of the duties he is required to undertake. Mr Hyde disputes Dr Mukundala's findings largely based on a belief that Dr Mukundala failed to understand truly the requirements of the position. Mr Hyde stated he is more than capable of performing the full range of duties required and requested an opportunity to participate in the DETT refresher which would provide a fair indication of his fitness to continue as a Prison Officer. Mr Hyde points to his past commitment to his role and his successful achievements. Mr Hyde states he sincerely wishes to return to his work and continue on with his career with Serco.

[79] Mr Hyde agrees that he had an adequate opportunity to respond to the Show Cause Letter and had the support of the union to do so. The union also represented him at the final termination meeting.¹⁶

[80] Mr Hyde agrees that it made sense that Serco would rely on Dr Mukundala's medical Report given he was his treating Orthopaedic Surgeon however he does not agree that the Report was in clear terms.¹⁷

[81] Serco then met with Mr Hyde and his union representative on 11 September 2017 and he was advised that his employment was being terminated as of that date. The letter of termination was read out to Mr Hyde at his request.

[82] Serco paid to Mr Hyde five weeks' pay in lieu of notice.

[83] On 2 October 2017 Mr Hyde's legal representatives filed this application with the Commission.

[84] On 1 November 2017 Mr Hyde's legal representatives wrote to Dr White a Consultant Occupational Physician advising him of Mr Hyde's circumstances and seeking a report from him as to Mr Hyde's fitness for work.

[85] Dr White reviewed Mr Hyde in person on 10 November 2017.

[86] Dr White provided a report to Mr Hyde's legal advisers dated 12 November 2017 wherein he detailed his opinion that Mr Hyde is able to perform his pre-injury duties, he is able to perform defensive movements and have prisoner contact, there are no work restrictions necessary and Mr Hyde is able to perform the DETT component of his role.

[87] The Applicant's legal representatives did not file a witness statement from Dr White.

[88] Dr White's 12 November 2017 report¹⁸ was accepted as evidence as well as a supplementary report dated 20 January 2018¹⁹ wherein Dr White states that he saw no medical reasons why Mr Hyde would not be able to perform defensive techniques displayed in a video of persons performing defensive techniques in a training environment. The Respondent did not object to the reports being tendered into evidence however challenges their relevance and validity.

Applicant's submissions

[89] The parties presented the case on the basis that the test for determining whether there was a valid reason for dismissal in a case relating to capacity was as set out in *Lion Dairy & Drinks Milk Ltd v Norman*²⁰ (Lion Dairy). A Full Bench of the Commission has since held that test to be wrong, and the correct test is whether, at the time of the dismissal an applicant suffered from the alleged incapacity, with such findings based on the relevant medical and other evidence before the Commission: *CSL Limited T/A CSL Behring v Chris Papaioannou*²¹ (CSL Limited) at [77].

[90] The weight of the evidence before the Commission, which includes the evidence of an Occupational Physician Dr White, is that the Applicant's disability did not prevent him from performing the inherent requirements of his role.

Dr Mukundala's Report dated 1 May 2017

[91] The Report was prepared based on Dr Mukundala's examination of Mr Hyde conducted on 23 November 2016, and it was informed by instructions contained in an email from the Respondent's HR Advisor, Mr Lahad sent on 13 March 2017.²²

[92] Amongst other things, the Applicant submits the instructions from Mr Lahad to Dr Mukundala required Dr Mukundala to assume the Applicant was unable to run and could not respond with defensive movements. The basis for those assumptions was not established. At Exhibit A3, paragraphs 73 to 75 the Applicant's evidence was,

"I do not agree [that I was unable to run and could not perform defensive movements] and I do not know why Marc Lahad stated that I could not run or perform defensive movements."

[93] The Report was prepared without a contemporary examination of the Applicant. The Applicant was last reviewed by Dr Mukundala on 23 November 2016, over 5 months prior to the date of the Report.²³

[94] As at 23 November 2016, the Applicant had an altered gait and was only able to run “*for relatively short distances of much less than 1 kilometre*”.²⁴ His situation had changed by May 2017 when the Report was requested.

[95] It is submitted Dr Mukundala’s Report was tainted, unreliable or flawed to the extent that it could be relied upon as evidence of the Applicant’s capacity as at the date of termination.

Dr White’s report dated 12 November 2017

[96] Dr White’s report of 12 November 2017 was prepared based on a Fitness For Work Assessment carried out on 10 November 2017.

[97] Dr White’s report contains clear findings that the Applicant is able to,

- a. Perform his pre-injury duties;
- b. Perform defensive movements and have prisoner contact; and
- c. Participate in the Defensive Equipment Techniques Refresher.

Dr White’s report dated 20 January 2018

[98] Dr White’s further report was prepared with respect to the video evidence attached to the witness statement of Mr Newell.²⁵

[99] Dr Mukundala’s 1 May 2017 Report does not identify any certain tasks the Applicant cannot perform other than running or sprinting.

[100] The Applicant submits the Respondent’s reasoning as described above was prejudiced reasoning in that the Respondent concluded the Applicant was unable to perform the inherent requirements based on his disability and not based on his capacity.

Respondent’s submissions

[101] Serco submits that the termination of the services of Mr Hyde on 11 September 2017 was,

- a. for a valid reason related to Mr Hyde’s capacity to perform the inherent requirements of his role as a Custodial Officer at Acacia Prison;
- b. effected in circumstances where Mr Hyde was provided with procedural fairness in that he was given an opportunity to respond to the reasons for dismissal relating to his medical incapacity; and

c. a measured response of Serco with respect to the inherent requirements of his role and the medical evidence before Serco at the time of termination of employment.

[102] It is the submission of Serco that the application should be dismissed.

[103] The Respondent submits there was a valid reason for the dismissal that related to Mr Hyde's capacity to perform the inherent requirements of his role in that,

a. Serco was in receipt of medical evidence from Mr Hyde's treating Orthopaedic Surgeon stating,

i. that Mr Hyde "*would never be fit to perform his pre-injury duties at 100% level*"; and

ii. that Serco compromise Mr Hyde's pre-injury duties and have a supernumerary around to assist Mr Hyde respond to any emergency or defensive movements.

[104] As to the proper approach to determining this matter Serco submit the facts and circumstances of this application can be distinguished from the facts and circumstances in the CSL Limited case. In the CSL Limited case, there was, prior to the implementation of the termination of the employment a material difference between the two medical opinions both of which were before the employer.

[105] It is submitted, on behalf of the Respondent, that in determining this application for an unfair dismissal remedy, the Commission is not obliged or required to adopt either the Lion Dairy approach or the *Jetstar Airways Ltd v Neeteson-Lemkes*²⁶ (Jetstar) approach, in that at the time of the termination of the employment of Mr Hyde,

a. there was no "apparent conflict" in the medical opinions that fell to Serco to be resolved (or anyone); and

b. the un-contradicted evidence of the Applicant's own Orthopaedic Surgeon (who both recommended and performed the fusion of the Applicant's ankle) confirmed that the Applicant was suffering from an incapacity.

[106] To the extent that in these proceedings there was an attempt to create the appearance of an apparent conflict in the medical opinions (which is not conceded by the Respondent) this arose out of a medical report that was prepared at the instigation of the lawyers for the Applicant for the purposes of the unfair dismissal proceedings, and was not a matter that was put before the employer in and around the time of the termination. The only other medical certificate provided by Dr Afilaka, (obtained at the instigation of the Applicant) did not attempt to deal with the questions that were initially and repeatedly advanced by Serco with respect to the Applicant's injury, and were ultimately addressed in detail by the Applicant's treating Orthopaedic Surgeon, Dr Mukundala.

[107] The Applicant was not denied the opportunity to obtain and submit any such medical evidence to contradict the written Report of the Applicant's treating Orthopaedic Surgeon. To the contrary, the Applicant and his advisers, in the form of his union, elected to not pursue this option in circumstances where,

- a. they collectively sought and obtained an extension of the timeframes for determination of the employer's concerns regarding capacity; and
- b. they were aware that the Respondent would make its decision based upon the findings of the Applicant's treating Orthopaedic Surgeon, Dr Mukundala.

[108] To the extent that there was any evidence of capacity before the Commission by way of a medical opinion, it remains the medical opinion of Dr Mukundala, the Applicant's treating Orthopaedic Surgeon.

[109] In the alternative, it is submitted that there is nothing in the views of Dr White which would create the necessary and/or sufficient evidentiary basis to result in a finding to the effect that the conclusion reached by Serco was not valid, noting that at [77] of the CSL Limited decision, the Full Bench held,

"In a dismissal related to the person's capacity, section 387(a) requires the Commission to consider and make findings as to whether at the time of the dismissal, the Applicant suffered from the alleged incapacity. Such findings are to be based on the relevant medical and other evidence before the Commission." (Underlining added)

[110] Irrespective of any apparent tension between the Lion Dairy approach and the Jetstar approach, the Commission should find that at the time of the dismissal of the Applicant, Mr Hyde was suffering from the incapacity (so described) and that the termination of the employment was for a valid reason.

[111] It is submitted that there is little in the CSL Limited decision which articulates or suggests any apparent error with reference to the principles contained in Lion Dairy.

[112] It is submitted that in the case of the Applicant in these proceedings, the Report of his treating Orthopaedic Surgeon, Dr Mukundala, was and remains a sufficient evidentiary basis for the employer to make an informed decision with respect to the capacity of the Applicant and that on this basis alone, it was and remains a valid reason for the termination.

[113] It is submitted that on the evidence there was a valid reason connected with the capacity of the employee that led to the decision to dismiss. If the Commission were to apply the Jetstar approach (whilst noting the submission of the Respondent that CSL Limited can easily be distinguished) the Commission, on the evidence before it, would comfortably find that at the time of the dismissal, the Applicant clearly and unambiguously suffered from the alleged incapacity.

Legislation

[114] Section 387 of the Act sets out the matters the Commission must have regard for when determining an unfair dismissal remedy application.

"387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
- (b) whether the person was notified of that reason; and*
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
- (h) any other matters that the FWC considers relevant.”*

Applicable Principles

[115] The Applicant submits that the Full Bench decision in CSL Limited²⁷ says that the test in this case is for the Commission to determine whether at the time of the dismissal Mr Hyde suffered from the alleged incapacity, with such findings based on the evidence before the Commission at the hearing.²⁸

[116] The Applicant submits that part of that evidence the Commission should have regard for, based on CSL Limited, is the evidence of Dr White, including his reports dated 12 November 2017 and 20 January 2018.

[117] From that point onwards the Applicant's submissions broadly follow the respective principles in Lion Dairy.²⁹

[118] The Respondent submits however CSL Limited is distinguishable from this matter but thereafter also broadly follow the Lion Dairy principles.

[119] The Respondent submits the CSL Limited decision refers to the perceived “tension” between the majority decision in Lion Dairy and Jetstar and [36] to [37] of CSL Limited explain the nature of the perceived “tension”.

[120] The Respondent submits that in the circumstances of an unfair dismissal application relating to the dismissed employee's capacity, the apparent “tension” between Lion Dairy and

Jetstar refers to circumstances where there is some conflict in the medical opinions upon which the decision to dismiss is made.

[121] The Respondent submits that Lion Dairy says it would “[u]sually be incumbent on the employer to resolve that conflict” but Jetstar says that in the circumstances of any apparent conflict in medical opinions, the Commission is required to consider and make findings as to whether at the time of the dismissal, the Applicant suffered from the alleged incapacity based upon relevant medical and other evidence before the Commission.

[122] The Respondent submits the facts and circumstances of this matter can be distinguished from the facts and circumstances in CSL Limited.

[123] In the CSL Limited, there was, prior to the implementation of the termination of Mr Papaioannou’s, a material difference of opinion between,

- a. Dr Bloom, who was described as the occupational physician and who provided a report pursuant to what was described as an independent medical examination; and
- b. the diagnosis of Dr Congiu, who was described as Mr Papaioannou’s long term treating psychiatrist.

[124] The difference was that Dr Congiu, noted that Mr Papaioannou’s condition was temporary in nature and opined that the estimated period of recovery would be six months however Dr Bloom gave a prognosis of recovery of within 12 to 24 months.

[125] Importantly both medical reports or assessments were provided to the employer prior to termination.

[126] In the decision at first instance, the Commissioner found that the reliance of the employer on the advice of Dr Bloom constituted,

- a. a clearly defensible decision adopted by the employer; and
- b. a valid reason for the dismissal.

[127] However, the ultimate finding of “harshness” which resulted in the order of reinstatement had, as its evidentiary basis, the perceived denial of a benefit the Commission found existed in the employer’s Agreement, which the Commissioner found was intentionally designed to be generous and to cover long periods of absence by the employee. Accordingly, the reinstatement order was an attempt to remedy the denial of the Applicant, Mr Papaioannou, to a salary continuation scheme.

[128] On appeal the Full Bench recognised that at first instance it was apparent the Commissioner’s decision was an application of the Lion Dairy approach.³⁰

[129] Ultimately the Full Bench in CSL Limited held that,

“[75] The approach advanced by the majority in Lion Dairy is inconsistent with the weight of authority and the proper construction of s 387 (a). It is, with respect, plainly wrong.

[77] Contrary to the proposition in Lion Dairy, there is no basis to leave the resolution of any conflict in medical opinion to the employer. The Commission is frequently called upon to resolve evidentiary conflict, including the assessment of expert evidence.

[77] The tension between Lion Dairy and Jetstar is to be resolved by the adoption of the approach in Jetstar. In a dismissal related to the person's capacity, s. 387 (a) requires the Commission to consider and make findings as to whether, at the time of dismissal, the Applicant suffered from the alleged incapacity. Such findings are to be based on the relevant medical and other evidence before the Commission."
(Underlining added)

[130] Considering the parties' submissions on the implications of the Full Bench decision in CSL Limited I agree with the Respondent that the Full Bench in CSL Limited was dealing with situations where there were conflicts in the medical opinions known to the employer at the time the decision to dismiss was made. This indeed was the case in both Lion Dairy and the first instance decision the subject of appeal in CSL Limited. However I do not agree that the Full Bench decision in CSL Limited is only applicable to unfair dismissal remedy applications where there is conflicting medical opinion. The decision in my view has general application to cases where a dismissal is related to the person's capacity.

[131] The Full Bench in CSL Limited rejected the particular part of the Lion Dairy approach which had previously held that the resolution of any conflict in medical opinion was to be left to the employer and instead reinforced the requirement of section 387 (a) of the Act in capacity cases for the Commission to consider and make findings as to whether at the time of the dismissal the employee suffered from the alleged incapacity.

[132] I do not however accept the Applicant's submission that the Full Bench's reference in CSL Limited at [77] to the Commission's findings as to alleged incapacity at the time of dismissal being based on the "...*relevant medical and other evidence before the Commission*" is authority for the proposition that the Commission must have regard for a new medical opinion an applicant obtains after dismissal which an applicant then argues demonstrates a conflict in medical opinion which the Commission must resolve.

[133] In this matter at the time the decision to dismiss was made the opinion of Dr White had not created any conflict with the medical opinions available to be considered by Serco because Dr White's opinion did not at that point in time exist.

[134] The evidence is no approach was made to Dr White for a medical opinion until after Mr Hyde had been dismissed and in fact he was only approached after this application had been made to the Commission.

[135] In this case when determining whether there was a valid reason for dismissal the Commission should not have regard for Dr White's evidence and his reports which were not in existence at the time the decision to dismiss Mr Hyde was made.

[136] Dr White's medical opinion was not a fact that existed at the time of the dismissal. In this case the medical opinion and evidence of Dr White is not relevant to the determination of whether or not there was a valid reason for Mr Hyde's dismissal.

[137] Section 394, under which this application is made, is found within Part 3-2 of the Act and section 381 sets out the Objects of Part 3-2. These Objects include, at (2), that the procedures and remedies and the manner of deciding on and working out such remedies are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

[138] In my view it would also not be consistent with providing a “fair go all round” to allow a medical opinion that did not even exist at the time an employer made a decision to dismiss to be used to challenge the validity of the reasons for that decision.

[139] I do accept though that should I decide the dismissal was unfair that Dr White’s evidence may be relevant when considering remedy.

Valid reason

[140] The medical opinions available at the time of the decision to dismiss which the Commission should have regard for are the medical certificate of Dr Mukundala dated 24 November 2016, Dr Afilaka’s report dated 15 February 2017 and Dr Mukundala’s Report dated 1 May 2017.

[141] The medical certificate of Dr Mukundala dated 24 November 2016 certifies Mr Hyde “...is fit to work (full duties)” That medical certificate was issued in response to an email request to Dr Mukundala which asked him to examine Mr Hyde’s ankle and included attached documentation which specified the physical requirements of Mr Hyde’s job and asked Dr Mukundala to comment on four questions with regard to Mr Hyde’s suitability to perform his pre-injury duties, specifically defensive movements and the ability to have prisoner contact, any side-effects from treatment/medication that may impact his ability to perform his duties, any current work restrictions to safely accommodate his ankle injury and any other information Serco should be aware of regarding his ankle.³¹

[142] Self-Evidently Dr Mukundala did not respond to the questions Serco asked him or provide any detail for his opinion.

[143] Given that Dr Mukundala did provide a detailed response to these same questions at a later date in his 1 May 2017 Report, I take the medical opinion expressed in this later Report as superseding Dr Mukundala’s 24 November 2016 medical certificate.

[144] Dr Afilaka’s report dated 15 February 2017 stated that Mr Hyde will be fit to continue his usual occupation as detailed in his position description as a Case Management Officer and he will be able to go through the defence and control training and defence and control in field.

[145] Dr Afilaka was Mr Hyde’s general practitioner whereas Dr Mukundala was the Orthopaedic Surgeon who had seen Mr Hyde and recommended the particular operation on his ankle and had operated on Mr Hyde’s ankle. I accept therefore in this matter the opinion of Dr Mukundala is to be preferred over the opinion of Dr Afilaka.

[146] I accept that the Report, an expert medical opinion of Dr Mukundala dated 1 May 2017, is the relevant medical opinion the Commission should have regard for when determining whether Mr Hyde had the capacity to perform the full duties of his job.

[147] Mr Hyde himself agreed it made sense to have the opinion of Dr Mukundala rather than going to another independent doctor or surgeon or consultant because Dr Mukundala knew all about his ankle.³²

[148] Mr Hyde was aware in March 2017 of the questions Serco was asking Dr Mukundala to respond to and that the questions were essentially the same as those which were originally asked of Dr Mukundala on 18 November 2016. In fact Mr Hyde was copied into the email dated 13 March 2017 from Mr Lahad to Dr Mukundala requesting his opinion and answers to five particular questions.³³

[149] At the time the expert medical opinion of Dr Mukundala was sought in early 2017 Mr Hyde had no objections to this occurring nor did he object to the information included in the email request dated 13 March 2017.

[150] The Applicant submits however the Commission should appreciate that Dr Mukundala's Report dated 1 May 2017 was based on Dr Mukundala's examination of Mr Hyde which had been conducted back on 23 November 2016. Separately the Applicant submits that the instructions from Mr Lahad to Dr Mukundala also included statements which were incorrect specifically,

“Since Richard has been back at work his range of movement in the ankle has increased, he does not experience pain but remains in movements as he cannot have prison contact as he is unable to run nor respond with defensive movements if need be.”³⁴

[151] Mr Hyde's evidence is that some of this was not correct. Mr Hyde however did not contact Dr Mukundala about this.³⁵

[152] Mr Hyde's evidence is that as at November 2016 he was only able to run on his injured ankle for relatively short distances of much less than 1 km but by April 2017 he was able to tolerate running for longer distances of approximately 1 km.³⁶

[153] The evidence also was that, five weeks prior to Serco emailing Dr Mukundala, on 3 February 2017, Mr Hyde had completed the Physical Readiness Form for the DETT and in doing so stated to Serco that he could not run 1 km.

[154] The Applicant submits the 1 May 2017 Report of Dr Mukundala was tainted, unreliable or flawed and could not be relied upon as evidence of Mr Hyde's capacity at the date of termination.

[155] The Applicant submits that this Report should not be accepted as evidence of Mr Hyde's lack of capacity to do the job because of,

- the incorrect instruction from Mr Lahad in the email to the effect that Mr Hyde was unable to run and could not respond with defensive movements,
- the fact Dr Mukundala last examined Mr Hyde in November 2016,
- the absence of a physical capacity assessment being performed,

- the failure to consider Mr Lahad’s instruction that Mr Hyde’s range of movement in the ankle had increased.

[156] A number of points can be made about these criticisms of Dr Mukundala’s medical opinion.

[157] In answer to the first question asked of him Dr Mukundala’s conclusion that Mr Hyde “...*would never be fit to perform his pre-injury duties at 100% level*” follows statements by Dr Mukundala that he is confident Mr Hyde has recovered from the surgery, that his right ankle joint has fused and that the movements of this joint level are completely abolished, followed by the observation that Mr Hyde would therefore depend more on the flexibility of other joints than the ankle joint that has been fused. It is not apparent that Dr Mukundala’s opinion that Mr Hyde would never be fit to perform his pre-injury duties at 100% level was infected by Mr Lahad’s emailed statement that Mr Hyde was unable to run or respond with defensive movements. The assertion that it was is mere speculation by the Applicant’s representatives.

[158] Further on in his answer to the first question Dr Mukundala states that Mr Hyde “[i]n a case of emergency, he would definitely need aide from his colleagues as he would be unable to sprint/run on this fused ankle joint” and then states that one has to remember the gait on this fused joint is not normal and the downside of surgery is a loss of movement at the ankle joint level. Again it is not apparent that Dr Mukundala’s opinion has been infected by Mr Lahad’s incorrect statement that Mr Hyde was unable to run. Dr Mukundala did not refer to Mr Lahad’s instruction that Mr Hyde “...*is unable to run...*” or use this wording, rather Dr Mukundala expresses his opinion that Mr Hyde “...*would be unable to sprint/run...*” and his explanation as to why this is the case is based on the state of Mr Hyde’s ankle following the surgery.

[159] I do accept that Dr Mukundala’s opinion that Mr Hyde would be unable to run is, on the evidence before the Commission at hearing, not correct. The evidence of Mr Hyde which I accept is that by April 2017 he was able to tolerate running for distances of approximately 1 km.

[160] Dr Mukundala in his opinion however in answer to question one refers to Mr Hyde being unable to “*sprint/run*” rather than only run and this opinion was expressed in the context of “...*a case of emergency...*”. Further in the paragraph immediately before question one Dr Mukundala says that Mr Hyde would find “...*that whenever there is any need for running or sprinting, he would find it very difficult as the ankle joint is completely fused.*”

[161] I think it is reasonable to understand Dr Mukundala’s opinion as recognising that sprinting and running are different.

[162] The concise Macquarie dictionary defines “Sprint” as follows,

1. to race at full speed, especially for a short distance, as in running, rowing, etc
2. to cover by sprinting: to sprint a hundred metres
3. a short race at full speed.

[163] Sprinting therefore means running at full speed for a short distance.

[164] I note that the Summary of Job Demands for a Case Management Officer includes “...*running 50 m in short bursts...*”.³⁷

[165] The evidence is that Mr Hyde was able to run for a distance of 1 km but there is no evidence that he was able to sprint, meaning to run at full speed for a short distance. Consequently Dr Mukundala’s opinion that Mr Hyde would be unable, or find it very difficult, to sprint in a case of emergency stands.

[166] Secondly whilst it is correct Dr Mukundala last examined Mr Hyde in November 2016 there is nothing in the evidence that proves the state of Mr Hyde’s ankle had changed since he was examined at this time. Mr Hyde’s evidence as to what had changed was limited to the fact that since 2016 he has become able to tolerate running for longer distances. The absence of an examination of Mr Hyde by Dr Mukundala in May 2017 is not a sufficient reason to reject Dr Mukundala’s opinion.

[167] Separately Dr Mukundala was not asked to put Mr Hyde through a physical capacity assessment and did not do so. There is no reason to conclude Dr Mukundala was unable to reach a proper medical opinion based on his previous examination of Mr Hyde and his knowledge of the state of Mr Hyde’s ankle.

[168] The argument that Dr Mukundala gave no consideration to Mr Lahad’s statement in the email that Mr Hyde’s range of movement in the ankle had increased is also a mere assertion. There is nothing in Dr Mukundala’s medical opinion that allows the Commission to know whether Dr Mukundala was or was not influenced by this statement of Mr Lahad.

[169] Consequently I accept that the Commission should have regard for Dr Mukundala’s medical opinion in the Report dated 1 May 2017.

[170] In the Report question one asked about Mr Hyde’s suitability to perform his pre-injury duties, specifically defensive movements and his ability to have prisoner contact. In response Dr Mukundala concludes that Mr Hyde would never be fit to perform his pre-injury duties at 100% level. His opinion was also that in case of emergency Mr Hyde would definitely need aide from his colleagues as he would be unable to sprint/run on his fused ankle joint. He suggested there would be a need to compromise Mr Hyde’s pre-injury duties and he highly recommended Mr Hyde having a supernumerary around to respond to any emergency or defensive movements whenever they are needed.

[171] In conclusion I am satisfied that the medical opinion of Dr Mukundala dated 1 May 2017 demonstrates that at the time of dismissal Mr Hyde could not perform the inherent requirements of his job.

[172] In answer to the question of any current work restrictions Serco would need to be aware of to safely accommodate Mr Hyde’s ankle injury Dr Mukundala repeated that Mr Hyde would need help from his colleagues in the case of emergency situations where sprinting/running and defensive movements are involved.

[173] Mr Hyde agrees that if he was reinstated to his job he would invariably on occasions be required to apply control and defence techniques. He agreed there would be the opportunity for a prisoner to seize upon him when he is on his own. In such a circumstance he

agreed he would apply his training and be expected to apply the control and defence techniques, whether for a few moments or for a longer period of time. Mr Hyde agreed that he could very well be doing this on his own as part of his normal duties and it is not a feature of his position that there is a supernumerary with him all the time.³⁸

[174] The work restrictions Dr Mukundala identified, to have aide from a colleague in the case of an emergency situation where sprinting/running and defensive movements are involved, is not a reasonable adjustment to Mr Hyde's job in order to accommodate his incapacity. It would not be a reasonable adjustment to require Serco to ensure Mr Hyde had a supernumerary around whenever needed.

[175] Serco initially proposed that a medical opinion as to whether or not Mr Hyde was fit to resume full duties be obtained from an independent medical expert. Mr Hyde agreed to this, but Serco shortly thereafter agreed to have Mr Hyde's own treating Orthopaedic Surgeon Dr Mukundala provide that Report.³⁹ Further having been provided with a copy of this Report and the Show Cause Letter Mr Hyde, through his union representative, requested Serco allow him more time in order to obtain an alternate medical report. Serco agreed to this and extended the time period for Mr Hyde to respond to the Show Cause Letter. However Mr Hyde, having consulted with his union, decided not to seek an alternate medical report.

[176] It was entirely reasonable for Serco to then rely upon Dr Mukundala's Report when Mr Hyde had been given the opportunity to challenge this Report by obtaining an alternate medical opinion but chose not to do so.

[177] Based on Dr Mukundala's Report of 1 May 2017 I find that Mr Hyde was not able to perform the inherent requirements of his job at the time of his dismissal. This posed a risk to the safety and welfare of other employees and to Mr Hyde himself had he returned to work as a Custodial Officer. Mr Hyde's inability to perform the inherent requirements of his job was a valid reason for his dismissal.

Notification of the reason for dismissal

[178] Mr Hyde was notified of the reasons Serco was considering dismissing him in the Show Cause Letter. Mr Hyde had been provided with a copy of Dr Mukundala's Report of 1 May 2017.

Opportunity to respond to the reason for dismissal

[179] Mr Hyde had the opportunity to respond to the reasons Serco was considering dismissing him before the final decision was made and he did so with a detailed written letter.

Refusal to allow a support person

[180] There was no refusal by Serco to allow Mr Hyde to have a support person present during any discussions relating to the dismissal and in fact he was assisted by his union representatives at the time.

Size of the enterprise and human resource management expertise

[181] Serco is a large enterprise and has dedicated human resource management specialists and expertise and the procedure followed by Serco was consistent with this.

Other matters

[182] The expert medical opinion was that Mr Hyde cannot perform the inherent requirements of his job as a Custodial Officer. If this was ignored and Mr Hyde had resumed work at the prison there would in my view have been risks to the safety of Mr Hyde himself and other Officers as mentioned above. There would have also been risks to the safety of prisoners and, because Custodial Officers sometimes escort prisoners off-site, risks to members of the public. These concerns weigh against finding that the dismissal of Mr Hyde was unfair.

[183] It is also a relevant matter that Mr Hyde has been employed since 2009.

Conclusion

[184] In all the circumstances the dismissal of Mr Hyde was not harsh, unjust nor was it unreasonable. Mr Hyde was not unfairly dismissed.

[185] Consequently I will dismiss this application and an order [PR606765] to that effect will be issued in conjunction with this decision.

COMMISSIONER

Appearances:

R. Cosentino of Slater & Gordon Lawyers for the Applicant.

P. Brown of Baker & McKenzie for the Respondent.

Hearing details:

2018.

Perth:

January 30.

Final written submissions:

Applicant, 20 February 2018.

Respondent, 13 and 21 February 2018.

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<PR606764>

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- ¹ Exhibit R3, Attachment IS4.
- ² Transcript at PN188.
- ³ Exhibit A3, Attachment F, p. 35.
- ⁴ Ibid., Attachment G, p. 36.
- ⁵ Ibid., Attachment E and Applicant's closing submissions dated 20 February 2018 at paragraph 30.
- ⁶ Transcript at PN296 to PN315.
- ⁷ Ibid., at PN550 to PN553.
- ⁸ Exhibit A3, Attachment E, pp. 17 and 23.
- ⁹ Ibid., Attachment B, p. 8.
- ¹⁰ Exhibit R2 at paragraph 29.
- ¹¹ Exhibit A3, Mr Hyde's statement at paragraphs 81 to 83.
- ¹² Transcript at PN275.
- ¹³ Ibid., at PN276 to PN287 and PN338.
- ¹⁴ Ibid., at PN333 to PN338.
- ¹⁵ Exhibit A3, Attachment J.
- ¹⁶ Transcript at PN341 to PN343.
- ¹⁷ Ibid., at PN288 to PN290.
- ¹⁸ Exhibit A5.
- ¹⁹ Exhibit A6.
- ²⁰ [2016] FWCFB 4218.
- ²¹ [2018] FWCFB 1005.
- ²² Exhibit A3, Attachment G, p.36.
- ²³ Ibid., Mr Hyde's statement at paragraph 73.
- ²⁴ Ibid., at paragraph 82.
- ²⁵ Exhibit R2, Attachment WN1.
- ²⁶ [2014] FWCFB 8683.
- ²⁷ [2018] FWCFB 1005.
- ²⁸ Applicant's closing submissions dated 20 February 2018 at paragraphs 1 to 7.
- ²⁹ [2016] FWCFB 4218 at [25].
- ³⁰ [2018] FWCFB 1005 at [19].
- ³¹ Exhibit R1.
- ³² Transcript at PN214 to PN215.
- ³³ Ibid., at PN218 to PN219.
- ³⁴ Exhibit A3, Attachment G, p. 36 at paragraph 2.
- ³⁵ Ibid., Mr Hyde's statement at paragraphs 75 to 76.
- ³⁶ Ibid., at paragraphs 81 to 82.
- ³⁷ Ibid., Attachment E, p.17
- ³⁸ Transcript at PN113 to PN121.
- ³⁹ Exhibit A3, Mr Hyde's statement at paragraphs 68 to 72.