



## DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Catherine Thomas**

v

**KDR Victoria Pty Ltd t/a Yarra Trams**  
(U2017/12153)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 15 MAY 2018

*Application for an unfair dismissal remedy – tram driver’s use of mobile telephone at the traffic lights – breach of cardinal safety rule – valid reason – proportionality – harshness – application dismissed*

[1] Ms Catherine Thomas has applied under s.394 of the *Fair Work Act 2009 (Cth)* (Act) for an unfair dismissal remedy. She was dismissed from her employment as a tram driver with KDR Victoria Pty Ltd (Yarra Trams) for having used her mobile telephone while operating a tram. Ms Thomas had 27 years of service and an unblemished record. She contends that her dismissal was harsh, unjust or unreasonable and seeks reinstatement. The company contends that Ms Thomas’ use of her mobile phone breached its safety rules, including a cardinal rule prohibiting mobile phone use while operating a tram, and that dismissal was a valid and proportionate sanction.

[2] The factual background to this matter is largely uncontested. On the evening of 5 October 2017, Ms Thomas was driving an E-class tram heading north along Smith Street, Fitzroy, on route 86. At approximately 8:30pm she stopped the tram at a tram stop located at the traffic lights on the south side of the intersection of Smith Street and Alexandra Parade. While the lights were red, and the tram was stationary, Ms Thomas took her mobile phone from her shirt pocket and checked her messages for some 15 to 20 seconds. A cyclist who had stopped next to the tram saw Ms Thomas using her mobile phone and made a complaint to the company.

[3] On 10 October 2017, when Ms Thomas reported for her next shift, her team manager, Ms Bernadette Doyle, told her about the complaint. Ms Thomas acknowledged that she had used her phone, but said that her father and father in law were both sick and she had been concerned for them. She apologised and said that she believed she had mitigating circumstances. Ms Thomas was then given a letter suspending her from her employment pending an investigation.

[4] On 13 October 2017, Ms Thomas attended a meeting with Ms Doyle, together with two representatives from her union, the Australian Rail, Tram and Bus Industry Union

(RTBU). Ms Thomas was questioned about what had occurred on the night in question. She admitted the conduct that was alleged against her in the complaint. Ms Doyle then prepared an investigation report. It concluded that Ms Thomas had breached the Yarra Trams General Rules and Driving Rules (Yarra Trams Rules), including Cardinal Rule 2, which prohibits the use of mobile phones while operating a tram, and Rule 26 which concerns driver distraction.

[5] On 27 October 2017, Ms Thomas attended a meeting with Ms Jewels Grano, who was at that time the manager of lines for the New Preston depot. Also present were Ms Doyle and two RTBU representatives. Ms Grano provided Ms Thomas with a copy of Ms Doyle's investigation report, and an opportunity to read it.<sup>1</sup> She told Ms Thomas that she had breached Cardinal Rule 2, and rules 9, 26 and 87, and that she considered termination of employment was warranted. There was some discussion of a possible separation arrangement, but none was agreed. Ms Grano told Ms Thomas that her employment was terminated with immediate effect. She was provided with five weeks' pay in lieu of notice.<sup>2</sup> On 2 November 2017, Ms Thomas received a letter confirming her dismissal effective from 27 October 2017.

[6] Pursuant to a procedure established under the *Yarra Trams Enterprise Agreement 2015 – Operations*,<sup>3</sup> Ms Thomas sought to have her dismissal reviewed. An appeal hearing was conducted on 24 November 2017 before Mr Brian Lacy. On 4 December 2017, he issued a non-binding decision and recommendation, in which he concluded that the company's decision to terminate Ms Thomas' employment was unjust and unreasonable, and that any sanction should have been limited to a warning. The company did not accept this recommendation.

[7] It is convenient to note at the outset two circumstances that are relevant to Ms Thomas' case.

[8] First, in April 2017, the company amended the Yarra Trams Rules in a number of ways, including by introducing a rule allowing drivers to receive lost property from members of the public. Mobile devices are a common item of lost property. A new rule authorised drivers to receive mobile phones when a tram is stationary, and to attempt to turn the phone off. The RTBU contended that this rule was not compatible with the *Road Safety Road Rules 2017 (Vic)* (Road Safety Rules). The company disagreed. Relevantly for the present matter, Ms Thomas contends that it is unfair that she was dismissed for using her own phone in circumstances where she would have been authorised to accept and turn off a mobile phone handed in by a member of the public.

[9] Secondly, on 7 October 2017, another tram driver was given a warning for using a mobile phone while seated in the cabin of a tram. Ms Thomas says that this shows an inconsistency and unfairness in the company's approach to dealing with the use of mobile devices. The company says that the driver in question was on a break, and that his case was very different to that of Ms Thomas.

[10] Ms Thomas' application for an unfair dismissal remedy was heard before me on 12 February 2018. Ms Thomas gave evidence. The company led evidence from Ms Doyle, Ms

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<sup>1</sup> Statement of Jewels Grano at [10]

<sup>2</sup> Statement of Jewels Grano at [12] – [15]

<sup>3</sup> AE416732 at clause 3.5 of Attachment 1

Grano and Mr Allan Jones, the director of lines. After the hearing, final written submissions and a reply were submitted, the last of which was filed on 26 March 2018.

***Initial matters to be considered***

[11] Section 396 of the Act requires that I decide four matters before considering the merits of Ms Thomas' application. There is no dispute between the parties, and I am satisfied, of the following. First, Ms Thomas' application was made within the 21 day period required by s.394(2) of the Act. Secondly, Ms Thomas was a person protected from unfair dismissal, as she earned less than the high income threshold (s.382). Thirdly, Ms Thomas' dismissal was not a case of genuine redundancy. Fourthly, no question of compliance with the Small Business Fair Dismissal Code arises.

[12] For a dismissal to be unfair, the Commission must be satisfied that the dismissal was harsh, unjust or unreasonable (s.385(b)). In considering whether it is so satisfied, the Commission must take into account the matters specified in s.387. I will address each of these in turn below.

***Was there a valid reason for dismissal (s.387(a))?***

[13] The Act directs consideration of whether there was a valid reason for the dismissal related to the person's capacity or conduct. A valid reason is one that is 'sound, defensible or well-founded.'<sup>4</sup>

[14] The Commission does not stand in the shoes of the employer and determine what the Commission would do if it had been in the employer's position.<sup>5</sup> The question the Commission must address is whether there was a valid reason for dismissal, in the sense both that there was a good or sufficient reason, and a substantiated reason.

[15] In cases relating to alleged misconduct, the Commission must make a finding on the evidence provided as to whether, on the balance of probabilities, the conduct occurred.<sup>6</sup> In the present matter, what occurred is not in contest. The characterisation of what occurred, and how serious the conduct was, are however both at issue.

[16] Ms Thomas did not dispute that she had engaged in the conduct for which she was dismissed, but submitted that this conduct was not sufficient for there to be a valid reason for dismissal.<sup>7</sup> In her final written submissions, she contended that, in order to establish that the company had a valid reason for her dismissal, the Commission must find that her conduct actually constituted a breach of either law or policy.<sup>8</sup> As a general principle, I do not agree with this submission. Conduct might not contravene policy or law, and yet still amount to a valid reason for dismissal. It is well-accepted that a valid reason need not necessarily be one relied on by the employer. Nevertheless, in the present matter, the focus of argument in relation to the question of valid reason was on whether Ms Thomas' conduct breached the

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<sup>4</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373

<sup>5</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

<sup>6</sup> *Edwards v Giudice* (1999) 94 FCR 561, at 564; *King v Freshmore (Vic) Pty Ltd*, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000, Print S4213 [24].

<sup>7</sup> Applicant's final written submissions dated 5 March 2018 at [27]

<sup>8</sup> Applicant's final written submissions dated 5 March 2018 at [28]

Yarra Trams Rules and, to a lesser extent, on whether she contravened road safety regulations.

[17] The investigation report concluded that Ms Thomas' conduct breached various provisions of the Yarra Trams Rules, including Cardinal Rule 2 and Rule 26, which concern use of mobile phones and driver distraction. It also found that her conduct breached Rule 87, which provides that drivers must follow the Road Safety Rules, and obey the Yarra Trams Rules. It concluded that Ms Thomas had breached the *Road Safety Act 1986*, although the intended reference here was apparently to rule 300 of the Road Safety Rules.<sup>9</sup> However, the letter of termination sent to Ms Thomas stated that her dismissal was due to 'serious safety breaches of the Yarra Trams Rules, specifically Cardinal Rule 2' concerning the use of handheld mobile devices.<sup>10</sup> It made no reference to breach of the Road Safety Rules.

[18] In the proceedings, Ms Thomas placed significant emphasis on demonstrating that she had not contravened the Road Safety Rules. Her final written submissions also devote considerable attention to her contention that she did not breach the Road Safety Rules because her tram was 'parked' at the relevant time. However, the company's case focused on Ms Thomas' contravention of the Yarra Trams Rules. It did not press a contention that Ms Thomas had breached the Road Safety Rules or that this was a valid reason for dismissal.

[19] For Ms Thomas, there is a broader field of contest, which includes the question of whether she breached the Road Safety Rules. She contends that, because she did not breach the Road Safety Rules, she did not contravene the Yarra Trams Rules. The company contests this, and says that the Yarra Trams Rules stand alone.

### ***Cardinal Rule 2***

[20] Tram drivers are required to comply with the Yarra Trams Rules. Rule 87(2) states that all drivers must know and obey the rules. The company contended, and I agree, that this is a lawful and reasonable direction, at least in relation to Cardinal Rule 2, and Rule 26(1) and (3).

[21] The Yarra Trams Rules contain 'cardinal' rules, tram services rules, and a number of other types of rules. There are eight cardinal rules. These appear towards the start of the rule book in a section highlighted in yellow. Cardinal Rule 2 is entitled 'Handheld Mobile Devices'. It states:

*'Never operate a tram, plant or machinery while using a handheld mobile device and / or any unauthorised electronic device. Refer to Rule 26 Driver Distractions.'*

[22] Beside the text there is a large graphic depicting a hand holding a mobile device. There is a separate picture of a mobile phone inside a red circle, with a red bar diagonally bisecting it. Other cardinal rules proscribe working when under the influence of drugs and alcohol, tampering with safety devices, operating vehicles without a licence, and failing to wear seatbelts.

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<sup>9</sup> Statement of Catherine Thomas, Annexure CT-5 at p.6

<sup>10</sup> Statement of Catherine Thomas, Annexure CT-6

[23] According to Ms Thomas' final written submissions, she had from the outset acknowledged that her conduct breached Cardinal Rule 2.<sup>11</sup> However, in both her written submissions and final written submissions, she contended that there was a 'technical consideration', the effect of which was that she had *not* in fact breached Cardinal Rule 2.<sup>12</sup> Ms Thomas contended that when she was stopped at the traffic lights, she was not 'operating' the tram, and that by using her mobile device at that time, she did not thereby contravene Cardinal Rule 2.<sup>13</sup> As we will see, this argument engages with the Road Safety Rules. But first I return briefly to Fitzroy on the evening of 5 October last year at around 8.30pm.

*Was Ms Thomas 'operating' a tram?*

[24] Ms Thomas stopped the tram at the intersection. She pressed the button to open the doors, allowing passengers to get off and on. She saw the traffic lights turn red and closed the doors, but unlocked them.<sup>14</sup> With the doors in unlocked mode, the hazard lights on the tram were flashing, and the LED lights displayed 'passengers alighting.' She then used her mobile phone for 15 to 20 seconds.<sup>15</sup>

[25] Ms Thomas contended that, with the tram in the state described above, it was 'parked' for the purposes of the Road Safety Rules. The dictionary in the Road Safety Rules defines 'park' as including 'stop and allow the driver's vehicle to stay'. She said that being 'parked' had two significant consequences. One was that the prohibition on mobile phone use in r.300(1C) of the Road Safety Rules no longer applied. The other was that when a tram is 'parked' for the purposes of the Road Safety Rules, it is not being 'operated' for the purposes of the company's Cardinal Rule 2.<sup>16</sup>

[26] In response to these two propositions, the company submitted that the tram was not 'parked' for the purposes of the Road Safety Rules, but rather 'stationary but not parked.' The latter expression is defined in r.300(1D) of the Road Safety Rules as 'stationary in a marked lane or line of traffic on a road'. A driver of a vehicle that is 'stationary but not parked' remains subject to the prohibition on using a mobile phone under the Road Safety Rules. To the second point, the company submitted that, in any event, these matters are not relevant to the proper interpretation of the company's own rules and in particular whether Ms Thomas was 'operating' a tram for the purposes of Cardinal Rule 2.

[27] In my view, when Ms Thomas used her mobile phone, the tram was 'stationary but not parked', for the purposes of the Road Safety Rules. I consider that the circumstances fall within the definition of this expression in r.300(1D). The tram was stationary in a line of traffic on the road. But even if I accepted that the tram was in fact 'parked' for the purposes of the Road Safety Rules, I do not accept that this would affect the proper interpretation of the Yarra Trams Rules; it would not have the consequence that the tram was not being 'operated' for the purposes of Cardinal Rule 2. I will explain why this is so.

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<sup>11</sup> Applicant's final written submissions dated 5 March 2018 at [66]

<sup>12</sup> Applicant's final written submissions dated 5 March 2018 at [66]; Applicant's submissions dated 20 December 2017 at [42]

<sup>13</sup> Applicant's submissions dated 20 December 2017 at [42]

<sup>14</sup> Applicant's final written submissions dated 5 March 2018 at [3]

<sup>15</sup> Applicant's final written submissions dated 5 March 2018 at [4] – [5]

<sup>16</sup> Applicant's final written submissions dated 5 March 2018 at [68]

**[28]** Firstly, the Yarra Trams Rules do not define their operation or interpretation by reference to the Road Safety Rules. They are the company's rules that apply to the professional conduct of its employees, including tram drivers. The Road Safety Rules are made under the *Road Safety Act 1986* and apply to drivers of cars and other vehicles, as well as other road users (see Rule 11). The Yarra Trams Rules do not take on their meaning from statutory rules that apply generally to vehicles of different kinds on roads across Victoria. There is nothing in the Yarra Trams Rules to suggest otherwise. Accordingly, even if it were accepted that Ms Thomas' tram was 'parked' for the purposes of the Road Safety Rules, this does not tell us anything about whether it was being 'operated' for the purposes of the Yarra Trams Rules. Cardinal Rule 2 does not contain the word 'park' or any of its variants. Nor does Rule 26, to which Cardinal Rule 2 refers. Rule 26 instead makes references to a tram being 'stationary'. There is no textual basis to conclude that a tram being 'parked' for the purposes of the Road Safety Rules means that it is not being 'operated' for the purposes of the Yarra Trams Rules.

**[29]** Secondly, the word 'operate' in the context of Cardinal Rule 2 is a transitive verb, that is, one taking a direct object, as in the sentence 'a driver operates a tram'. The ordinary English meaning of the word 'operate' in the present context includes 'to control the function of.'<sup>17</sup> In my view, when Ms Thomas was stopped at the tram stop at the traffic lights, she remained in control of the tram, and was operating it. It might have been different if the tram was not running; if it had lost power, or was sitting idle and not taking passengers. However, Ms Thomas' tram was in service on route 86. She was its driver. Its power was on. She was conducting passengers north along Smith Street.

**[30]** Ms Thomas contended that, in correspondence between the company and the RTBU concerning the introduction of the new rule 26(4) (which concerns drivers receiving lost mobile phones from members of the public), Mr Jones had himself suggested that when a tram is stopped, and in a position in which the driver could leave the controls, the vehicle is 'parked'. Mr Jones also stated in correspondence to the union that a tram is considered to be 'parked' when it is at a tram stop and the driver is not in contact with the controls.<sup>18</sup> But this does not address the objective meaning of the words 'operate a tram' in the Yarra Trams Rules. The exchange in question related to the union's concern that tram drivers could not comply with the new rule 26(4) because it was inconsistent with r.300 of the Road Safety Rules. Mr Jones was seeking to reconcile the new rule 26(4) with r.300. He was not addressing the application of Cardinal Rule 2. The company's position as to the consistency of Rule 26(4) with r.300 is that a driver would ordinarily step outside the cabin to receive a lost mobile phone (Ms Thomas does not accept that this is always so), and that the driver would then cease, momentarily, to be a 'driver' in control of a tram for the purposes of the Road Safety Rules.<sup>19</sup> Ms Thomas and the RTBU do not accept this analysis. However, it is not necessary for me to determine whether rule 26(4) is compatible with r.300.

**[31]** Ms Thomas contended that an E-class tram is controlled by a hand-operated instrument, such that, when her hands were not on it (including during the time she was using her mobile phone) the tram could not move. Mr Jones acknowledged that in such a position, Ms Thomas could have safely left the cabin if she had had to.<sup>20</sup> But again this does not

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<sup>17</sup> Oxford Dictionary, Online Edition 2018

<sup>18</sup> Applicant's final written submissions dated 5 March 2018 at [39]

<sup>19</sup> Respondent's final written submissions dated 19 March 2018, Annexure A at [13] – [17]

<sup>20</sup> PN561 – PN563

engage with the proper meaning of the word ‘operate’ in Cardinal Rule 2. The fact that the tram could not move because Ms Thomas’ hands were not on the instrument does not mean that the tram was not being operated. Nor does it mean that it was safe for her to use her mobile phone.

**[32]** Finally, in construing the meaning of Cardinal Rule 2, the purpose of the Yarra Trams Rules is to be taken into account. On the first page of the rules, there is a message from the Chief Executive Officer of the company, which states that safety is the company’s number one priority. It states that the rules provide boundaries for safe, organised and efficient operation of trams on the network, and that certain changes have been made to the rules to ensure risks are managed so far as is reasonably practicable.<sup>21</sup> The effect of Ms Thomas’ interpretation of Cardinal Rule 2 and its interaction with the Road Safety Rules is that Rule 2 did not apply to her at the relevant time on the evening of 5 October last year; she was free to use her phone, whether to text or speak on the phone, without infringing the rule. This would place a serious limitation on, and potentially compromise, the safety objective of the rule, and is unlikely to have been intended.

**[33]** In my opinion, Ms Thomas was operating the tram while it was stopped at the tram stop, at the traffic lights. Cardinal Rule 2 applied to her at that time.

*Does Rule 26(4) conflict with Cardinal Rule 2?*

**[34]** Ms Thomas contended that, if Cardinal Rule 2 applied to her, the effect of the new Rule 26(4) was to require drivers to collect lost mobile phones and therefore to breach Cardinal Rule 2 in ‘exactly the same circumstances’ as those for which Ms Thomas was dismissed.<sup>22</sup> It was submitted that to have an exception to Cardinal Rule 2 for receiving lost mobiles and turning them off when the tram is stationary, but no such exception for personal phones, does not make sense. In effect, it was contended that this impeached Cardinal Rule 2, or rendered its enforcement in relation to Ms Thomas in the circumstances unfair or unreasonable. There are several reasons why such submissions should be rejected.

**[35]** First, I do not consider that a driver who receives a mobile phone from a member of the public and turns it off is ‘using’ that device for the purposes of Cardinal Rule 2. To ‘use’ something is to ‘deploy (it) as a means of accomplishing or achieving something’.<sup>23</sup> As a matter of common usage, a person does not ‘use’ a mobile phone by touching it or holding it. Nor does one use it by receiving it from another person. I accept that by pressing the off button, one could be said to be using the phone for a fleeting moment, although by turning it off, one is actually precluding the use of it. The Road Safety Rules contain a definition of the word ‘use’ which specifically does extend to holding a device and other things that go beyond the ordinary meaning (see r.300(4)). But this is a statutory construct that needs to go beyond the ordinary meaning of the word to achieve a legislative purpose. It does not affect the interpretation of the Yarra Trams Rules.

**[36]** In her final submissions, Ms Thomas contended that the company had expressly authorised drivers to ‘use’ mobile phones by accepting lost phones; and that Mr Jones had

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<sup>21</sup> Yarra Trams General Rules and Driving Rules, Exhibit R2 at p.2

<sup>22</sup> Applicant’s final written submissions dated 5 March 2018 at [69]

<sup>23</sup> Oxford Dictionary, Online Edition 2018

said that using a lost mobile phone was permissible.<sup>24</sup> This misstates the company position, and Mr Jones' evidence. The company did not contend that receiving lost phones constituted 'use' of the phone. Mr Jones said that it was acceptable for drivers to collect a phone when the tram was stationary.<sup>25</sup>

[37] Secondly, even if accepting a device from a member of the public and pressing the off button constitutes 'using' it, it is use which is explicitly authorised. Cardinal Rule 2 refers to Rule 26. Rule 26(4) in turn states that any devices that are handed in as lost property can be received when the tram is stationary; and that drivers should attempt to silence or power off the device and place it out of sight. Cardinal Rule 2 is not infringed by a driver complying with Rule 26(4), because the latter is expressly permitted. It is a work-related task. If it constitutes *use* of a phone under Cardinal Rule 2 at all, it is permissible use pursuant to an exception.

[38] I note that the Yarra Trams Rules require or allow drivers to perform other tasks while they are operating a tram. For example, drivers may communicate with passengers when the tram is stationary (Rule 26(2)). This is not conduct that offends against the rule that drivers must not allow themselves to be distracted (Rule 26(1)) – even though it will engage their attention to some degree – because such conduct is expressly permitted. These are work-related matters that are authorised by the Rules, and cannot be equated with non-work-related use of a mobile device, which is particularly distracting, and specifically prohibited.

[39] Finally, putting to one side technical arguments of construction, it is appropriate to reflect on the substance of the two scenarios that Ms Thomas seeks to equate. In my opinion, receiving a mobile device from a member of the public and turning it off is qualitatively very different from using a device in a substantive way, particularly when it is one's own personal phone. The latter brings with it a higher level of personal interest and engagement. The expectation of such engagement, as well as the engagement itself, is distracting. Receiving a lost mobile phone from a member of the public and turning it off carries with it little of the intellectual and emotional diversion that is offered from actual use of a mobile phone, especially one's own phone. A lost phone is principally just an object, rather than a source of information, entertainment, and communication.

[40] In my view, on a plain reading of Cardinal Rule 2, in the context of the Yarra Trams Rules as a whole, Ms Thomas used her mobile phone while operating a tram. Her conduct breached the rule. The rule and its enforcement are not rendered unreasonable or unfair by the presence of Rule 26(4). Her breach of Cardinal Rule 2 was a valid reason for dismissal.

### **Rule 26**

[41] Rule 26 relates to 'driver distractions' and relevantly reads as follows:

*"1. Drivers must not allow themselves to be distracted while in control of a tram.*

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<sup>24</sup> Applicant's final written submissions dated 5 March 2018 at [67]

<sup>25</sup> PN552 – PN553



*3. Using an electronic device whilst driving is distracting and increases the likelihood of being involved in a collision. The operation or interaction with any type of mobile phone, transistor radio, multimedia device, interactive smart watches, fitness tracker or any other unauthorised electronic device while in control of a moving or stationary tram is not permitted (except for hearing aids). This equipment must be kept out of sight, hence smart watches and fitness trackers cannot be worn. Stored unauthorised electronic devices must be switched off and/or silent mode but not on vibrate mode. Your unauthorised electronic device may be turned on and used during layover breaks at a terminus but not in the driver's cabin.*

*4. Any such equipment handed in as lost property can only be received when the tram is stationary. To limit distraction to drivers, attempt to silence or power off the device and then place it out of sight.”*

[42] Elements of Rule 26(3), as well as all of Rule 26(4), were introduced in April 2017 as part of a suite of changes made to the Rule Book.<sup>26</sup> All tram drivers undertook training on the changes. A document headed ‘significant changes to the rule book’ was given to each driver.<sup>27</sup> At the end of the training, each driver was required to achieve a score of 100%. Ms Thomas did so.<sup>28</sup>

[43] The company contended that Ms Thomas’ use of her mobile phone while on duty operating a tram service was a breach of Rule 26(1), because she had allowed herself to become distracted by her phone while in control of a tram. It submitted that her conduct also contravened Rule 26(3), which prohibits operating a mobile device ‘while in control of a moving or stationary tram’. In addition, it said that Ms Thomas had breached Rule 26(3) by not having her phone ‘switched off and/or (in) silent mode.’

[44] Ms Thomas acknowledged that she was distracted while using her mobile phone, but contended that despite her ‘general acceptance’ that she should not have been using her phone, there was a technical question as to whether she was in fact ‘in control’ of the tram at the time.<sup>29</sup> She relies again on the contention that the tram was ‘parked’, for the purposes of the Road Safety Rules, to argue that she was not strictly speaking ‘in control’ of the tram and did not therefore contravene Rule 26(1). However in my view, just as Ms Thomas was ‘operating’ the tram at the relevant time, so too was she ‘in control’ of it. She was the tram driver sitting at the controls. She was stopped at a traffic light, at a tram stop, running a service along Smith Street. The keys were in the ignition, the power was on, and it was in operating mode.<sup>30</sup> I note that Rule 26(3) itself contemplates that a driver remains in control of a tram when it is stationary: use of phones and other devices is prohibited ‘while in control of a moving or stationary tram’.

[45] In a manner similar to her position in relation to Cardinal Rule 2, Ms Thomas submitted that even if she did breach Rule 26(1) or Rule 26(3), the Commission should take into account that Rule 26(4) required drivers to collect lost mobile phones and therefore, she says, breach Rule 26(1) in the ‘same circumstances’. But as explained above, the

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<sup>26</sup> Statement of Allan Jones at [6]

<sup>27</sup> Statement of Allan Jones at AJ1

<sup>28</sup> Statement of Allan Jones at [7]

<sup>29</sup> Applicant’s final written submissions dated 5 March 2018 at [57]

<sup>30</sup> PN396 - PN398

circumstances are not at all the same, and I reject this contention for the same reasons set out earlier.

[46] Ms Thomas then submitted that, if a breach of Rule 26(1) were established, it would be a minor breach as there was ‘no safety consideration’ when using mobile phones in the state the tram was in at the time.<sup>31</sup> I consider the gravity of her conduct further below.

[47] In relation to Rule 26(3), Ms Thomas acknowledged that her phone was on ‘vibrate’ when it should not have been, and that she had forgotten to turn it off. She said this was a breach of Yarra Tram Rules, but a minor one. Again, I consider the gravity of her conduct below. Ms Thomas also contended that, although she acknowledged that she was not supposed to have the phone on her person, this principle is rather a practice observed by drivers, not a matter specifically prohibited by the policy. I agree. This did not breach the Yarra Trams Rules.

[48] Accordingly, I find that Ms Thomas’ conduct breached Rule 26(1) and Rule 26(3) of the Yarra Trams Rules. In my opinion these breaches were serious matters that constituted a valid reason for dismissal.

### ***Rule 9***

[49] The investigation report concluded that Ms Thomas had breached Rule 9, which states that drivers ‘must not behave in any way likely to put public safety in danger or undermine public confidence.’ However this was not referred to in the termination letter. The company’s final written submissions focused on Ms Thomas’ breach of Cardinal Rule 2 and Rule 26 as the valid reasons for dismissal. Breach of Rule 9 was not pressed as a valid reason for dismissal. In the circumstances, it is not necessary for me to decide whether Ms Thomas breached Rule 9 of the Yarra Trams Rules such as to give rise to a valid reason for dismissal.

### ***Rule 87***

[50] The investigation report also concluded that Ms Thomas had breached Rule 87, which provides that all drivers must know and obey the Road Safety Rules, and that all employees must know and follow the Yarra Trams Rules. Again, the termination letter does not refer to Rule 87, and the company’s final written submissions do not rely on a breach of Rule 87 as a separate valid reason for Ms Thomas’ dismissal: it is referred to only as a source of a reasonable direction from the company to Ms Thomas and other drivers to comply with the Yarra Trams Rules.<sup>32</sup>

[51] Further, the company did not contend that it had a valid reason to dismiss Ms Thomas because she had breached the Road Safety Rules. As noted earlier, Ms Thomas contended that the prohibition on the use of mobile phones in rule 300(1C) of the Road Safety Rules did not apply to her at the time she used her phone, because it was ‘parked’. The company contended that the tram was in fact ‘stationary but not parked’ within the meaning of r.300(1D), and that the prohibition on the use of mobile phones continued to apply.<sup>33</sup> For the company however, these submissions were made in response to Ms Thomas’ contention that

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<sup>31</sup> Applicant’s final written submissions dated 5 March 2018 at [60]

<sup>32</sup> Respondent’s final written submissions dated 19 March 2018, at [10] and [11]

<sup>33</sup> Respondent’s final written submissions dated 19 March 2018, at [15] – [16]

the Yarra Tram Rules should be read through the prism of the Road Safety Rules; they were not pressed in support of an additional valid reason for dismissal. In these circumstances, and given my conclusions above that Ms Thomas' conduct contravened Cardinal Rule 2 and Rule 26, it is not necessary for me to determine whether she also contravened the Road Safety Act, and thereby rule 87(1).

[52] In conclusion, I have found that Ms Thomas breached Cardinal Rule 2, and Rules 26(1) and 26(3) of the Yarra Trams Rules. In my opinion her breach of Cardinal Rule 2 constituted a valid reason for termination in its own right. The rule enshrined a fundamental safety principle. Ms Thomas was aware of her obligation to observe the rule. Her contravention of this rule is a serious matter. For the same reason, I also consider that her breaches of Rule 26(1) and (3) together constituted a valid reason for dismissal.

***Notification of reasons for dismissal and opportunity to respond (s.387(b) and (c))***

[53] In considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether an employee has been notified of the reasons for dismissal and whether the person was afforded an opportunity to respond to any reason related to their conduct or performance.

[54] To tell against a conclusion that a dismissal was unfair, notification of the reason for dismissal should occur before the decision to dismiss is made,<sup>34</sup> and be made in explicit, plain and clear terms.<sup>35</sup> The question of whether an employee had an opportunity to respond to reasons relating to conduct or performance should be understood in a common sense way; the focus is whether the employee is treated fairly, rather than on any formality.<sup>36</sup>

[55] In her written submissions, Ms Thomas contended that Ms Doyle did not separately consider whether, if the conduct of Ms Thomas was substantiated, it constituted a breach of the rules. However the company clearly did consider whether her conduct had breached its rules, and concluded that it had. It was further submitted that the allegation that Ms Thomas had breached the Road Rules was not put to her. Had it been, Ms Thomas contends, there could have been a proper consideration of the significance of Rule 26(4). However, the company did not ultimately rely on any breach of the Road Safety Rules. As regards Rule 26(4), I do not consider it to have a bearing on Ms Thomas' contravention of Cardinal Rule 2 and Rule 26, for the reasons I have already mentioned. I note that the investigation report contains responses given by Ms Thomas to questions put to her by the company during her interview on 13 October 2017. Among these Ms Thomas is recorded as having said 'No electronic device is permitted in the cabin, however with lost property specifically mobile phones we can. It's different'.<sup>37</sup> Ms Thomas explained in her reply statement that she was referring here to the differences between the two rules, not the differences in the circumstances. But nevertheless, the lost property issue was clearly part of the discussions.

[56] Further, the letter dated 20 October 2017 advised Ms Thomas that she was suspended on full pay pending the investigation into her conduct. It refers specifically to a breach of

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<sup>34</sup> *Chubb Security Australia Pty Ltd v Thomas*, Print S2679 at [41]

<sup>35</sup> *Crozier v Palazzo Corporation Pty Ltd (2000)* 98 IR 137 at 151; *Previsic v Australian Quarantine Inspection Services* Print Q3730

<sup>36</sup> *RMIT v Asher (2010)* 194 IR 1 at 14-15

<sup>37</sup> Statement of Catherine Thomas, Annexure CT-5 at p.5

Cardinal Rule 2 and Rule 26. A note from the discussion that occurred during the termination meeting, as well as the record of the meeting, confirm that Ms Thomas knew that the reason for her dismissal was her use of her mobile phone, conduct that was prohibited by Cardinal Rule 2 and Rule 26.

[57] I am satisfied that Ms Thomas was notified of the valid reasons for dismissal that I have identified above. She understood the conduct that the company considered to be in breach of Cardinal Rule 2 and Rule 26. The investigation report noted the other rules that the company considered she had breached, as well as the Road Safety Rules. The termination letter did not refer to these. There was no need for it to do so.

[58] Ms Thomas contended in her written submissions that her responses to the allegations against her were not provided to the decision-maker.<sup>38</sup> She contended that the investigation report prepared by Ms Doyle did not set out her contentions concerning the ‘comparable’ scenario of lost mobile phones, or previous failures of the communications system (whereby urgent messages can be passed on to drivers). As I have explained, the scenario of lost phones is not comparable the Ms Thomas’ case. And the question of the communications system allegedly not working is referred to on page 5 of the investigation report.

[59] I am satisfied that Ms Thomas was notified of the reasons for her dismissal (specifically, she was notified of the two reasons that I have found to be valid reasons), and that she was afforded a reasonable opportunity to respond to the reasons for dismissal.

***Considerations in s.387(d)-(g)***

[60] There is no suggestion that the company refused, unreasonably or otherwise, to allow Ms Thomas to have a support person present to assist in discussions relating to the dismissal (s.387(d)). RTBU representatives attended the meetings.

[61] If a dismissal relates to unsatisfactory performance, s.387(e) requires the Commission to consider whether the person has been warned about it prior to dismissal. However the present matter concerns conduct rather than performance. It was not necessary for Ms Thomas to have been warned about use of her mobile phone.

[62] The Commission is required to consider the degree to which the size of the employer’s enterprise, and the degree to which the absence of dedicated human resources specialists or expertise in the enterprise, would be likely to impact on the procedures followed in effecting the dismissal (ss.387(f)(g)). No submissions were made on these matters. The company is a reasonably large organisation. It has dedicated human resources specialists. In my view, these considerations do not carry weight in the analysis of whether the dismissal was unfair.

***Any other matters the Commission considers relevant (s.387(h))***

[63] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission is to take into account any other matters that it considers relevant.

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<sup>38</sup> Applicant’s final written submissions dated 5 March 2018 at [75]

[64] It is well established that a dismissal may be harsh, unjust or unreasonable, despite the existence of a valid reason for dismissal. The Commission should consider all of the circumstances, and weigh the gravity of the misconduct and other circumstances telling against a dismissal being unfair with any mitigating circumstances and other relevant matters that might support the applicant's claim that the dismissal was harsh, unjust or unreasonable.<sup>39</sup>

### ***Gravity and proportionality***

[65] The gravity of an employee's conduct and the proportionality of the dismissal to that conduct are important matters to be taken into consideration.

[66] It was contended for Ms Thomas that, even if she had committed a breach of Cardinal Rule 2 or Rule 26, these were minor breaches, as the state of the tram was such that it was 'safe to use a mobile'. It was submitted that this had been acknowledged by the company's witnesses.<sup>40</sup> However, this misstates the evidence, and conflates usage with handling of a mobile phone. The company witnesses did not say that it was safe to 'use a mobile'. At issue here again is the company's rule that allows drivers to receive a lost mobile phone from a member of the public. Mr Jones agreed under cross-examination that when an E-class tram is at a tram stop, the driver's hands are off the controls, the doors are unlocked and the hazard lights are on, it is safe for the driver to receive a lost phone, and also to leave the controls and their seat.<sup>41</sup> Ms Grano said that a driver could accept a lost mobile phone and turn it off quickly if they could.<sup>42</sup> And Ms Doyle said that the driver could step out of the cabin, take the lost property and stow it in their bag.<sup>43</sup> However, the company considers these arrangements for receiving lost devices to be safe. There is no apparent reason why situational awareness cannot be maintained while undertaking these tasks. It is possible to be vigilant and at the same time to receive an object, such as a lost phone, from a member of the public. There was no evidence to show otherwise.

[67] I do not accept Ms Thomas' argument that, because under Rule 26(4) she would have been authorised to receive from a passenger a lost mobile phone, it was therefore safe for her to use her own phone. It was repeatedly contended for Ms Thomas that the circumstances in which she used her mobile phone give rise to 'no safety consideration.'<sup>44</sup> As I have explained above, there is a fundamental difference between using one's own mobile phone and accepting a lost phone from a member of the public in a manner authorised by the company's rules.

[68] Ms Thomas' contention that any breach of the rules was not serious was linked to a significant degree to her arguments in relation to Rule 26(4), which I have rejected. However it is important for me also to consider the seriousness of her conduct irrespective of any alleged nexus with Rule 26(4). To recap briefly, the tram was stopped. It was an E-class tram, which is hand-operated. Because Ms Thomas' hands were occupied with her mobile phone, she says that the tram could not move. Her hands were not free to operate the control which

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<sup>39</sup> *B v Australian Postal Corporation* (2013) 238 IR 1

<sup>40</sup> Applicant's final written submissions dated 5 March 2018 at [70]

<sup>41</sup> PN561 - PN562

<sup>42</sup> PN673

<sup>43</sup> PN777

<sup>44</sup> See Applicant's final written submissions dated 5 March 2018 at [60] and [63]

moves the tram. In these circumstances, the tram could not have moved and collided with another vehicle or a person.

[69] It is true that one could imagine a worse violation of Cardinal Rule 2 or Rule 26, such as using a mobile phone while a tram is moving. Indeed earlier in 2017 there was an instance of such conduct. Ms Grano's evidence was that in mid-2017, a tram had collided with a stationary tram, causing significant damage to both trams and resulting in a passenger and the driver being taken to hospital. The tram driver in question had been using a mobile phone at the time of the accident. The driver resigned. Ms Grano sites this as an example of the potential consequences of tram drivers being distracted by mobile phones.<sup>45</sup>

[70] The contravention of the Rules could have been worse. It did not result in damage or injury. But the conduct remains serious. For 15-20 seconds Ms Thomas was using her phone and was not alert to her surroundings. For example, she did not see the cyclist next to her cabin who was watching her use her mobile phone, and who then reported this to the company.<sup>46</sup> Mr Jones' evidence was that a tram driver needs to be focused on looking at the intersection and the road ahead. While Ms Thomas was checking her messages, her attention was not on the intersection. She was not maintaining situational awareness. Mr Jones identified potential hazards as including vehicles likely to accelerate in front of trams, cars and pedestrians crossing against the red light and pedestrians running towards the tram to board it.<sup>47</sup> In this regard, the driver has a bell and a horn to attract attention and alert people to danger. Ms Thomas acknowledged that, from the perspective of the front of an intersection, the driver is the person in the best position to see any potential hazards and anticipate an accident.<sup>48</sup> Mr Jones said that there was no safe level of mobile phone use, which is why it is prohibited.<sup>49</sup>

[71] Ms Thomas acknowledged that drivers of cars and trucks and others using the road do not always behave sensibly, and in particular do not always acknowledge the hazard warning lights or LED lights on a tram.<sup>50</sup> She agreed that at the tram stop on Alexandra Parade the most significant control measure for ensuring separation between vehicles and passengers was the tram itself and the driver's alertness.<sup>51</sup>

[72] In *BHP Coal Pty Ltd v Schmidt*, the Full Bench made the following observations about the approach to ensuring a 'fair go all round' in the context of a case involving safety issues:

*“The criteria for assessing fairness, although not exhaustive, are clearly intended by the legislature to guide the decision as to the overall finding of fairness of the dismissal and are essential to the notion of ensuring that there is ‘a fair go all round’: This is particularly important in relation to safety issues because the employer has obligations to ensure the safety of its employees, and commitment and adherence to*

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<sup>45</sup> Statement of Jewels Grano at [17]

<sup>46</sup> PN436- PN442

<sup>47</sup> Statement of Allan Jones at [13] – [14]

<sup>48</sup> PN427 - PN429

<sup>49</sup> Statement of Allan Jones at [16]

<sup>50</sup> PN172 – PN176

<sup>51</sup> PN345

*safety standards is an essential obligation of employees - especially in inherently dangerous workplaces. The notion of a fair go all round in relation to breaches of safety procedures needs to consider the employer's obligations and the need to enforce safety standards to ensure safe work practices are applied generally at the workplace.*<sup>52</sup>

[73] The company's number one priority is safety. It owes obligations to the public and its employees to maintain safe operating procedures. Trams share the roads with cars and pedestrians. It is reasonable to expect the operator of the tram network to seek to inculcate a rigorous safety culture with high standards. Cardinal Rule 2 and Rule 26 further that objective. They are in my view reasonable. Ms Thomas agreed that the company must be able to trust its drivers to do the right thing all of the time, not just most of the time.<sup>53</sup>

[74] Ms Thomas was aware of these rules and understood her obligation to comply with them.<sup>54</sup> In 2015, Ms Thomas underwent training on the Yarra Trams Rules. She completed a training quiz, answering 'true or false' to a series of propositions. One of these was 'I can use my personal mobile device as long as I am stationary at a red light'. She correctly answered 'false'.<sup>55</sup> She also underwent refresher training on the rules in April 2017.<sup>56</sup> Ms Thomas was aware of the company's intention to enforce the rules<sup>57</sup> and that breaching them could lead to her dismissal.<sup>58</sup>

[75] In my opinion, Ms Thomas' breach of Cardinal Rule 2 and Rule 26 were serious matters, not minor breaches. The consideration of whether dismissal was proportionate to the conduct should take into account all of the circumstances, including those that I address below; as will be seen, I do not consider that dismissal was disproportionate.

[76] I note the fact that the appeals chair of the Yarra Trams Disciplinary Appeals Board issued a non-binding decision and recommendation, in which he concluded that 'if some form of punishment is considered to be necessary ... it ought to be limited to a warning for breach of rule 26.' The chair concluded that Cardinal Rule 2 was not contravened, on the basis that Ms Thomas was entitled to an 'exemption' under rule 300. I disagree. In any event I would find a breach of Rule 26 on its own to be a serious matter.

### ***Differential treatment?***

[77] On 7 October 2017, two days after Ms Thomas used her mobile phone in her tram on Smith Street, another tram driver, Mr Deniz, was observed by Mr Jones using a mobile device at a tram stop situated on Spring Street, just before the intersection with Bourke Street. Ms Thomas contended that Mr Deniz was using his mobile phone, was accused of breaching Cardinal Rule 2 and Rule 26, but unlike her, was given a warning. She contends that the

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<sup>52</sup> *BHP Coal Pty Ltd v Schmidt* [2016] FWCFB 1540 at [8]

<sup>53</sup> PN188

<sup>54</sup> PN193 - PN199; PN211

<sup>55</sup> PN274; PN278-PN279; Exhibit R3, item 6

<sup>56</sup> PN235

<sup>57</sup> PN268, PN314

<sup>58</sup> PN456 - PN460; see also PN283-PN285

company's differential treatment of Mr Deniz in respect of similar conduct renders her dismissal unfair.

**[78]** It is well established that differential treatment of similar conduct by an employer may be a legitimate basis for finding that a dismissal is unfair.<sup>59</sup> However, this principle must be applied with caution to ensure that the comparable case or cases in which there was no termination are properly comparable.<sup>60</sup>

**[79]** The company contended that the circumstances of Mr Deniz's conduct were materially different from those of Ms Thomas. It says he was on a break at an on-road terminus. He nonetheless breached Rule 26(3) by using his mobile phone in the cabin of the tram, and for this he received a warning. The company contends that his conduct was of a much lesser order than that of Ms Thomas.

**[80]** The only person who observed Mr Deniz in the tram on Spring Street was Mr Jones, who is the director of lines for the company. In his statement, Mr Jones said that the tram stop on Spring Street at the corner of Bourke Street is the 'end of the line'. He also called it an 'on-road terminus.' It will be recalled that Rule 26(3) permits a driver to use a mobile phone 'at a terminus but not in the driver's cabin'.

**[81]** For Ms Thomas it was contended that the tram stop in question is not a terminus. She said that a terminus is 'the end of a railway line or other transport route, or station at such point.'<sup>61</sup> However, Mr Jones explained that although the stop was not an official terminus, he considered the term 'on-road terminus' to describe the actual location very well.<sup>62</sup> Ms Thomas contended that Mr Jones had acknowledged in cross-examination that Mr Deniz would have continued north along Spring Street after leaving the tram stop and did not change ends of the tram.<sup>63</sup> But the tram stop in question is on the City Circle, which runs in a loop.

**[82]** The employee record of interview that records this matter, and which indicates that Mr Deniz received a warning, states that he breached Cardinal Rule 2 and Rule 26, and refers to him having been 'in control' of the tram.<sup>64</sup> It is not clear to me how he was in control of a tram, or operating it, if he was on a break. It is not clear whether the tram was powered at the time. It may be that the conclusion that Mr Deniz breached Cardinal Rule 2 is subject to some doubt. In any event, in his oral evidence, Mr Jones said that there was no requirement for drivers to maintain situational awareness when they are on a break.<sup>65</sup> He said Mr Deniz's conduct contravened Rule 26(3), because he was using a mobile phone in the cabin.

**[83]** Ms Thomas contended that the evidence did not support a conclusion that Mr Deniz was on a break. I disagree. Mr Jones said in his statement that Mr Deniz was on a break. He

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<sup>59</sup> *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 at [32]-[33]

<sup>60</sup> *Darvell v Australian Postal Corporation* [2010] FWAFB 4082 at [21]-[24]

<sup>61</sup> Oxford Dictionary of English, Third Edition, 2010; see also Applicant's final written submissions dated 5 March 2018 at [86]

<sup>62</sup> PN607 – PN608

<sup>63</sup> PN579 – PN580

<sup>64</sup> Statement of John Anderson, Annexure JDA22

<sup>65</sup> PN616



repeated this in his oral evidence.<sup>66</sup> Mr Jones' evidence explains that the city circle tram that had been driven by Mr Deniz finishes on Spring Street near the corner of Bourke Street. He said that the tram sits on the on-road terminus and that the driver can have a break and is able to use the bathrooms at the adjacent Windsor Hotel.<sup>67</sup>

**[84]** Mr Deniz was not called to give evidence or summonsed to appear. Mr Jones has given sworn evidence about the circumstances surrounding Mr Deniz's use of a mobile phone. As the director of lines, he considered Mr Deniz to be at an on-road terminus and on a break. I accept this evidence. In my view, this conduct is clearly less serious than that of Ms Thomas.

#### ***Rule 26(4)***

**[85]** I have considered Ms Thomas' contention that in effect Rule 26(4) requires a contravention of r.300 of the Road Safety Rules. However, it is not necessary for me to decide this question. It was not part of Ms Thomas' case that she had accepted, or had been required to accept, a lost mobile phone on the day in question. She did not contend that, because of Rule 26(4), she was confused about what the company expected of her in relation to Cardinal Rule 2 or Rule 26(1) and (3).

**[86]** If Rule 26(4) does not comply with the Road Safety Rules, this will have its own consequences. An employee could not then fairly be dismissed or disciplined for complying with Rule 26(4). And the company would have to account for its position, and the actions of its employees, if the relevant authorities, such as the police, alleged any infringement of the Road Safety Rules. But Ms Thomas was not dismissed for accepting a lost mobile phone from a member of the public in accordance with the Yarra Trams Rules. She was dismissed for using her mobile phone to check her messages while she was operating and in control of a tram, in contravention of Cardinal Rule 2 and Rule 26(1) and (3).

#### ***Lack of insight***

**[87]** Ms Thomas expressed contrition for her conduct.<sup>68</sup> She did not dispute contravening the Yarra Trams Rules during the investigation.<sup>69</sup> However, the company contended that Ms Thomas has not embraced its safety standards and continues to display a lack of insight into the seriousness of her conduct. It submitted first that Ms Thomas had continued to approve submissions on her behalf that deny the application of the core rule against mobile phone use in the circumstances of the evening in question. As discussed above, Ms Thomas contested the company's position that she had contravened Cardinal Rule 2 and Rule 26. These contentions were no doubt developed by her counsel, acting in her best interests to prosecute arguments in furtherance of her unfair dismissal claim. That she made such contentions through her counsel does not mean that she denies having done anything wrong. However, it does appear to me that Ms Thomas maintains that she did not do anything particularly serious. Under cross-examination, the following exchange occurred:

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<sup>66</sup> PN615

<sup>67</sup> Statement of Allan Jones at [21]

<sup>68</sup> See for example the investigation report at page 5

<sup>69</sup> PN292

*“So you say that you accept that you've breached an aspect of Rule 26, being 26.3, that doesn't allow you to have the mobile phone on vibrate mode on your person? Correct.*

*Beyond that, you don't accept that you've breached any rule of the company in relation to your conduct on 5 October; is that right? I don't believe so because I believe that I did not breach safety rules because - and as the witness' own statement said, because the hazard lights were on and the LED was going, the drivers didn't - the cars did not drive past my tram at the time.*

*So some months now after your dismissal and after all that's been and gone, we're still in a position where you don't acknowledge beyond having the phone and vibrating on your person, you don't acknowledge that you've breached a cardinal safety rule? That's your evidence? Yes.”<sup>70</sup>*

**[88]** Ms Thomas' statement that she did not consider herself to have breached a cardinal safety rule was perhaps influenced by the technical argument advanced by her counsel on her behalf. But her explanation of why she had not breached a cardinal safety rule was that the hazard lights and the LED lights were on, and that cars did not drive past at the time. In my opinion, this is not compatible with a full acceptance of the prohibition on mobile phone use while operating a tram. It suggests that Ms Thomas believes that, depending on the circumstances, it is safe and acceptable for a driver to use their mobile phone. Furthermore, I note that Ms Thomas' final submissions press the position that her dismissal was disproportionate to 'any limited wrongdoing' and that any breach was 'minor'.<sup>71</sup>

**[89]** The company also submitted that Ms Thomas was reluctant in cross-examination to accept the importance of tram drivers anticipating risks and taking appropriate measures to address them, by maintaining situational awareness at all times. The following exchange occurred:

*“And, of course, no small part of trying to reduce the hazards and trying to ensure separation is the role of the tram driver and the tram driver's vigilance at the tram stop. Do you accept that? Yes and no.*

*You only partially accept that? Well, once the tram has stopped and the doors are open, there is a limit to what we can do to stop anything else happening thereafter.*

*Would you accept that the alertness of the tram driver can be an important safety barrier in that the tram driver can anticipate a hazardous situation arising? Yes, the tram driver can anticipate, but the tram driver cannot necessarily prevent.*

*No, can't necessarily prevent, but could prevent if vigilant. Do you accept that? Not always, no.”<sup>72</sup>*

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<sup>70</sup> PN232 – PN234

<sup>71</sup> Applicant's final written submission dated 5 March 2018 at [102]; Applicant's final written submissions in reply dated 26 March 2018 at [22]

<sup>72</sup> PN167 – PN170

[90] Ms Thomas was clearly making the point that a tram driver cannot necessarily prevent a hazardous situation arising. She accepted that a tram driver has a role to play in anticipating such situations, and using the gong or horn to alert people to danger.<sup>73</sup> She also accepted that the company would want to do all it could to avoid accidents, and that one of those measures would be relying on tram drivers to be vigilant when they are at a tram stop.<sup>74</sup> In my opinion Ms Thomas does appreciate the importance of driver vigilance, but does not fully accept the seriousness of her conduct in using her mobile phone in the circumstances she did on 5 October 2017.

### *The explanation for her conduct*

[91] I have taken into account Ms Thomas' explanation for her conduct. It is not in dispute that Ms Thomas' mobile phone use was personal and not work-related. Her father and father in law were ill. Where a driver needs to be contacted or contactable during a shift, the relevant procedure is for the driver to provide the family member or other person with the mobile phone number of an officer at their particular depot; messages can then be relayed to the operations centre and thereafter to the tram driver directly. According to Mr Jones, this is the procedure Ms Thomas should have followed, and was aware of.<sup>75</sup> Ms Thomas said that this system had not worked well in the past and she was concerned for her family members. However, I do not consider this to be an acceptable explanation or a mitigating consideration. Furthermore, Ms Thomas conceded that the phone had been in her shirt, on vibrate mode, and that the use of her mobile phone was deliberate and premeditated.<sup>76</sup> I do not identify any mitigating factors that go to the core issue of Ms Thomas having breached important safety standards, which was the reason for her dismissal.<sup>77</sup>

### *Personal circumstances*

[92] I have taken account of the fact that Ms Thomas was an employee with very lengthy service and a good employment record. I appreciate that Ms Thomas is 51 years old, has a mortgage and that the company is the only tram operator in Melbourne. She was a member of a defined benefits superannuation scheme to which she can no longer contribute. It may be difficult for Ms Thomas to find work. The financial and emotional impact of the company's decision to dismiss her has been significant.

[93] The Commission's role is not to consider what it would have done, had it been in the position of the employer. Rather, it must consider whether the dismissal was harsh, unjust or unreasonable, taking into account all of the circumstances. I have considerable sympathy for Ms Thomas. The decision to dismiss her was a heavy sanction; but it was not unjust or unfair, and in my view it was not harsh. Safety standards that apply to tram drivers protect the company's workers and customers, as well as the general public. Ms Thomas understood the rules and the consequences of breaching them.

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<sup>73</sup> PN179

<sup>74</sup> PN181 – PN182

<sup>75</sup> Statement of Allan Jones at [17]

<sup>76</sup> PN452 - PN453

<sup>77</sup> See *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249 at [28]

***Conclusion***

[94] I am satisfied that there was a valid reason for Ms Thomas' dismissal. The investigation into the incident and the manner in which the dismissal was effected were not attenuated with procedural or other unfairness. The dismissal was not disproportionate to the conduct. The personal circumstances weighing in favour of a conclusion that the dismissal was harsh are significant, but not sufficient to render it harsh, or unjust or unreasonable.

[95] Taking into account all of the circumstances and the considerations in s.387, I consider that the dismissal of Ms Thomas was not harsh, unjust or unreasonable and that accordingly her dismissal was not unfair.

[96] The application for an unfair dismissal remedy is dismissed.



DEPUTY PRESIDENT

*Appearances:*

Mark Diamond, RTBU, for Ms Thomas

Richard Dalton of counsel for KDR Victoria Pty Ltd

*Hearing details:*

2018

Melbourne

12 February

*Final written submissions:*

Applicant: 5 March 2018

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