DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Marc Waters
v
Mt Arthur Coal Pty Limited T/A Mt Arthur Coal Pty Limited
(U2018/805)

COMMISSIONER SAUNDERS NEWCASTLE, 5 JUNE 2018

Application for an unfair dismissal remedy – Facebook post – valid reason for dismissal – dismissal not harsh, unreasonable or unjust – application dismissed.

[1] In the period leading up to Christmas 2017, Mt Arthur Coal Pty Limited (***Mt Arthur***), part of the BHP Billiton group, made a number of different decisions as to whether it would operate its open cut coal mine in the Hunter Valley (***Mine***) on Christmas Day and Boxing Day in 2017. Mt Arthur ultimately decided to operate the Mine on those days.

[2] Mr Waters, a Production Operator at the Mine, who was not at work in the period from 22 to 24 December 2017 and was not required to work on 25 or 26 December 2017, was dismissed for posting on his Facebook page on 24 December 2017 the erroneous statement: "Xmas & Boxing days shifts are off for good" (***24 December Facebook Post***). Mr Waters alleges that his dismissal was harsh, unjust and unreasonable. Mt Arthur denies those allegations.

[3] Mr Waters gave evidence in support of his unfair dismissal application, as did Mr Jeffrey Drayton, Vice President of the CFMMEU, Mining and Energy Division, Northern Mining & NSW Energy District, Mr Wayne Morris, Production Operator employed by Mt Arthur, Mr Brett Rodgers, Production Operator employed by Mt Arthur, and Mr Anthony Watson, an employee of the CFMMEU and an Industry Safety and Health Representative appointed by the Minister under s.28 of the *Work Health and Safety (Mines and Petroleum Sites) Act* 2013.

[4] Ms Tracy Hennig was Mt Arthur's sole witness. She worked in the position of Production Overburden Manager at the Mine at the time of Mr Waters's dismissal and made the decision to terminate Mr Waters's employment.

Initial matters for consideration

[5] There is no dispute between the parties, and I find on the evidence, that the initial matters set out in s.396 of the *Fair Work Act* 2009 (Cth) (***Act***) are, insofar as they are relevant, satisfied in this case.

Was the dismissal harsh, unjust or unreasonable?

[6] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Waters's dismissal was harsh, unjust and/or unreasonable. I will address each of these matters in turn below.

Valid reason (s.387(a))

Legal principles

[7] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.[1] In order to be "valid", the reason for the dismissal should be "sound, defensible and well founded"[2] and should not be "capricious, fanciful, spiteful or prejudiced."[3]

[8] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[4] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[5]

[9] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[6] It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[7]

[10] The significance of breaches of employer policies in the context of a consideration of whether there was a valid reason for dismissal was discussed by the Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post*[8] as follows:

> "[35]... as indicated by Northrop J in *Selvachandran*, "valid reason" is assessed from the perspective of the *employer* and by reference to the acts or omissions that constitute the alleged misconduct, on which the employer relied, considered in isolation from the broader context in which they occurred. It is the reason of the employer, assessed from the perspective of the employer that must be a "valid reason" where "valid" has its ordinary meaning of "sound, defensible or well founded". As Northrop J noted, the requirement for a "valid reason" should not impose a severe barrier to the right of an employer to dismiss an employee.

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[1] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

[2] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

[3] Ibid

[4] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[5] Ibid

[6] *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24]

[7] Ibid

[8] [2013] FWCFB 6191

> [36] A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal."

Relevant context

[11] Mr Waters worked on B crew at the Mine. He was elected to the position of B crew site health and safety representative in late 2016 and remained in that position until his dismissal on 22 January 2018. At the time of Mr Waters's dismissal, there were about 200 workers on B crew at the Mine. Workers on B crew work a mixture of day shifts (6:30am until 7:10pm) and night shifts (6:30pm until 7:10am).

[12] I accept Ms Hennig's evidence that information is distributed and communicated at the Mine in the following "top down" manner:[9]

- decisions and information are usually communicated from the General Manager to the Managers who then distribute the communications to Superintendents. Once informed, Superintendents communicate information to Supervisors who then make announcements to employees and employees of labour hire companies that Mt Arthur uses to supply workers to the Mine (***Contract Workers***);

- information is distributed to health and safety representatives at the Mine in the same manner that information is provided to employees and Contract Workers. Although employees and Contract Workers at the Mine are not directed or requested to make enquiries to a health and safety representative in relation to operational concerns or queries at the Mine, I accept Mr Waters's evidence that, in reality, employees and Contract Workers regularly communicated with him and other health and safety representatives at the Mine in relation to health and safety issues, including where such issues related to operational decisions or activities at the Mine;[10]

- the Mine also has an established Site Leadership Team which is comprised of all Managers, the General Manager at the Mine and the Health Safety and Environment Superintendent (Mr Kris Sheehan). The Site Leadership Team is ultimately responsible for strategic planning for safety, cost and production at the Mine. Decisions are made and plans are set by the Site Leadership Team. In addition, the Site Leadership Team is also responsible for strategic decision making and planning in relation to the culture at the Mine;

- when information needs to be distributed across the Mine, for example in relation to shift scheduling, the most practicable manner in which to do this is to communicate the information to the Site Leadership Team who then disseminate the information in the "top down" manner described above;

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[9] Ex R1 at [24]-[35] & [43]

[10] Ex A8 at [4]-[6]

- members of the Site Leadership Team also have a responsibility to share information with the other members of that team. In particular, members of that team are responsible for sharing any information concerning conduct or communications that are in opposition to plans and decisions made by the Site Leadership Team or the principles by which the Mine operates;

- there are a number of methods by which Mt Arthur communicates information to employees and Contract Workers engaged at the Mine, including:
    - pre-start meetings run with crews at the commencement of each shift;
    - a regular newsletter issued by the General Manager (by email);
    - posts on noticeboards at the Mine; and
    - rolling information screens spread across the Mine (e.g. in pre-start areas)

- pre-start meetings occur at the commencement of every shift and there are two shifts each day (day shift and night shift). These meetings are usually run by Supervisors of each crew. Typically, every worker engaged at the Mine (other than staff, such as Managers) attends a pre-start before every shift worked. The purpose of a pre-start meeting is a full information debrief with employees and Contract Workers. For example, safety, operational and scheduling information is provided at the pre-start meetings. Generally, at a pre-start meeting, the person running the meeting will conclude the meeting by:
    - asking if anyone has any questions; and
    - informing employees and Contract Workers that any later queries should be directed to their Supervisor (or another Supervisor who is available); and

- in addition to the communication methods described above, it is understood at the Mine that any additional enquiries or concerns are to be raised with a Supervisor at the Mine (usually, the Supervisor responsible for the employee or Contract Worker's crew).

[13] I also accept Ms Hennig's evidence that if Mt Arthur was to ignore its structure and established communication practices and allow employees and Contract Workers to disseminate or publish operational information without approval to do so, there would be significant practical consequences for the business, including:

- a failure by Mt Arthur Coal to comply with the BHP Code of Business Conduct (***Code***) and BHP Charter Values (***Charter Values***);

- a loss of actual and perceived control at the Mine; and

- operational disruptions due to a real potential for miscommunication and misrepresentation.

[14] The Mt Arthur Coal Enterprise Agreement 2016 (***Enterprise Agreement***) applied to Mr Waters during the period leading up to his dismissal. Pursuant to clause 15.2 of the Enterprise Agreement, Mr Waters was not obliged to work on Christmas Day or Boxing Day.

[15] In October 2017, Mt Arthur called for expressions of interest from direct employees and Contract Workers to volunteer to work on Christmas Day and Boxing Day 2017. Employees and Contract Workers were directed to speak with their Supervisor in the first instance if they had "any questions regarding possible Christmas Day and Boxing Day working arrangements".[11]

[16] Mr Waters did not volunteer to work on Christmas Day or Boxing Day in 2017.

[17] The vast majority of people who volunteered to work at the Mine on Christmas Day and/or Boxing Day 2017 were Contract Workers.

[18] In December 2017, communications in relation to shift scheduling and logistics for Christmas Day and Boxing Day were primarily managed by Mt Arthur in two ways:

- in relation to employees and Contract Workers, by direct conversations between Supervisors and the workers at the Mine, pre-start meetings and the use of noticeboards at the Mine; and

- in relation to Contract Workers, Mr Chris Pecora and Mr Dan Scully, both Superintendents at the Mine, communicated with the employers of the Contract Workers who then disseminated the information to each worker by phone, email or text message. Mr Pecora was primarily responsible for liaising with the employers of Contract Workers so that information could be communicated to the Contract Workers.

[19] On about 15 December 2017, Mt Arthur made a decision that it would operate the Mine on Christmas Day and Boxing Day 2017. That decision was communicated to the employees and Contract Workers who had volunteered to work.

[20] On 20 and 21 December 2017, Mr Waters attended the Mine on day shift. On those days Mr Waters received about 12 enquiries from employees and Contract Workers in relation to whether he knew if the Christmas Day and Boxing Day shifts were going ahead.[12]

[21] On 21 December 2017, Mr Waters was informed by another site safety and health representative , Mr Owen John Carter (known at the Mine as "George"), that Mr Waters was required to participate in a risk assessment with Mt Arthur management to determine if the Mine could produce on Christmas Day and Boxing Day 2017. This was in response to safety concerns that had been raised.

[22] The risk assessment meeting was held on 21 December 2017 and was attended by a range of Mt Arthur employees, including site safety and health representatives such as Mr Waters. During that meeting Mr Waters became aware of a number of safety concerns that had been raised by employees in relation to the number of emergency rescue team (***ERT***) employees who had volunteered to work on Christmas Day and Boxing Day. Mr Waters was informed that only two members of the ERT had volunteered to work on Christmas Day and Boxing Day 2017. I accept Mr Waters's evidence that on a usual day at the Mine there are about twelve ERT working on a crew.

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[11] Ex R1 at pp.171 & 173

[12] Ex A7 at [22]

[23] At the risk assessment meeting on 21 December 2017, the view was expressed that it was not adequate to have only two members of the ERT working on Christmas Day and Boxing Day if the Mine was going to produce on those days. In response, Mt Arthur proposed utilising the Muswellbrook Fire Brigade and Ambulance Service in the first instance, and if they were busy attending to incidents, the Singleton Fire Brigade and Ambulance Service could be called on to deal with any emergencies on Christmas Day and/or Boxing Day. The Singleton Fire Brigade and Ambulance Service is more than a 40 minute drive away from the Mine. The Muswellbrook Fire Brigade and Ambulance Service is more than a 20 minute drive from the Mine. Issues were raised at the meeting about the appropriateness of using these services to deal with any emergencies at the Mine. At the end of the meeting, a number of issues had not been resolved and the risk assessment was not complete. Arrangements were made for the risk assessment to be completed on the following day, Friday, 22 December 2017.

[24] Mr Waters and Mr Morris were not rostered to work on 22 December 2017. As a result, they made enquiries as to whether their names would be recorded on the completed risk assessment. Mr Waters and Mr Morris were told that their names would be recorded on the completed risk assessment. Mr Waters and Mr Morris then asked to be provided with a final copy of the risk assessment once it was completed.

[25] On 21 December 2017, Mr Dan Scully, Superintendent employed by Mt Arthur at the Mine, sent an email to the other Superintendents and the Site Leadership Team of the Mine to provide communications to be issued to the workforce at the Mine. The purpose of the communication was to:

- confirm that operations were going to occur at the Mine on Christmas and Boxing Day 2017;
- confirm rostering for Christmas and Boxing Day 2017; and
- provide logistical information in relation to operations for those shifts.

[26] Mr Waters was not rostered to work, and did not work, in the period from 22 to 26 December 2017.

[27] On 22 December 2017, Mr Watson notified Mt Arthur that he would be attending the Mine to discuss concerns around the plans to operate the Mine on Christmas Day and Boxing Day 2017.

[28] On 22 December 2017, Mr Watson attended the Mine and requested additional information from the Acting General Manager of the Mine, Mr Cu Phan, in relation to the arrangements for ERT support planned at the Mine on Christmas Day and Boxing Day 2017. Mr Watson voiced concerns that sufficient ERT coverage would not be available on Christmas and Boxing Day 2017.

[29] Shortly before the meeting between Mr Watson and Mr Phan on 22 December 2017, two of the ERT workers, who had previously volunteered to provide ERT assistance on Christmas Day and Boxing Day 2017, retracted their expressions of interest to do so.

[30] By email sent at 3:18pm on 22 December 2017, Mr Phan informed the Site Leadership Team and the Superintendents at the Mine that:

- despite receiving approximately 70 expressions of interest to perform work at the Mine on Christmas Day and Boxing Day, due to late withdrawals and a shortage of a number of critical skill requirements (i.e. ERT support), Mt Arthur had decided not to proceed with Christmas and Boxing Day operations in 2017; and

- the decision not to operate should be passed on to teams and others affected.

[31] Mr Phan's email of 22 December 2017 and the associated message was communicated to employees and Contractor Workers by:

- being read at pre-start meetings;

- where necessary (due to absence from the Mine) personal telephone calls to affected workers; and

- being passed on to the employers of Contract Workers to be forwarded to the Contract Workers.

[32] At 4:04pm on 22 December 2017, Mr Phan emailed Mr Watson to advise him that the Mine would not be operating on Christmas or Boxing Day 2017, because sufficient ERT support could no longer be provided.

[33] At the time Mr Phan's email was sent on 22 December 2017 (and thereafter), Mt Arthur continued to undertake efforts to identify and attain sufficient ERT support to allow operation at the Mine on Christmas Day and Boxing Day 2017. Despite these ongoing efforts, the decision not to operate the Mine was communicated to the workforce due to concerns that sufficient notice would not be able be provided if the announcement was further delayed.

[34] After the announcement on 22 December 2017 to employees and Contract Workers, Mt Arthur was able to secure the services of Queensland-based professional emergency response workers to provide ERT support and who were willing to attend the Mine for work on Christmas and Boxing Day 2017. These ERT workers were usually engaged to work at a BHP Mitsubishi Alliance mine in Queensland.

[35] On 23 December 2017 at 12:05pm, Mr Phan further informed the Site Leadership Team and the Mine Superintendents by email that:

- efforts had been made to rectify the critical skill requirements to safely operate the Mine on Christmas Day and Boxing Day;

- Mt Arthur had been able to secure the required services to continue safe operations over the Christmas and Boxing Day period; and

- the decision to operate the Mine should be passed on to teams and others affected.

[36] Mr Phan's email and the associated message was communicated to employees and Contractor Workers:

- by being read at pre-start meetings;

- where necessary (due to absence from the Mine) personal telephone calls to affected workers; and

- being passed on to the employers of Contract Workers (by Mr Pecora) to be forwarded to the Contractor Workers.

[37] Employees who had not volunteered to work on Christmas Day or Boxing Day 2017 (such as Mr Waters) did not receive any specific communications as to whether these shifts were going ahead (unless they were present at a relevant pre-start meeting where the decision was announced). Mt Arthur took this approach because it determined that it was not necessary to inform those employees in relation to shifts that they would not be attending.

[38] Mr Rodgers worked day shift on 23 and 24 December 2017. On 23 December 2017, Mr Rodgers received about 30 to 40 enquiries from employees and Contract Workers about whether work was proceeding on Christmas Day and Boxing Day. In addition, a number of employees and Contract Workers raised concerns with Mr Rodgers on 23 and 24 December 2017 in relation to ERT workers from Queensland not being familiar with the Mine and whether they would have sufficient training, information and/or licences to conduct their role at the Mine.

[39] At 2:14pm on 23 December 2017, Mr Phan emailed Mr Watson to inform him that sufficient ERT coverage had been arranged for operations at the Mine on Christmas Day and Boxing Day.

[40] At 7:45pm on 23 December 2017, Mr Phan sent Mr Watson a copy of Mt Arthur's operating risk assessment as per his request.

[41] At 11:30am on 24 December 2017, Mr Watson emailed Mr Phan requesting additional information in relation to operations at the Mine on Christmas Day and Boxing Day 2017.

[42] At 3:08pm on 24 December 2017, Mr Watson sent an email to Mr Phan attaching a "Direction to suspend mining operations" (***Direction***). The Direction stated, amongst other things, that:

- Mr Watson was of the opinion that there had "been a failure at the mine to comply with the WHS laws or with any safety management system required by the regulations in respect of the coal mine, and because of that failure there is a danger to the health or safety of workers at the coal mine";

- "No production is to take place at the mine as requested by the mine from 7pm 24/12/2017 until 7pm 26/12/2017 with the use of an ERT team from interstate"; and

- "The reasons for issuing the direction are […] Risk assessment not acceptable due to lack of consultation with workforce, no workforce representatives on risk assessment. In relation to interstate ERT team, I believe they cannot be adequately trained in the Mine Safety Management Systems in such a short time. There is also no evidence of a Risk Assessment from Thiess."

[43] Mt Arthur received the Direction but made a decision not to comply with it. Mt Arthur maintains that it had a right not to comply with the Direction. Whether or not Mt Arthur had such a right is currently subject to an investigation by the Department of Planning and Environment – Resources Regulator and both parties in these proceedings agree that I do not need to consider or determine that issue in these proceedings.

[44] Mt Arthur did not issue a further communication to affected employees and/or Contract Workers after receiving the Direction and deciding not to comply with it, because confirmation had already been provided to affected employees and Contract Workers that shifts on Christmas Day and Boxing Day were going ahead prior to the Direction being issued and Mt Arthur's decision in that regard had not changed.

[45] On Christmas Day and Boxing Day 2017, operations occurred at the Mine in accordance with Mr Phan's email of 23 December 2017.

Mr Waters's communications re Christmas Day and Boxing Day 2017 operations

[46] Notwithstanding that Mr Waters was not rostered to work, and did not work, in the period from 22 to 26 December 2017, in the period from 22 to 24 December 2017, he engaged in extensive communications with a range of employees and Contract Workers in relation to whether the Mine was operating on Christmas Day and Boxing Day 2017. Those communications provide relevant context to the 24 December Facebook Post, for which Mr Waters was dismissed. I will therefore set out those communications in some detail.

[47] On 22, 23 and 24 December 2017, Mr Waters received approximately 10 enquiries each day from employees and Contract Workers regarding whether work was proceeding at the Mine on Christmas Day and Boxing Day.

[48] Mr Waters kept in contact with Mr Carter on 22, 23, and 24 December 2017 in relation to whether the Mine was operating on Christmas Day and Boxing Day. Mr Waters had a telephone discussion with Mr Carter on Friday, 22 December 2017 after Mr Carter had attended the meeting where the risk assessment was completed. Mr Carter informed Mr Waters that Mt Arthur was not going to operate the Mine on Christmas Day and Boxing Day. Shortly thereafter Mr Waters posted on his Facebook page the following statement (***22 December Facebook Post***):

> "All Xmas and boxing day shifts are off"

[49] On Saturday, 23 December 2017, Mr Waters spent the day Christmas shopping in Muswellbrook, and at the Scone town pool with his children. It was a busy day for Mr Waters; he was preparing for his family to arrive for Christmas. Mr Waters did not read any of his mobile telephone notifications that day until around 3.00pm when he returned home.

[50] When Mr Waters arrived home, he noticed that a Contract Worker, Mr Andy Craker, had made the following comment on Mr Waters's Facebook post:

> "My employer has texted me telling me the shifts are on."

[51] In response, at 5.07pm Mr Waters sent Mr Craker the following message by way of Facebook messenger:

> "Any (sic) can uforward me the text [Mr Waters's mobile number followed by the thumbs up emoji]".

[52] At 5.10pm on 23 December 2017, Mr Waters and Mr Craker then had a discussion by telephone. Mr Craker confirmed he had received notification from his employer advising that work at the Mine was proceeding on Christmas Day and Boxing Day.

[53] After his telephone discussion with Mr Craker, Mr Waters had a telephone conversation with Mr Carter at 5:31pm on 23 December 2017. Mr Waters informed Mr Carter that he had been advised by a contractor that work was proceeding on Christmas Day and Boxing Day. Mr Carter informed Mr Waters that Mt Arthur had made a decision to work the two days because they had made arrangements for an ERT to fly down from Queensland.

[54] After Mr Waters became aware that the shifts on Christmas Day and Boxing Day at the Mine were proceeding, he deleted his 22 December Facebook. The evidence does not reveal the precise time at which that Facebook post was deleted by Mr Waters.

[55] At 9.05pm on 23 December 2017, Mr Waters contacted Ms Naomi Chick, a B crew Site Health and Safety Representative employed by Mt Arthur, by telephone to advise her of the decision by Mt Arthur to work Christmas Day and Boxing Day.

[56] At about 4:30pm on 24 December 2017, Mr Waters was informed by Mr Evans that Mr Watson had issued Mt Arthur a Direction to suspend mining operations under s.30 of the *Work Health and Safety (Mines and Petroleum) Act 2013*.

[57] At about 4.30pm on 24 December 2017, Mr Waters made the 24 December Facebook Post. To reiterate, the 24 December Facebook Post consisted of the following statement:

> "Xmas & Boxing days shifts are off for good"

[58] At the time Mr Waters made the 24 December Facebook Post, he knew that:

- he was hearing about operational decisions at the Mine third hand and was not getting any direction communication from an authorised person at the Mine;[13]
- he was not being kept up to date with operational decisions being made at the Mine, in particular whether the Mine would operate on Christmas Day and/or Boxing Day 2017;[14]
- there was a period of time during which his 22 December Facebook Post had been on his Facebook page (prior to its deletion) and the information in that post was not accurate;[15] and

[13] PN305

[14] PN306-9; PN337-8

[15] PN310

- he did not have, and had not sought, authorisation from Mt Arthur to make his 24 December Facebook Post.[16]

[59] At 4.39 pm on 24 December 2017, Mr Waters received a Facebook message from Ms Bronwyn Schrag, a Contract Worker. Mr Waters cannot recall the exact time he saw and responded to Ms Schrag's message, but he recalls it was after he made the 24 December Facebook Post. Mr Waters and Ms Schrag engaged in the following Facebook communications after 5.00pm on 24 December 2017:

Ms Schrag:

> "Are the shifts REALLY off for good?
> What a fucking cock up!!!
> Lmao"

Mr Waters:

> "Yep tony Watson issued the company with a section 38
> ordering them to cease work
> That's come from jimmy Evans"

Ms Schrag:

> "hahahahah ... what a balls up!!
> They have stuffed sooooo many people around.. they are a bunch of incompetent idiots!!! [two emojis of smiley faces with tears]"

Mr Waters:

> "I agree"'

Ms Schrag:

> "Thankyou! Have an awesome Christmas!!!! See you boxing
> night!!!X"

Mr Waters:

> "Merry Christmas to you too"

[60] Sometime after 5.00pm, Mr Craker made a comment on the 24 December Facebook Post, although Mr Waters does not recall the specifics of Mr Craker's comment and Mr Waters no longer has a copy of it. Mr Waters does, however, recall that it prompted him to contact Mr Craker by Facebook messenger and engage in the following communications:

Mr Waters:

[16] PN314; PN336

"Yep tony Watson issued the company with a section 38 ordering them to cease work
Shifts canned"

Mr Craker:

"I thought this would happen .... i just called chandler after hours number and they have not heard a thing and instructed us to show up.i guess this is going to cost them 4hrs @triple time

Has anyone informed contractors?"

Mr Waters:

"Not sure'"

Mr Craker:

"So what would happen when connies show up to work?"

Mr Waters:

"If u turn up u get paid"

Mr Craker:

"Na not even worth the effort

Get on the piss tomorrow then lol"

Mr Waters:

"Do u have the number for lroc"

Mr Craker:

"Na never had to call them .... dogey should have it

The boys wernt very happy last night about the rescue squad getting fly in. Quite rightly so given the time they had for inductions. I totally get whats happening but very frustrating that it had to happen xmas eve via social media and that chandler has stuck its head in the sand [thumbs up emoji]

"Oh well onwards and upwards .... have a very merry xmas to
you and your family"

Mr Waters:

"I can't believe you guys haven't been informed"

Mr Craker:

> "Oh well its going to cost them .... if they don't pay up it becomes shane thompsons headache"

[61] Mr Waters gave the following evidence, which I accept, to clarify these communications with Mr Craker:

- in referring to a "section 38", Mr Waters intended to refer to the Direction to suspend mining operations issued under section 30 of the *Work Health and Safety (Mines and Petroleum) Act* 2013;

- in referring to "iroc", Mr Waters was referring to the Mine's dispatch office which is located in Brisbane and referred to at the Mine as "IROC";

- Mr Waters understood that in referring to "dogey'" Mr Craker was referring to Mr David Ellem, CFMMEU Bayswater Lodge Vice President, who is referred to at the Mine by his nickname, "Dodgy"; and

- in referring to "connies", Mr Waters understood that Mr Craker was referring to Contract Workers.

[62] I accept Mr Waters's evidence, which is supported by his mobile telephone records, that, commencing at 6:24 pm on 24 December 2017, Mr Waters attempted to contact the Mine on three occasions by telephone to ask whether the shifts would be going ahead on Christmas Day and Boxing Day. On each occasion, the call was diverted to a message service. At 6:26pm, Mr Waters called the Mine and left a message to the following effect:

> "I am Marc Waters. I am the HSR off B crew. Can you please confirm whether the shifts are going ahead."

[63] Mr Waters did not receive a response to his message.

[64] At 6.42 pm on 24 December 2017, Mr Waters sent Mr Anthony Bagnall, a Production Operator on B crew at the Mine, a Facebook message. Mr Waters does not recall exactly what prompted him to message Mr Bagnall, but he believes he was prompted to message Mr Bagnall either by a comment made by Mr Bagnall on the 24 December Facebook Post or contact by Mr Bagnall to Mr Waters by some other means. Mr Waters and Mr Bagnall exchanged the following messages on Facebook:

Mr Waters:

> "Tony Watson served the company with a section 38 today which orders them to cease work. All shifts are canned. Obviously bhp hasn't passed information on to the contract companies"

Mr Bagnall:

> "Jonny is at work now apparently going out to work"

Mr Waters:

> "Really?
> What's his mobile number?
> I'll give him a call and see what's going on if they r operating or not
> Mines [Mr Waters' mobile number]"

Mr Bagnall:

> "Im trying to call him now… [Mr Jonathan ("Johnny") Harris's mobile number] Probably swing him a message and ask him to call you"

[65] Mr Jonathan Harris is a Contract Worker on B crew.

[66] At 6.45 pm on 24 December 2017, Mr Waters called Mr Harris and asked him whether the shifts were going ahead or not. Mr Harris confirmed that the shifts were going ahead.

[67] At 6.48 pm and again at 6.53 pm on 24 December 2017, Mr Waters spoke with Mr Evans by telephone about the decision of Mt Arthur to ignore the Direction and instead to operate on Christmas Day and Boxing Day 2017. Mr Evans confirmed to Mr Waters that Mt Arthur was still going ahead with the shifts on those days.

[68] After speaking with Mr Evans on the evening of 24 December 2017, Mr Waters deleted his 24 December Facebook Post. The evidence does not disclose the precise time at which Mr Waters deleted his 24 December Facebook Post.

[69] At 7:25pm on 24 December 2017, Ms Schrag sent Mr Waters a screen shot of two text messages she had received from her employer, Stellar Recruitment, at 6:12 pm that evening, via Facebook message. The two text messages stated the following:

> "Christmas shifts are 100% on [smiley face emoji]"

> "Hi, just a quick message as there has been some apparent communication about the Christmas shifts circulating. The Christmas shifts you have been locked into previously are still going ahead as planned. Please disregard any other messages and this message if you are no longer locked into shifts. Thanks Lucinda [smiley face emoji]"

[70] Mr Waters and Ms Schrag then engaged in the following Facebook communications during the evening of 24 December 2017:

Mr Waters:

> "Rang jimmy. Company received a section 38 they r choosing to ignore it. It's in the hands of the regulators now. Shits about to go down .... big time!!"

Ms Schrag:

> "So what will happen to us if we work? [face emoji]"

Mr Waters:

> "Nothing
> You get paid
> You won't be in trouble it has to do with management"

Ms Schrag:

> "What rescue crew will be on shift??"

Mr Waters:

> "Don't know"

[71] At 7:29pm on 24 December 2017, Mr Waters received a telephone call from Mr Morris, who enquired as to whether the shifts were still going ahead. Mr Waters confirmed that they were, based on the information he had been told.

[72] At about 6:07pm on 24 December 2017, Ms Hennig became aware of the 24 December Facebook Post. Ms Hennig then informed Mr Dennis, a Superintendent at the Mine, that he would need to speak to Mr Pecora to contact the employers of the Contract Workers to "squash the rumour".

[73] At approximately 6:16pm on 24 December 2017, Ms Hennig forwarded a copy of the 24 December Post to the Site Leadership Team at the Mine and sent them the following message:

> "Hi Team, this was just on Facebook. CD [meaning Mr Dennis] is chasing Chris Pecora to let Stella and Chandler know that it's not true."

[74] Ms Hennig took this course of action so that the Site Leadership Team could communicate with employees and Contract Workers to put a stop to any incorrect rumours in relation to shifts on Christmas and Boxing Day. Ms Hennig expected this communication would occur in the usual "top down" manner of communication at the Mine.

[75] At approximately 7:01pm on 24 December 2017, Mr Dennis sent a screenshot of the 24 December Facebook Post to the Mine's Superintendents via text message. In addition, Mr Dennis informed the Superintendents engaged at the Mine as follows:

> "Have text Fang [meaning James Christiansen who is an Overburden Supervisor at the Mine who was rostered to work on Christmas Day] and he is aware that unless he hears from the leadership team we follow the plan that we have set out."

[76] Because the vast majority of workers rostered to work on Christmas Day and Boxing Day 2017 were Contract Workers, Mt Arthur took the view that communications with this group were the most important to maintaining the operations on those days.

[77] I accept Ms Hennig's evidence that, given Mt Arthur only became aware of the 24 December Facebook Post shortly before the commencement of night shift at 6:30pm on 24

December 2017, it was difficult for Mt Arthur to plan and implement a coordinated response to the 24 December Facebook Post.[17] Mt Arthur's Site Leadership Team, Superintendents and Supervisors undertook efforts to ensure operations occurred as planned on Christmas Day and Boxing Day 2017.[18]

[78] No evidence was adduced of any particular employee or Contract Worker being misled by, or failing to attend a shift on Christmas Day or Boxing Day as a result of, the 24 December Facebook Post. However, I am satisfied that the 24 December Facebook Post had the potential to cause confusion amongst employees and Contract Workers who had volunteered and been rostered to work on Christmas Day and/or Boxing Day. Further, the 24 December Facebook Post caused inconvenience to Mt Arthur, because it had to engage in further, last minute, communications with workers who had been rostered to work on Christmas Day and/or Boxing Day.[19] The first of those shifts was the Christmas Eve night shift commencing at 6:30pm on Christmas Eve and finishing at 7:10am on Christmas Day.

Alleged breaches of policy

[79] Ms Hennig made the decision to terminate Mr Waters's employment for the following reasons:

(a) Mr Waters's conduct in posting the 24 December Facebook Post breached the Charter Value of "Respect". The Charter value of Respect is said to mean "Embracing openness, trust, teamwork, diversity and relationships that are mutually beneficial". Ms Hennig considered that the 24 December Facebook Post did not embrace openness, trust or relationships that are mutually beneficial. Rather, Ms Hennig considered that the 24 December Facebook Post:

- was unclear and represented information Mr Waters believed to be true as if it was an official statement from Mt Arthur;
- was made without authorisation;
- was made without knowledge of the actual position;
- was, if wrong, capable of disrupting operations at the Mine;
- was, if wrong, capable of confusing and inconveniencing other employees and workers at the Mine; and
- potentially deprived other employees and workers of the opportunity to make a fully informed decision in relation to the opportunity to attend work over Christmas.

(b) Mr Waters's conduct in posting the 24 December Facebook Post breached the Charter Value of "Integrity". The Charter Value of Integrity is said to mean "Doing what is right and doing what we say we will do". Ms Hennig did not consider that Mr Waters

[17] Ex R1 at [98]

[18] Ibid

[19] Ex R1 at [91]-[98]

acted with integrity when publishing the 24 December Facebook Post. Rather, she considered that:

- Mr Waters misrepresented information he believed to be true as an absolute fact and an official or authorised statement from Mt Arthur;
- the 24 December Facebook Post was made without authorisation;
- the 24 December Facebook Post was made without knowledge of the actual position; and
- Mr Waters knew, or should have known, that he was acting beyond the scope of his authority.

(c) Mr Waters's conduct in posting the 24 December Facebook Post breached the Charter Value of "Accountability". The Charter Value of Accountability is said to mean "Defining and accepting responsibility and delivering on our commitments". Based on his conduct in the investigation and show cause process, Ms Hennig did not consider that Mr Waters accepted accountability for (or understood the impact of) the 24 December Facebook Post;

(d) Mr Waters's conduct in posting the 24 December Facebook Post breached his obligation under the Code to "Never … [d]istribute material that is likely to cause annoyance, inconvenience or needless anxiety to your colleagues". Ms Hennig considered that Mr Waters had breached this Code obligation on the basis that:

- the 24 December Facebook Post presented incorrect information in relation to the status of Christmas and Boxing Day Shifts 2017 as an absolute fact;
- Mr Waters had not been informed by Mt Arthur (or any authorised representative thereof) that shifts on Christmas and Boxing Day 2017 would not occur;
- the 24 December Facebook Post was made without authorisation;
- the 24 December Facebook Post was made without knowledge of the actual position;
- Mr Waters knew, or ought to have known, that the 24 December Facebook Post would or could be viewed by employees and Contract Workers engaged by Mt Arthur; and
- Mr Waters knew or should have known that the provision of incorrect, unverified or unauthorised information in relation to operations and shifts scheduled over the Christmas period was likely to cause annoyance, inconvenience or needless anxiety to Mr Waters's colleagues.

(e) Mr Waters's conduct in posting the 24 December Facebook Post breached his obligation under the Code to "never … [d]isclose information to the public, including

the media and members of the investment community, unless you are specifically authorised to do so". Ms Hennig considered that the 24 December Facebook Post disclosed information in relation to the Mine to the public without authorisation from Mt Arthur. Ms Hennig considered that Mr Waters knew, or should have known, that he did not have authorisation to make a post about operational matters on Facebook. Furthermore, Ms Hennig considered that Mr Waters knew, or should have known, that, without having authorisation to make the 24 December Facebook Post, he could not have been assured of its accuracy. Once posted on Facebook, Mr Waters could not control the distribution of the 24 December Facebook Post;

(f) Mr Waters's conduct in posting the 24 December Facebook Post breached his obligation under the Code to "never … [p]ost any commentary about BHP Billiton or photographs of work locations and processes/activities on social media sites …" Ms Hennig considered that:

- the 24 December Facebook Post amounted to the posting of commentary about the operations of the Mine on social media; and

- a person connected with Mr Waters on Facebook could reasonably be assumed to have understood that the 24 December Facebook Post referred to his employment at the Mine.

(g) in both his response and conduct during the investigation, Ms Hennig considered that Mr Waters failed to accept responsibility or accountability for the 24 December Facebook Post;

(h) Ms Hennig did not accept Mr Waters's justification that he published the 24 December Facebook Post in an effort to help his colleagues or Mt Arthur. Rather, she considered that Mr Waters knew, or ought to have known, that his conduct could, or was intended to, disrupt operations at the Mine on Christmas and Boxing Day 2017. Ms Hennig considered this to be the case because:

- at no time did Mr Waters make any effort to inform employees or Contract Workers that shifts were going to occur (even when he believed that to be the case) – instead only informing employees when he considered shifts to be cancelled;

- Mr Waters knew or should have known that he had not received information from an authorised source; and

- Mr Waters did not make any suggestion that employees or Contract Workers should contact an appropriate or authorised source of information, instead choosing to make a seemingly absolute statement to employees and Contract Workers on Facebook.

(i) on 21 December 2015, Mt Arthur issued a final warning to Mr Waters in relation to his participation in a refusal to perform work as directed in October 2015. Ms Hennig considered that the final warning issued to Mr Waters was relevant to an appropriate outcome because:

- it exhibited showed that he had previously engaged in misconduct and disruptive behaviour in circumstances where he did not agree with Mt Arthur's operational decisions; and

- in Ms Hennig's view, the 24 December Facebook Post constituted a further example of such behaviour by Mr Waters.

(j) the workforce community at the Mine is small and 'close knit'. Information and rumours spread quickly throughout the workforce and are subject to a "ripple effect" that can easily occur. Ms Hennig formed the view that the 24 December Facebook Post was reckless and sought, or had the potential, to compromise Mt Arthur's important efforts to operate the Mine on Christmas and Boxing Day 2017.

[80] Mt Arthur does not have a separate policy dealing with social media. The obligations imposed on Mt Arthur's employees in relation to social media are contained within the Code and, more broadly, the Charter Values. Employers are entitled to address issues in relation to social media in such a way. The important issue in the context of considering whether there is a valid reason for dismissal is whether the relevant employee was aware of, and had been trained in, the relevant policy.

[81] Mr Waters was aware of, and had been trained in, the Code and Charter Values prior to the events of December 2017 which led to his dismissal. Mr Waters ultimately accepted that he understood in December 2017 that his obligations under the Code extended to certain conduct outside work hours and without any use of work resources.[20] I am satisfied that Mr Waters's understanding of the Code in that regard is consistent with the proper construction of his obligations under the Code. The title of part five of the Code is "Using Company Resources". That is the part of the Code on which Mt Arthur relies in these proceedings. Although there is no question that Mr Waters did not use any "company resources" to make the 24 December Facebook Post, it is clear from the detailed information contained within part five of the Code that, in certain circumstances, the obligations contained within it extend beyond the use of "company resources". For example:

- the Code includes (at p.57) the following "expectations" of employees in relation to "communicating externally":

> "It is important that you feel equipped to speak positively about BHP Billiton when asked by family and friends, as well as your wider circle of contacts in both formal and informal settings. It is natural to express pride in BHP Billiton's heritage and its broader social contribution.
>
> However, in today's 24/7 networked world, care must be taken to ensure that you are not speaking on behalf of BHP Billiton unless authorised to do so by your Corporate Affairs representative or Group Investor Relations, in line with public disclosure guidance and our media standards…
>
> If you associate yourself with, or are likely to be associated with, BHP Billiton when you communicate externally, *Our Charter* and the Code apply, including provisions relating to harassment, privacy, our information technology, insider

[20] PN201-3

> trading, intellectual property and this section on communicating externally. Apply the same principles of media to social media, and only respond in behalf of BHP Billiton if you are authorised to do so."

- The Code states that employees should "never" engage in the following when "communicating externally":

> "- Disclose information to the public, including the media and members of the investment community, unless you are specifically authorised to do so…
>
> - Post commentary about BHP Billiton or photographs of work locations and processes/activities on social media sites. Commentary on BHP Billiton should only be published to social media by those authorised to do so…"

Out of hours conduct

[82] Before addressing each of the alleged breaches of policy in detail, I will consider Mr Waters's argument that Mt Arthur did not have a valid reason for his dismissal because the conduct on which it relied to terminate his employment occurred "out of hours".

[83] It is only in exceptional circumstances that an employer has a right to extend any supervision over the private activities of employees.[21]

[84] The out of hours conduct must have a relevant connection to the employment relationship in order to be a valid reason for dismissal.[22] In ascertaining whether a relevant connection is established, the following matters should be considered:[23]

(a) whether the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employee and employer;

(b) whether the conduct damages the employer's interests; or

(c) whether the conduct is incompatible with the employee's duty as an employee.

[85] There is no question that Mr Waters's conduct in using his own device, at home, to post his 24 December Facebook Post took place outside the workplace and was therefore "out of hours conduct".

[86] I am satisfied that Mr Waters's conduct in posting his 24 December Facebook Post had a relevant connection to the employment relationship for the following reasons:

(a) First, Mr Waters's purpose in making the 24 December Facebook Post was to communicate with his work group;[24]

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[21] *Appellant v Respondent* (1999) 89 IR 407 at 416

[22] *Rose v Telstra Corporation Ltd* (AIRC, Ross VP, 4 December 1998) Print Q9292, 11

[23] Ibid

[24] PN283

(b) Secondly, although Mr Waters did not mention Mt Arthur or BHP in his 24 December Facebook Post, he referred in his post to "shifts". That was plainly a reference to work shifts at the Mine and any employee or Contract Worker who read the 24 December Facebook Post would have so understood that to be the case;

(c) Thirdly, the 24 December Facebook Post not only referred to "shifts", but also related to current operational matters at the Mine. Mt Arthur was required to respond to the 24 December Facebook Post by engaging in further communications with workers who had volunteered and been rostered to work on Christmas Day and/or Boxing Day 2017;

(d) Fourthly, I am satisfied that the 24 December Facebook Post:

- viewed objectively, was likely to cause serious damage to the relationship between Mr Waters and Mt Arthur because the content of the post was incorrect and required Mt Arthur to take steps to attempt to prevent or minimise the confusion which would likely be caused by the post;

- would have been likely to, if not addressed in a timely manner, damage Mt Arthur's interests in operating the Mine on Christmas Day and Boxing Day 2017; and

- was incompatible with Mr Waters's duty as an employee, particularly his obligation to comply with his relevant obligations under the Code and to act in accordance with the Charter Values. The particulars of those obligations and the ways in which Mr Waters failed to comply with them are dealt with in detail elsewhere in this decision.

Findings re alleged breaches of policy

[87] I am satisfied that Mr Waters's conduct in posting the 24 December Facebook Post breached the Charter Value of "Respect". The 24 December Facebook Post did not embrace openness, trust or relationships that are mutually beneficial. Instead, the 24 December Facebook Post:

- was incorrect and represented information Mr Waters assumed to be true as if it was an official statement from Mt Arthur;

- was made without authorisation;

- was made without knowledge of the actual position;

- was capable of disrupting operations at the Mine; and

- was capable of confusing and inconveniencing other employees and Contract Workers at the Mine.

[88] I am satisfied that Mr Waters's conduct in posting the 24 December Facebook Post breached the Charter Value of "Integrity", particularly the obligation to do "what is right". Mr Waters acted contrary to that value by:

- misrepresenting incorrect information he believed to be true as if it was an absolute fact and an official or authorised statement from Mt Arthur;

- making the 24 December Facebook Post without authorisation; and

- making the 24 December Facebook Post without knowledge of the actual position, or having made enquiries with an authorised source as to the actual position.

[89] Mt Arthur alleges that Mr Waters's conduct in posting the 24 December Facebook Post breached the Charter Value of "Accountability". Mt Arthur also contends that, based on his conduct in the investigation and show cause process, Mr Waters did not accept accountability for (or understood the impact of) his 24 December Facebook Post. I do not accept these arguments. Mr Waters's conduct in making the 24 December Facebook Post did not constitute a failure by him to accept responsibility or deliver on commitments. He accepted responsibility by involving himself in, and making comments on social media about, operational matters at the Mine. Further, in his show cause response, Mr Waters accepted responsibility for his conduct in making the 24 December Facebook Post, albeit he did not believe that he had breached the Code or the Charter Values. In addition, Mr Waters apologised a number of times in his show cause response, including in the following terms:[25]

> "I apologise if, what I thought was the right thing, was not the most appropriate action under the circumstances that specifically arose over the Christmas Day & Boxing Day period."

[90] I am satisfied that Mr Waters's conduct in posting the 24 December Facebook Post breached his obligation under the Code to "Never … [d]istribute material that is likely to cause annoyance, inconvenience or needless anxiety to your colleagues". In particular:

- the 24 December Facebook Post presented incorrect information in relation to the status of Christmas and Boxing Day Shifts 2017 as if it was an absolute fact;

- Mr Waters had not been informed by Mt Arthur (or any of its authorised representatives) that shifts on Christmas and Boxing Day 2017 would not occur;

- the 24 December Facebook Post was made without authorisation;

- the 24 December Facebook Post was made without knowledge of the actual position;

- Mr Waters knew, or ought to have known, that the 24 December Facebook Post would or could be viewed by employees and Contract Workers engaged by Mt Arthur; and

[25] Ex A7 at p.154

- the provision of incorrect and unverified or unauthorised information in relation to operations and shifts scheduled over the Christmas period was likely to cause annoyance, inconvenience or needless anxiety to Mr Waters's colleagues, particularly those colleagues who had volunteered to work and had been rostered to work on Christmas Day and/or Boxing Day.

[91] I am satisfied that Mr Waters's conduct in making the 24 December Facebook Post breached his obligation under the Code to "never … [d]isclose information to the public, including the media and members of the investment community, unless you are specifically authorised to do so". The 24 December Facebook Post disclosed information in relation to operational matters concerning the Mine to the public without authorisation from Mt Arthur. Although Mr Waters had the highest level of privacy setting on his Facebook account, a number of Mr Waters's Facebook friends did not work at the Mine and once Mr Waters made his 24 December Facebook Post he could not control the distribution of that post to a broader audience than just his Facebook friends.

[92] I am satisfied that Mr Waters's conduct in posting the 24 December Facebook Post breached his obligation under the Code to "never … [p]ost any commentary about BHP Billiton or photographs of work locations and processes/activities on social media sites …" In particular, the 24 December Facebook Post was made on a social media site (Facebook) and was commentary about BHP Billiton. Even though the 24 December Facebook Post did not refer specifically to BHP Billiton, Mt Arthur or the Mine, it constituted commentary about BHP Billiton because it concerned operations and shifts at the Mine, which is a BHP asset.

[93] I am not satisfied on the evidence that the CFMMEU was conducting a campaign to discourage production from occurring on Christmas Day and Boxing Day 2017, or any similar campaign. The evidence adduced in support of such a finding was second or third hand hearsay and, in many instances, the source of the alleged representations was not identified.[26] I therefore give such evidence very limited weight. In addition, a number of witnesses, including Mr Drayton, the relevant CFMMEU official, denied the existence of such a campaign and those witnesses were not cross examined on that evidence.

[94] I accept that Mr Waters was eager to find out, in the period when he was not at work from 22 to 24 December 2017, whether the Mine would operate on Christmas Day and Boxing Day 2017. So much is clear from the extensive communications in which Mr Waters engaged with employees and Contract Workers in that period, together with the multiple telephone calls Mr Waters made to the Mine, albeit in quick succession in the period from about 6:24pm to 6:26pm on 24 December 2017. However, I reject the explanation given by Mr Waters that he made the 24 December Facebook Post to "stop confusion"[27] or to "reduce annoyance, inconvenience and needless anxiety of the work groups".[28] Had Mr Waters acted with such an intention, I am satisfied on the balance of probabilities that he would have made additional posts to his Facebook page after he became aware that his 22 December Facebook Post was no longer correct and his 24 December Facebook Post was incorrect. After Mr Waters became aware that his 22 December Facebook Post was no longer correct, he deleted it but he did not post an additional post on his Facebook page to the effect that Mt Arthur had made a decision to proceed with shifts on Christmas Day and Boxing Day. Similarly, after Mr

[26] See, for example, Ex R1 at [69]

[27] Ex A7 at [70]; Ex R1 at p.201

[28] Ex A7 at p.153

Waters became aware that his 24 December Facebook Post was incorrect, he deleted it but he did not post an additional post on his Facebook page to the effect that Mt Arthur was proceeding with shifts on Christmas Day and Boxing Day. Mr Waters was not able to provide any satisfactory explanation for his failure to make such additional posts to inform employees and Contract Workers of the true position. I do not accept Mr Waters's explanation that he was too busy to make such a post; he made time to engage in significant communications by telephone and Facebook with a whole range of employees and Contract Workers over the period from 22 to 24 December 2017. Importantly, this included the exchange of private Facebook messages with Ms Schrag (see paragraph [69] to [70]) after Mr Waters had deleted the 24 December Facebook Post. Instead of engaging in such private communications with individuals, Mr Waters could have in fact saved time by simply making an additional public Facebook post. Nor do I accept that Mr Waters simply did not think of making an additional Facebook post once he became aware of the true position, given he had originally used Facebook as a platform to convey that the Mine was not operating on Christmas Day and Boxing Day in his 22 December Facebook Post and 24 December Facebook Post and he communicated the true position about the Mine operating on Christmas Day and Boxing Day to individual employees and Contract Workers when he communicated with them in the period from 22 to 24 December 2017. If Mr Water's real objective was to stop confusion and reduce inconvenience etc, I am satisfied he would have posted additional clarifying posts on his Facebook page.

[95] It is apparent from the evidence that Mr Waters disagreed with Mt Arthur's decision to operate the Mine on Christmas Day and Boxing Day 2017. In particular:

(a) as a result of his attendance at the risk assessment meeting on 21 December 2017, Mr Waters became aware of safety concerns which had been raised by employees in relation to the low numbers of ERT workers who had volunteered to work on Christmas Day and Boxing Day;[29]

(b) Mr Waters was concerned that ERT workers from Queensland would not be sufficiently trained or inducted to undertake emergency response duties at the Mine on Christmas Day or Boxing Day;[30]

(c) Mr Waters agreed with the following comment made by Ms Schrag on 24 December 2017:

> "hahahahah ... what a balls up!!
> They have stuffed sooooo many people around… they are a bunch of incompetent idiots!!!"

(d) Mr Waters was aware from his 24 December 2017 communications with Mr Craker that "the boys wern't very happy last night about the rescue squad getting fly in. Quite rightly so given the time they had for inductions"; and

(e) Mr Waters held a personal concern about the decision by Mt Arthur not to comply with the Direction.[31] In fact, Mr Waters thought it was wrong of Mt Arthur to operate the Mine on Christmas Day and Boxing Day 2017.[32]

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[29] Ex A7 at [25]

[30] Ex A7 at pp.151-3

[96] I accept that Mr Waters honestly assumed that Mt Arthur would comply with the Direction after it was made, as Mt Arthur had in the past. However, in circumstances where Mr Waters had a limited understanding of the legislative power envoked by Mr Watson to make the Direction, including whether there were any grounds on which Mt Arthur might have a right not to follow it,[33] it is significant that Mr Waters took no steps to find out from an authorised source of information whether Mt Arthur would comply with the Direction. Mr Water accepts that he had the mobile telephone number of his Superintendent Production and could have contacted him or his Supervisor to find out the true position.[34] Instead of taking any such step, Mr Waters took to Facebook and posted an absolute statement that "Xmas & Boxing days shifts are off for good".

[97] I find on the balance of probabilities and having regard to the *Briginshaw* standard that Mr Waters knew, or ought to have known, that his conduct in making the 24 December Facebook Post, in the context of the earlier 22 December Facebook Post, could, or was intended to, disrupt operations at the Mine on Christmas Day and Boxing Day 2017. My reasons for making such a finding are the matters referred to in the previous three paragraphs, together with the fact that by the time he made the 24 December Facebook Post, Mr Waters knew that:

- he was hearing about operational decisions at the Mine third hand and was not getting any direction communication from an authorised person at the Mine;[35]

- he was not being kept up to date with operational decisions being made at the Mine, in particular whether the Mine would operate on Christmas Day and/or Boxing Day 2017;[36]

- there was a period of time during which his 22 December Facebook Post had been on his Facebook page (prior to its deletion) and the information in that post was not accurate;[37] and

- he did not have, and had not sought, authorisation from Mt Arthur to make his 24 December Facebook Post.[38]

[98] I accept that Mr Waters had his Facebook page on the highest privacy setting when he made the 22 December Facebook Post and the 24 December Facebook Post. However, I do not accept Mr Waters's evidence that, at the time he made those Facebook posts, only approximately nine of his 25 Facebook friends worked at the Mine as employees or Contract Workers. My reasons for rejecting that evidence, which impacts negatively of my assessment of Mr Waters's credibility as a witness, are as follows:

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[31] Ex A7 at p.151

[32] PN451-3

[33] PN334-5

[34] PN234-7; PN260; PN362; PN373

[35] PN305

[36] PN306-9; PN337-8

[37] PN310

[38] PN314; PN336

(a) First, Mr Waters gave evidence that there were about 200 workers in his work group (B crew) at the Mine;[39]

(b) Secondly, Mr Waters made the following statements in his show cause response:

- "In my capacity as Health & Safety Representative while I am on the mine site, I have access to a computer and can search and give people messages. However, while I am not at work, I cannot do so and I do not have all email addresses or mobile phone numbers for members of my work group, however a lot of them were friends of mine on Facebook" [emphasis added];

- "I posted my initial post on my Facebook page as that was the only way I had to communicate with members of my work group"; and

- "I posted the Facebook post for reasons of safety. It was the best way to communicate with members of my work group from home."

(c) Thirdly, during his interview on 29 December 2017 Mr Waters stated that he "believed that a [Facebook] post was the quickest and easiest way to communicate with the majority of the crew" [emphasis added]. Mr Waters's desire to communicate with a "majority" or "a lot" of his work crew of about 200 by using Facebook does not sit well with his evidence that he only had nine Facebook friends who worked at the Mine; and

(d) Fourthly, after Mr Waters was stood down during Mt Arthur's investigation he deleted from his Facebook list of friends every person with whom he worked at the Mine. Mr Waters contends that he undertook this action so a similar matter could not arise in the future.[40] I do not accept that explanation. Mr Waters could have avoided any similar matter arising in the future by simply not making comments on his Facebook page about work-related matters, or at the very least, operational matters at the Mine. Mr Waters knew he was being investigated for comments made on his Facebook page. He therefore knew, or ought to have known, that the number and identity of his Facebook friends with whom he worked at the Mine would be relevant to the investigation.

Mr Waters's role as a health and safety representative

[99] Mr Waters also submits that he was protected against dismissal by reason of the fact that he was dismissed because his conduct in making the 24 December Facebook Post involved the exercise of a power or performance of a function as a health and safety representative under the *Work Health and Safety Act* 2011 (NSW) (***WHS Act***).[41] It follows, so Mr Waters contends, that the reason relied on by Mt Arthur for his dismissal was not "valid".

[100] There is no dispute that Mr Waters was elected as a health and safety representative in late 2016, and he remained in that position at all times until his dismissal on 22 January 2018.

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[39] PN137-148

[40] PN391-7

[41] ss.104 and 106 of the WHS Act

[101] Section 68 of the WHS Act governs the powers and functions of a health and safety representative for a work group. Section 70 of the WHS Act sets out the general obligations of relevant employers in relation to health and safety representatives.

[102] Sections 68 and 70 of the WHS Act were introduced by the Work Health and Safety Bill 2011 (***Bill***). The Bill enacted the nationally agreed *Model Work Health and Safety Act* (***Model Act***) in NSW, as part of the national harmonisation of work health and safety legislation. The explanatory memorandum to the Model Act states, amongst other things, that s.68 (which is in identical terms to s.68 of the WHS Act) confers the necessary powers and functions on health and safety representatives to enable them to fulfil their representative role under the Model Act. It states that the primary function of health and safety representatives is to represent workers in their work group in relation to health and safety matters at work.[42]

[103] Section 68 falls under Part 5 of the WHS Act, entitled "consultation, representation and participation", Division 3 entitled "health and safety representatives" and Subdivision 5, entitled "powers and functions of health and safety representatives". Section 68 states:

> "(1) The powers and functions of a health and safety representative for a work group are:
>
> (a) to represent the workers in the work group in matters relating to work health and safety, and
>
> (b) to monitor the measures taken by the person conducting the relevant business or undertaking or that person's representative in compliance with this Act in relation to workers in the work group, and
>
> (c) to investigate complaints from members of the work group relating to work health and safety, and
>
> (d) to inquire into anything that appears to be a risk to the health or safety of workers in the work group, arising from the conduct of the business or undertaking.
>
> (2) In exercising a power or performing a function, the health and safety representative may:
>
> (a) inspect the workplace or any part of the workplace at which a worker in the work group works:
>
> (i) at any time after giving reasonable notice to the person conducting the business or undertaking at that workplace, and
>
> (ii) at any time, without notice, in the event of an incident, or any situation involving a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard, and

[42] See, too, s.50 of the WHS Act

(b) accompany an inspector during an inspection of the workplace or part of the workplace at which a worker in the work group works, and

(c) with the consent of a worker that the health and safety representative represents, be present at an interview concerning work health and safety between the worker and:

(i) an inspector, or

(ii) the person conducting the business or undertaking at that workplace or the person's representative, and

(d) with the consent of one or more workers that the health and safety representative represents, be present at an interview concerning work health and safety between a group of workers, which includes the workers who gave the consent, and:

(i) an inspector, or

(ii) the person conducting the business or undertaking at that workplace or the person's representative, and

(e) request the establishment of a health and safety committee, and

(f) receive information concerning the work health and safety of workers in the work group, and

(g) whenever necessary, request the assistance of any person.

Note : A health and safety representative also has a power under Division 6 of this Part to direct work to cease in certain circumstances and under Division 7 of this Part to issue provisional improvement notices.

(3) Despite subsection (2)(f), a health and safety representative is not entitled to have access to any personal or medical information concerning a worker without the worker's consent unless the information is in a form that:

(a) does not identify the worker, and

(b) could not reasonably be expected to lead to the identification of the worker.

(4) Nothing in this Act imposes or is taken to impose a duty on a health and safety representative in that capacity."

[104] Mr Waters contends that in making the 24 December Facebook Post he was exercising one or more of the following powers or functions under s.68 of the WHS Act:

- representing the workers in his work group in matters relating to work health and safety (s 68(1)(a));

- inquiring into anything that appears to be a risk to the health or safety of workers in the work group, arising from the conduct of the business or undertaking (s 68(1)(d)); and/or

- receiving information concerning the work health and safety of workers in the work group (s 68(2)(f)).

[105] As to Mr Waters's argument that he was "representing" workers under s.68(1)(a) of the WHS Act when he made the 24 December Facebook Post, there is nothing in s.68, or the WHS Act considered as a whole, which indicates a legislative intention for the legal meaning of the word "represent" to have anything other than its ordinary meaning. Accordingly, a health and safety representative is entitled to act or speak for persons (namely his or her work group) in his or her capacity as a health and safety representative. Such a construction of "represent" accords with the object and purpose of the WHS Act.[43] It follows that s.68(1)(a) authorises a health and safety representative to act or speak for his or her work group in matters relating to work health and safety. In addition, I accept that in order to exercise the power and function of representing workers in matters relating to work health and safety it may be necessary in some circumstances for the health and safety representative to obtain information from and provide information to workers. For example, in order to speak or act for workers when a risk assessment is being undertaken in relation to an operational matter which has health and safety implications, the health and safety representative may need to obtain information from and provide information to workers as part of that representative function.

[106] I do not accept Mr Waters's argument that he was "representing" workers under s.68(1)(a) of the WHS Act when he made the 24 December Facebook Post, for the following reasons:

(a) First, although Mr Waters participated on 21 December 2017 in the preparation of a risk assessment in relation to the decision of Mt Arthur to operate the Mine on Christmas Day and Boxing Day 2017 and that decision had health and safety implications, the risk assessment was not completed on 21 December 2017. Mr Waters was not at work from 22 to 24 December 2017, which is when the risk assessment was completed and the final decision was made by Mt Arthur to operate the Mine on Christmas Day and Boxing Day 2017. Mr Waters's role in the preparation of the risk assessment and Mt Arthur's obligation to consult with workers in relation to it concluded when Mr Waters finished his shift on 21 December 2017, even though he received enquiries and voluntarily engaged in communications with employees and Contract Workers in the period from 22 to 24 December 2017 (while he was not at work) about whether the Mine would operate on those days. In the course of those communications Mr Waters became aware that the Direction had been issued. Mr Waters then *assumed*, without seeking any information from Mt Arthur, that the Mine would not operate on Christmas Day and Boxing Day 2017. By taking to Facebook on 24 December 2017 and asserting that "Xmas & Boxing days shifts are off for good", Mr Waters was not acting or speaking for his work group in matters relating to work health and safety, nor was he communicating information to workers in his work group as part of his function in representing workers in connection with the preparation of a risk assessment or any other matter; and

[43] Section 3 of the WHS Act

(b) Secondly, there is nothing in s.68(1)(a) of the WHS Act which confers a power or function on a health and safety representative to communicate matters relating to work health and safety to his or her work group on social media. This is particularly so where the communication on social media is made to the public, that is, where recipients of the post include non-workers for the purposes of the WHS Act (as was the case here) and the person communicating the information on social media (Mr Waters, in this case) has no control over what those recipients will do with the post and with whom they may share it.

[107] I do not accept Mr Waters's contention that he was "inquiring into anything that appears to be a risk to the health or safety of workers in the work group, arising from the conduct of the business or undertaking" when he made the 24 December Facebook Post. The 24 December Facebook Post does not, on any construction of the word "inquire", fall within the scope of an "inquiry". The 24 December Facebook Post was a statement of Mr Waters's assumption, stated in unambiguous terms, about an operational decision made by Mt Arthur. Mr Waters did not ask any questions or seek any information in his 24 December Facebook Post.

[108] I do not accept Mr Waters's argument that he was "receiving information concerning the work health and safety of workers in the work group" when he made the 24 December Facebook Post. An entitlement to "receive information concerning the work health and safety of workers in a work group" does not confer on a health and safety representative a power or function to communicate matters, particularly not on social media where some of the recipients of the information are not part of the work group.

[109] Mr Waters also contends that Mt Arthur did not comply with its obligations under s.70 of the WHS Act, with the result, so the argument goes, that Mr Waters is excused from any breach by him of the Code or the Charter Values, or Mt Arthur's breach of duty somehow mitigates Mr Waters's conduct in breaching those policies or somehow invalidates the reason for Mr Waters's dismissal.

[110] Section 70 of the WHS Act falls under Part 5, Division 5, Subdivision 6 "Obligations of person conducting business or undertaking to health and safety representatives". Section 70 states:

"(1) The person conducting a business or undertaking must:

(a) consult, so far as is reasonably practicable, on work health and safety matters with any health and safety representative for a work group of workers carrying out work for the business or undertaking, and

(b) confer with a health and safety representative for a work group, whenever reasonably requested by the representative, for the purpose of ensuring the health and safety of the workers in the work group, and

(c) allow any health and safety representative for the work group to have access to information that the person has relating to:

(i) hazards (including associated risks) at the workplace affecting workers in the work group, and

(ii) the health and safety of the workers in the work group, and

(d) with the consent of a worker that the health and safety representative represents, allow the health and safety representative to be present at an interview concerning work health and safety between the worker and:

(i) an inspector, or

(ii) the person conducting the business or undertaking at that workplace or the person's representative, and

(e) with the consent of one or more workers that the health and safety representative represents, allow the health and safety representative to be present at an interview concerning work health and safety between a group of workers, which includes the workers who gave the consent, and:

(i) an inspector, or

(ii) the person conducting the business or undertaking at that workplace or the person's representative, and

(f) provide any resources, facilities and assistance to a health and safety representative for the work group that are reasonably necessary or prescribed by the regulations to enable the representative to exercise his or her powers or perform his or her functions under this Act, and

(g) allow a person assisting a health and safety representative for the work group to have access to the workplace if that is necessary to enable the assistance to be provided, and

(h) permit a health and safety representative for the work group to accompany an inspector during an inspection of any part of the workplace where a worker in the work group works, and

(i) provide any other assistance to the health and safety representative for the work group that may be required by the regulations.

Maximum penalty:

(a) in the case of an individual--$10,000, or

(b) in the case of a body corporate--$50,000."

[111] Mr Waters's argument in relation to s.70 of the WHS falls down at a number of levels:

(a) First, nothing in s.70 imposed on Mt Arthur an obligation to communicate or consult with Mr Waters in relation to the outcome of its decision as to whether to operate the Mine on Christmas Day and/or Boxing Day 2017, particularly in circumstances where Mr Waters was not at work or rostered to work at any time in the period from 22 to 25 December 2017; and

(b) Secondly, even if there were an obligation on Mt Arthur to communicate or consult with Mr Waters the outcome of its decision as to whether to operate the Mine on Christmas Day and/or Boxing Day 2017, any failure to comply with such an obligation did not confer on Mr Waters a right to make the 24 December Facebook Post, nor did it excuse his breach of the Charter Values and Code, mitigate the seriousness of his conduct, or invalidate the reason for his dismissal. That is particularly so in circumstances where Mr Waters knew at the time he made the 24 December Facebook Post that:

- under the Code he needed authorisation to make the 24 December Facebook Post on social media;
- he did not have or seek such authorisation;
- his post was about an operational matter;
- he was not being kept informed of decisions being made by Mt Arthur about that operational matter; and
- prior to making the post, he had not, nor sought to, confirm the accuracy of the post with an authorised person at Mt Arthur.

Facebook terms and conditions

[112] Mr Waters relies on protections he says were available to him under the Facebook Terms of Service. In particular, Mr Waters relies on statement 7 in the Facebook Terms of Service:

> "If you collect information from users, you will: obtained their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it."

[113] I accept Mr Waters's evidence that he has not been approached or asked for consent to have his Facebook information collected, nor has he read or been notified of a privacy policy post explaining what information has been collected from him or how it would be used.

[114] Mr Waters does not deny that he made the 24 December Facebook Post. A copy of the 24 December Facebook Post was provided to Ms Hennig by Mr Dennis. The evidence does not reveal how Mr Dennis came into possession of a copy of the 24 December Facebook Post.

[115] I reject Mr Waters's argument that Mt Arthur was not entitled to rely on his 24 December Facebook Post in making its decision to dismiss him, for the following reasons:

(a) First, there is no basis to find that the Facebook Terms of Service were binding on Mt Arthur. There is no evidence that Mt Arthur or any of its managerial employees were members of Facebook or had Facebook accounts in December 2017, nor is there any evidence to suggest that the Facebook Terms of Service were ever brought to the attention of Mt Arthur; and

(b) Secondly, Mt Arthur's actions in using the 24 December Facebook Post to conduct an investigation into Mr Waters' activities and then deciding to terminate his employment does not, in my view, constitute the collection of "information from users". Reading and relying on the content of a Facebook post by an employee such as Mr Waters is quite different from the collection of information from Facebook users.

Conclusion re valid reason

[116] For the reasons set out above, I am satisfied that Mr Waters engaged in substantial breaches of the Charter Values and Code by his conduct in posting the 24 December Facebook Post. As a result, Mt Arthur had a valid reason for his dismissal.

Was Mr Waters notified of the reasons for his dismissal and given an opportunity to respond (s.387(b)&(c))?

[117] It is necessary to consider and take into account whether Mr Waters was notified of any valid reason(s) for his dismissal and whether he was given an opportunity to respond to any reason(s) related to his capacity or conduct.

[118] In *Crozier v Palazzo Corporation Pty Ltd* a Full Bench of the Australian Industrial Relations Commission dealing with a similar provision of the *Workplace Relations Act* 1996 stated the following (at [73]):

> "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for the termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."

[119] The criterion concerning whether an employee was provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity should be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.[44]

[120] On 29 December 2017, Mr Waters attended a meeting at which he was asked questions in relation to his comments on social media concerning the decision to operate the Mine on Christmas Day and Boxing Day 2017. At that meeting Mr Waters was provided with a letter informing him that he was being stood down with pay, "pending an investigation into his alleged conduct on 24-29 December 2017".

[44] *RMIT v Asher* (2010) 194 IR 1 at 14-15

[121] On 9 January 2018, Mr Waters attended a meeting at which a letter dated 9 January 2018 from Mt Arthur was read to him. That letter set out the findings of Mt Arthur's investigation and invited Mr Waters to provide a written response and show cause why his employment should not be terminated. The findings and alleged breaches were described in the following way in that letter:

> "… The investigation is now complete. The investigation found that:
>
> - On 24 December 2017 you posted a statement on Facebook to the effect of "all Xmas & Boxing Day shifts are off".
>
> - Later the same day at approximately 5 PM you posted a further statement on Facebook to the effect of "Xmas & Boxing day shifts are off for good".
>
> - You did not have authorisation from the Company to make an official statement regarding the operations.
>
> - You are not an authorised spokesperson for the Company to comment in a public forum with regards to the operations.
>
> Marc, as a result of your actions, the information you posted to Facebook misled other workers, resulting in some employees not attending work, which caused financial disadvantage to them and impact to the safety and productivity of the operation…
>
> I have found that your actions constitute misconduct and also in breach of Company policies and procedures, including:
>
> - BHP Charter Values – Integrity and Respect
>
> - BHP Code of Business Conduct – Never distribute material that is likely to cause annoyance, inconvenience or needless anxiety to your colleagues and never Post commentary about BHP Billiton on social media sites. Commentary should only be published to social media by those authorised to do so…"

[122] On 12 January 2018, Mr Waters responded to the show cause request by way of correspondence to Mt Arthur.

[123] On 22 January 2018, Mr Waters attended a further meeting with Ms Hennig and a Superintendent from the Mine. At that meeting Ms Hennig informed Mr Waters that his employment had been terminated. Ms Hennig also provided Mr Waters with a letter of termination dated 22 January 2018. The letter of termination set out the reasons for termination as follows:

> "… As outlined in the letter [dated 9 January 2018], your actions were found to amount to misconduct and in breach of Company policies and procedures, including:
>
> - BHP Charter Values – Integrity and Respect
>
> - BHP Code of Business Conduct – Never distribute material that is likely to cause annoyance, inconvenience or needless anxiety to your colleagues and

> never Post commentary about BHP Billiton on social media sites. Commentary should only be published to social media by those authorised to do so.
>
> Marc, in relation to the findings of the investigation regarding the Facebook post, this was a serious matter as it created unnecessary disruption to the operation, annoyance and anxiety on your colleagues. I consider that your conduct and behaviour is a serious breach of our Charter Values and Code of Business Conduct. I am further concerned that your written response did not show insight into your actions, including the impact of your actions on your co-workers, and did not demonstrate any remorse or provide any assurance that you would not engage in similar behaviour in the future…
>
> In the circumstances, I have decided to terminate your employment with effect from today…"

[124] Mr Waters contends that his alleged breach of the Charter Value of Accountability was not communicated to him for his response prior to the termination of his employment. I agree. There is no reference to the Charter Value of Accountability, whether in express terms or any other way, in the findings and outcome of investigation letter dated 9 January 2018. The termination letter dated 22 January 2018 does not expressly refer to the Charter Value of Accountability, but it does refer to concerns in relation to Mr Waters's lack of insight and his failure to demonstrate remorse or provide any assurance that he would not engage in similar behaviour in the future. I accept those concerns fall with the concept of "Accountability" in the Charter Values, but they were not communicated to Mr Waters prior to the decision to terminate his employment. Similarly, the allegation that Mr Waters breached the Charter Value of Accountability by making the 24 December Facebook Post was not put to him prior to his dismissal. Notwithstanding these denials of procedural fairness, I have earlier found that Mr Waters did not breach the Charter Value of Accountability. Accordingly, Mt Arthur did not have a valid reason to dismiss Mr Waters for breach of the Charter Value of Accountability. It follows that the denials of procedural fairness concerning the Charter Value of Accountability did not give rise to any substantive unfairness to Mr Waters.

[125] For the reasons set out above, I am satisfied that Mr Waters was notified of what I have determined to be a valid reason for his dismissal and he was given an opportunity to respond to that reason prior to his dismissal.

Was there an unreasonable refusal to allow Mr Waters to have a support person present (s.387(d))?

[126] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, it is relevant to consider and take into account whether the employer unreasonably refused the support person being present.

[127] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an

> employee the opportunity to have a support person present when they are considering dismissing them."[45]

[128] Mr Waters took a support person with him to his meeting with Mt Arthur on 29 December 2017, 9 January 2018, and 22 January 2018. Accordingly, I am satisfied that there was no unreasonable refusal by Mt Arthur to allow Mr Waters to have a support person present to assist at any discussions relating to his dismissal.

Warnings about unsatisfactory performance (s.387(e))

[129] Where an employee protected from unfair dismissal is dismissed for the reason of unsatisfactory performance, the employer should warn the employee about the unsatisfactory performance before the dismissal.

[130] In this case, the reasons for dismissal related to Mr Waters's conduct, rather than his performance, so this consideration is not relevant.

Impact of size of Mt Arthur on procedures followed in effecting the dismissal (s.387(f))

[131] Mt Arthur is a large business enterprise, so that I do not consider that its size would be likely to impact on the procedures followed in effecting Mr Waters's dismissal.

Absence of dedicated human resource management specialists or expertise (s.387(g))

[132] Mt Arthur has dedicated human resource management specialists and expertise, so this consideration is not relevant.

Other relevant matters (s.387(h))

[133] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[134] The basis upon which a dismissal may be found to be harsh, unjust or unreasonable, notwithstanding a finding that there was a valid reason for dismissal based upon conduct in breach of employer policy was explained by the Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post*[46] in the following terms:

> "[41] Nevertheless, it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" for the dismissal": *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *J Boag & Son Brewing Pty Ltd v John Button* [2010] FWAFB 4022; *Windsor Smith v Liu* [1998] Print Q3462; *Caspanello v Telstra Corporation Limited* [2002] AIRC 1171; *King v Freshmore (Vic) Pty Ltd* [2000] Print S4213; *Dahlstrom v Wagstaff Cranbourne Pty Ltd* [2000] Print T1001; *Erskine v Chalmers Industries Pty Ltd* [2001] PR902746 citing *Allied Express Transport Pty Ltd* (1998) 81 IR 410 at 413; *Qantas Airways Limited v Cornwall* (1998) 82 IR 102 at 109; *ALH Group Pty Ltd T/A the Royal Exchange Hotel v Mulhall* [2002]

[45] Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1542].
[46] [2013] FWCFB 6191

PR919205. That principle reflects the approach of the High Court in *Victoria v Commonwealth* and is a consequence of the reality that in any given case there may be "relevant matters" that *do not* bear upon whether there was a "valid reason" for the dismissal but *do* bear upon whether the dismissal was "harsh, unjust or unreasonable".

[42] Broadly speaking, circumstances bearing upon whether a dismissal for misconduct is harsh, unjust or unreasonable fall into three broad categories:

> (1) The acts or omissions that constitute the alleged misconduct on which the employer relied (together with the employee's disciplinary history and any warnings, if relied upon by the employer at the time of dismissal) but otherwise considered in isolation from the broader context in which those acts or omissions occurred.
>
> (2) The broader context in the workplace in which those acts or omissions occurred. [This may include such matters as a history of toleration or condonation of the misconduct by the employer or inconsistent treatment of other employees guilty of the same misconduct.]
>
> (3) The personal or private circumstances of the employee that bear upon the substantive fairness of the dismissal. [This includes, matters such as length of service, the absence of any disciplinary history and the harshness of the consequences of dismissal for the employee and his or her dependents.]

[43] The determination of whether there was a "valid reason" proceeds by reference to the matters in category (1) and occurs before there is a consideration of what Northrop J described as "substantive fairness" from the perspective of the employee. Matters in categories (2) and (3) are then properly brought to account in the overall consideration of the whether the dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason".

...

[47] In *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 41 IR 452 Sheppard and Heerey JJ observed (at p 460):

> "Employers can promulgate polices and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable."

[48] Thus, a finding that an employee has failed to comply with policies and procedures does not mean that a dismissal is not harsh, unjust or unreasonable. The Commission has consistently applied the proposition that instant dismissal of an employee for non-compliance with his or her employer's policies may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable: *Kangan Batman TAFE v Hart* [2005] PR958003, Ross VP, Kaufman SDP and Foggo C at para [51]; *Fearnley v Tenix Defence Systems Pty Ltd* [2000] Print S6238, Ross VP, Polites SDP and Smith C (Fearnley) at [61]); *Atfield v Jupiters Ltd* (2003) 124 IR 217 (Jupiters) at [12]-[13]."

Length and quality of Mr Waters's employment with Mt Arthur

[135] Mr Waters was employed by Mt Arthur for just over six years prior to his dismissal. He was issued with a stage 3 final written warning on 21 December 2015 for breaching the Charter Value of Integrity. In particular, Mt Arthur found that during his shifts on 6 and 9 October 2015 Mr Waters deliberately drove the trucks he operated during those shifts at a slow speed because Mt Arthur would "not agree to the workforces' claims in the ongoing enterprise agreement negotiations". Mr Waters challenged that warning in s.739 proceedings before the Commission. In those proceedings I reached the following conclusion:[47]

> "Mr Waters was motivated to drive slowly on 6 and 9 October 2015 because Mt Arthur would not agree to the workforces' claims in the ongoing enterprise agreement negotiations. His conduct in that regard constituted unlawful industrial action. There was a proper basis for the stage 3 – final warning issued by Mt Arthur to Mr Waters on 21 December 2015."

[136] Mr Waters provided Mt Arthur with personal references from his Supervisor at the Mine, Mr Jason Owers, and Mr Gary Brown, Area Manager for Stellar Recruitment, as part of his show cause response. Those references are very complimentary of Mr Waters and his performance and conduct as an employee at the Mine. In particular, Mr Owers expressed the opinion in his reference that "Marc in the last 12 months has turned his attitude towards his roles in working with MAC [Mt Arthur] around and has worked very well with myself, other OCEs and the crew through engagement being proactive through consultation and asking for help or finding information through other avenues. He is very safety focused and ensuring that all operators especially trainees who are new to our industry understand our key objectives with safety and production targets."

[137] I find that Mr Waters was employed by Mt Arthur for a reasonable period of time. The fact that he had received a prior final written warning for breach of the Charter Value of Integrity, albeit in different circumstances to the conduct which led to his dismissal, is significant and weighs against Mr Waters's argument that his dismissal was harsh. However, the weight to be given to the prior final written warning is somewhat lessened by the turnaround in Mr Waters's attitude at work in the 12 months prior to his dismissal.

Mr Waters's remorse

[138] I accept that Mr Waters has shown genuine remorse for his conduct in making the 24 December Facebook Post. Mr Waters communicated his remorse to Mt Arthur as part of his response to the show cause request. I have taken into account Mr Waters's genuine remorse in weighing up whether his dismissal was, in all the circumstances, harsh, unjust or unreasonable.

Gravity of Mr Waters's conduct

[139] As I have already found above, Mr Waters engaged in substantial breaches of the Code and Charter Values by making his 24 December Facebook Post. Although Mt Arthur did not suffer any actual loss or damage as a consequence of Mr Waters's conduct and there is no evidence of any employees or Contract Workers actually being misled by his conduct, I am

[47] *CFMEU v Mt Arthur Coal Pty Ltd* [2016] FWC 2959 at [77]

satisfied that Mr Waters's conduct was serious, for the reasons set out above in relation to there being a valid reason for the dismissal, including my findings that (a) Mr Waters did not make the 24 December Facebook post to "stop confusion" or to "reduce annoyance, inconvenience and needless anxiety of the work groups", and (b) Mr Waters knew, or ought to have known, that his conduct in making the 24 December Facebook Post, in the context of the earlier 22 December Facebook Post, could, or was intended to, disrupt operations at the Mine on Christmas Day and Boxing Day 2017. I am also satisfied that Mr Waters's dismissal was not disproportionate to the gravity of his misconduct in breaching the Code and Charter Values.

Economic consequences

[140] I am satisfied on the basis of the detailed evidence adduced by Mr Waters that his dismissal by Mt Arthur has had, and will continue to have, significant economic consequences for him and his family, including his children (who are financially dependent on him) and his father (who he supports financially). However, having regard to all the circumstances of this case including the gravity of Mr Waters's conduct, my value judgment is that the dismissal was not harsh in its consequences for the personal and economic situation of Mr Waters, in the sense discussed in the judgment of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd.*[48]

Mitigating factors

[141] Mr Waters contends that there are four mitigating factors in relation to his conduct:

- the numerous different decisions made by Mt Arthur in the week leading up to Christmas Day 2017 in relation to whether or not the Mine would operate on Christmas Day and Boxing Day;

- the lack of communication between Mt Arthur and (i) its employees and (ii) the Contract Workers and their employers in relation to whether or not the Mine would operate on Christmas Day and Boxing Day;

- the short notifications provided by Mt Arthur to (i) its employees and (ii) the Contract Workers and their employers in relation to whether or not the Mine would operate on Christmas Day and Boxing Day; and

- Mr Waters's conduct in advising individual employees and Contract Workers in communications with them that the shifts were proceeding once Mr Waters had been informed that was the case.

[142] I accept that each of these mitigating factors weighs to some extent in support of Mr Waters's contention that his dismissal was unfair.

Other unfair dismissal cases concerning posts by employees on Facebook

[143] Detailed submissions were made on behalf of Mr Waters in relation to a number of unfair dismissal cases in which it was held that the dismissal of the employee concerned for

[48] (1995) 185 CLR 410 at 465

posting information on Facebook was harsh, unjust and/or unreasonable. I have read and had regard to each of those cases in reaching my decision in this matter.

[144] I make the following points in relation to the cases relied on by Mr Waters concerning dismissals involving information posted on Facebook:

- each case must be considered on its own merits having regard to all the relevant circumstances;

- one distinguishing feature between this case and many of the other cases concerning posts on Facebook is that the information included by Mr Waters in the 24 December Facebook Post had the potential to affect his employer's operation. Unlike a number of other cases, Mr Waters was not simply using Facebook as a means of "letting off steam" or expressing his personal views about his manager, employer, or clients/customers of his employer; and

- Mr Waters was already on a final written warning for engaging in serious conduct in breach of the Charter Value of Integrity, namely deliberately driving trucks slowly as a means of attempting to apply industrial pressure on Mt Arthur. He was therefore on notice of his requirement to comply with Mt Arthur's Charter Values and other policies. It is significant that Mr Waters again breached the Charter Values by making the 24 December Facebook Post, even though circumstances giving rise to the breach in 2017 were different from those in 2015 and Mr Waters had turned around his attitude at work in the 12 months prior to his dismissal.

Allegations of inconsistent disciplinary action

[145] Mr Waters asserts that he was unfairly afforded inconsistent treatment by Mt Arthur in relation to his dismissal. He points to other employees who were not dismissed as result of (i) posting information concerning their employment with Mt Arthur on Facebook or (ii) informing employees and Contract Workers on the two-way radio that Mt Arthur had been served with a notice to cease operations on Christmas Day and Boxing Day.

[146] In *Darvell v Australian Postal Corporation*,[49] the Full Bench made the following comments in relation to the question of differential treatment between employees (references omitted):[50]

> "[21] The issue of differential treatment of employees in respect of termination of employment was considered by Vice President Lawler in *Sexton v Pacific National (ACT) Pty Ltd*. In *Sexton's* case, his Honour said:
>
> > "[33] It is settled that the differential treatment of comparable cases can be a relevant matter under s.170CG(3)(e) to consider in determining whether a termination has been harsh, unjust or unreasonable …
> >
> > [36] In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a

[49] [2010] FWAFB 4082

[50] Ibid at [21]-[24]

> finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a 'fair go all round' within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing 'apples with apples'. There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made."

[22] Section 170CG(3)(e) of the *Workplace Relations Act 1996* (Cth) was relevantly similar to s.387(h) of the FW Act.

[23] Similarly, in *Daly v Bendigo Health Care Group*, Senior Deputy President Kaufman said:

> "[62] I am troubled by the apparent disparity in the treatment of Mrs Daly and the other nurses concerned. However, on balance I have concluded that this factor does not render the otherwise justified termination of her employment into one which is harsh, unjust or unreasonable. There was no evidence led as to why the other three nurses were treated differently to Mrs Daly. The fact that none of them was sacked does not of itself render the treatment of Mrs Daly unjust. Although differential treatment of employees can render a termination of employment, harsh, unjust or unreasonable, that is not necessarily the case. I agree with Lawler VP's observation in *Sexton* that '*there must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made.*' There is not, in this case, sufficient evidence to enable a proper comparison to be made. Having regard to Mrs Daly's years of experience, her direct involvement with the patient to a greater extent than that of the other nurses and her refusal to acknowledge that she had acted inappropriately, I am not prepared to find that because the employment of the other nurses involved was not terminated, Mrs Daly's termination of employment was harsh, unjust or unreasonable."[Footnotes omitted]

[24] We respectfully concur with their Honours."

[147] I find that the different treatment of Mr Waters to other employees was not unfair for the following reasons:

(a) the employee who made an announcement over the two-way radio on 24 December 2017 in relation to the Direction which been served on Mt Arthur to cease operations on Christmas Day and Boxing Day 2017received a stage two written warning.[51] That employee was not dismissed because he also stated over the two-way radio that workers should check with their Supervisor before making any decision about their attendance at work on Christmas Day and/or Boxing Day 2017. His conduct in that regard was consistent with the accepted chain of command at the Mine. This point of distinction provides an appropriate and fair reason for the decision by Mt Arthur to issue a written warning to this employee but to take a stronger form of disciplinary action against Mr Waters; and

[51] Ex A9; attachment BAR-2

(b) Mr Waters alleges that another employee, Mr Cory Hanson, posted information on Facebook in 2014 in relation to his Supervisor, but he was not dismissed. The show cause letter sent to Mr Hanson on 5 August 2014 asserts that "On 1 August 2014 the Company receive further information that you made defensive and malicious comments on social media regarding … shortly prior to his commencement on B crew as your Supervisor" and "your comments on social media were made with deliberate intent to incite bullying and harassing behaviour". The letter does not set out the content of the alleged Facebook post by Mr Hanson. In his response to the show cause letter, Mr Hanson asked for a copy of the alleged Facebook post because it did not appear on his Facebook page. Mr Hanson also stated that he could not recall making any comments about the Supervisor since communicating with a friend on Facebook in May 2014 about the Supervisor, and Mr Hanson deleted that post about one to two hours after making it. Ms Hennig is not aware of the incident involving Mr Hanson or his employment history. No evidence was adduced as to the decision made by Mt Arthur in relation to the incident involving Mr Hanson (other than that he was not dismissed) or the reasons for any such decision. I do not have sufficient evidence to make a proper comparison between Mr Waters's circumstances and those pertaining to Mr Hanson in 2014. Accordingly, I do not have a sound or proper basis to make a finding of inconsistent treatment in relation to the Facebook posts made by Mr Hanson in 2014 and those made by Mr Waters in 2017.

Conclusion

[148] There was a valid reason for Mr Waters's dismissal. He was afforded procedural fairness in relation to what I have determined was conduct in breach of the Code and the Charter Values. Although Mr Waters had turned his attitude around in the 12 months prior to his dismissal, he had a prior final written warning for breach of the Charter Values. I am not satisfied that the other relevant matters under s.387(h) of the Act outweigh those factors which support a finding of a fair dismissal. Accordingly, after considering and taking into account each of the matters specified in section 387 of the Act, my value judgment is that Mt Arthur's dismissal of Mr Waters was not harsh, unjust or unreasonable. It follows that Mr Waters's unfair dismissal application is dismissed.

COMMISSIONER

Appearances:

J. Short of the CFMMEU, instructed by J Drayton of the CFMMEU, on behalf of Mr Waters

J. Williams of Counsel, instructed by S Beaman of Herbert Smith Freehills, on behalf of Mt Arthur

Hearing details:

2018.

Newcastle:

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