



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Sione Vai

v

ALDI Stores (A Limited Partnership)
(U2017/13703)

COMMISSIONER GREGORY

MELBOURNE, 11 JULY 2018

Application for relief from unfair dismissal – misconduct – held valid reason for dismissal.

Introduction

[1] Mr Sione Vai was employed as a Warehouse Operator by ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership) (“ALDI”) at its Distribution Centre in Dandenong. He had been employed by ALDI since 1 November 2013.

[2] On 25 November last year Mr Vai attended a Christmas party organised by ALDI for its Warehouse Operators at the Distribution Centre. It was held at the Brownstone Micro Brewery at the Atura Hotel in Dandenong (“the Hotel”). The party was held in a private room at the Hotel and the costs of the room hire, together with food and drinks, were met by ALDI. However, Mr Vai was dismissed from his employment following an incident at the party involving him allegedly throwing a beer glass and its contents in the direction of other employees, including two Section Leaders. He now claims to have been unfairly dismissed.

[3] Mr G. Dircks, together with Mr T. Koletsos, appeared on behalf of Mr Vai. Mr B. Avallone of Counsel appeared on behalf of ALDI. Both were given permission to appear under s.596(2)(a) of the *Fair Work Act 2009* (Cth) (“the Act”) as the application involved a degree of complexity and their involvement might enable it to be dealt with more efficiently.

The Relevant Legislation

[4] Section 385 of the Act states that a person has been *unfairly dismissed* if the Commission is satisfied their dismissal was “harsh, unjust or unreasonable.”¹

[5] Section 387 continues to set out the criteria the Commission must take into account in considering whether the dismissal was harsh, unjust or unreasonable. It states in full:

“387 Criteria for considering harshness etc.

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

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”²

The Applicant's Evidence and Submissions

Mr Sione Vai

[6] Mr Vai was employed by ALDI as a Warehouse Operator on a permanent part-time basis from 1 November 2013 until his dismissal on 1 December 2017. He received a warning on 22 June last year about a safety breach but this was not related to his termination. He said he was well liked and respected by other staff at the Distribution Centre “... and the allegations put forward for my termination are out of character as to how I conducted myself under normal circumstances, at work or outside of work.”³

[7] Mr Vai was told about the Christmas party, which was to be held at the Brownstone Micro Brewery at the Atura Hotel in Dandenong, by his Section Leader. He was then given a written invitation and was required to complete a form to confirm he was attending. He understood the party was organised by the Section Leaders at the Distribution Centre, and not the Managers, but was approved by ALDI. He also understood it was not an official ALDI function but that it was paying for it. The employees attending were not given any direction or guidance about expected standards of behaviour in advance of the function.

[8] Mr Vai walked to the Hotel as he lives nearby. He was with a colleague from work, Mr Rohan Chand, who had travelled to his house and they walked to the Hotel together. There were about 60 employees in attendance at the party, together with about six Section Leaders. However, there were no Managers in attendance and there were no official speeches or other presentations made during the evening, and nobody appeared to be “in charge of the staff.”⁴

[9] Mr Vai said that as soon as he entered the function room “some hotel staff were looking at me,”⁵ and he believed this was because of his size and appearance. He then said, “As the night moved on I had consumed a fair amount of alcohol and was just enjoying myself.”⁶ At one point he went to get three glasses of beer but was told by the bar staff he was now limited to one glass at a time. He was confused by this as he had seen other employees ordering handfuls of drinks. He went and asked his Supervisor what was going on and said he told him there was no reason why he should not have been given the three beers.

[10] The bar staff then told him he could not have another drink and he would no longer be served. He became agitated in response and kept on asking for a drink. One of the bar staff then said, “You are not listening, you coconut.”⁷ Mr Vai said, “[t]he word ‘coconut’ was a racial insult because I am an Islander,”⁸ and he was offended by what had been said to him.

[11] During the rest of the evening other employees, including some Section Leaders, continued to get drinks for him. However, he became increasingly agitated and decided it was better if he left. This was because he believed he was being treated differently to others, and had been referred to as a “coconut.” He rang his cousin and asked him to come and pick him up and he then left with Mr Chand in his cousin’s car. He was not escorted from the venue and could not recall what time it was when he left. He also could not recall being involved in any physical violence toward any other person at the Hotel.

[12] On the following Monday, 27 November, he received a text message from his head Supervisor, “Monique,”⁹ informing him that he had been suspended from work. He was on an RDO on that day. On Wednesday, 29 November, he was asked by Mr Eric Schreiber, the Logistics Manager, to attend a meeting with him and “Rohan,”¹⁰ the Transport Manager. He attended and was told about the allegation that he had thrown a glass of beer during the course of the evening. He was also told there was CCTV footage of the incident, however, he was not shown the footage at that time. He indicated in response that he could not recall the incident, but “... if I did throw it I would not have taken deliberate aim at anybody.”¹¹

[13] Mr Vai said he was told that ALDI had carried out an investigation into what had occurred, but he was not shown any written accounts of any interviews that took place. However, some of the witness statements were read out to him. He was then asked to attend a further meeting on 1 December, and Mr Schreiber again went through the allegations. Mr Vai repeated that he could not recall throwing a glass at anybody, but said that the bar staff had directed racist comments toward him during the course of the evening. He also told Mr Schreiber that he was only listening to one side of the story. After a brief break in the meeting he was then told his employment was going to be terminated. A payment in lieu of notice was then deposited in his bank account, but at no stage did he receive a letter of termination.

[14] Mr Vai acknowledged in cross-examination that prior to attending the Christmas party he had been watching a rugby match on television with his uncle, and they had both drunk some kava. He also acknowledged that after viewing the CCTV footage during the course of the proceedings “it looks like”¹² he had thrown a pot of beer in a horizontal direction, and it had hit the wall opposite, or a lamp next to the wall. However, he denied his conduct had put anyone at risk. He also said the incident had not occurred while he was at work.

[15] He also indicated in cross-examination that he had previously worked in the security industry, and would not regard such behaviour as responsible or socially acceptable as it could

put people in danger. He also acknowledged that when he spoke to Mr Wilde at the Christmas party he did not tell him that the bar staff had used racist or discriminatory language towards him. He was also unable to recall the conversation with Ms Nicoll when she said he told her about it being his Christmas party, and he being able to drink what he wanted. He also could not recall leaving the Hotel shortly after the glass was thrown.

[16] He also acknowledged that when he told Mr Schreiber that the bar staff had called him “coconut man”¹³ this was the first time he had mentioned this to anyone. He also indicated in re-examination that after he was stopped by the bar staff from getting a drink other employees “from my section and the section leaders that know me”¹⁴ continued to get drinks for him.

Mr Vai’s Submissions

[17] Mr Vai submits that this “is an unusual usual case,”¹⁵ given he has no memory of the events relied upon as the basis for his dismissal. He has also not received any written advice of his termination, and had not previously seen the Termination Advice Form referred to in ALDI’s F3 Employer Response document.

[18] He continues to submit that the allegations about his behaviour appear to be confined to an allegation that only the contents of the glass were thrown. It also does not appear to be asserted that the beer hit anyone. However, he has no actual recollection of the incident and is therefore unable to give any evidence about it. He also submits that the reliability of the evidence of other witnesses may also be affected by the consumption of alcohol.

[19] He also submits that the evidence does not establish what actually occurred, particularly given the reaction of Ms Nicoll on the CCTV footage, and the absence of any sound on that footage. He also makes reference to the content of the email sent to Mr Schreiber by Mr Dunlop. There were also a number of things happening at the time, including the glass that was dropped by Mr Dunlop and the immediate reaction to this from others in the room. Mr Vai was also agitated at the time because he had been refused service by the bar staff, and a racial slur had been directed at him. It is submitted in response that his behaviour in all the circumstances was simply a lapse or “an instance of simply aberrant behaviour that justifies any description.”¹⁶

[20] In his submission the fact that he was racially abused by the bar staff and treated in a demeaning manner is of particular relevance. This “provocation is an ameliorating factor”¹⁷ that should be taken into account, and he refers to the decision in *Tenix v Fearnley*¹⁸ which found that provocation can be a relevant factor in judging the behaviour of an employee. In terms of whether the racial slurs were actually made during the course of the evening Mr Vai submits his evidence should not be dismissed simply because it was not corroborated. It was not challenged in cross-examination and there is no evidence indicating the racial comments were not made. In addition, the fact he did not complain about the comments at the time does not mean they were not made to him.

[21] He also submits that ALDI must take some responsibility for the alleged misconduct, given it occurred while he was intoxicated, as it paid for the cost of the function and the supply of food and alcohol.¹⁹ In this context Mr Vai refers to the decision in *Keenan v Leighton Boral Amey Joint Venture (‘Keenan’)* at [133],²⁰ which he submits involved similar circumstances. However, he submits it can also be distinguished from the present matter in that his behaviour was not an intentional act, as indicated by the content of the email sent by

Ms Nicoll to Mr Schreiber. He also emphasises that the employee's dismissal in *Keenan* was considered to be "harsh" because the conduct was unrelated to the workplace, and it was not considered that there would be any ongoing consequences at work as a result of the conduct.

[22] Mr Vai also submits that his conduct involved an isolated instance, which was similar to the circumstances in *Keenan*. His consumption of alcohol also had much to do with what occurred, and should be considered to be a mitigating factor. He again refers in this context to the decision in *Keenan* when Hatcher VP stated:

"[132] It is clear, I consider, that Mr Keenan's conduct was the result of him becoming intoxicated by alcohol at the Christmas function. That is itself a mitigating factor. I do not mean to suggest by this that Mr Keenan can divest himself of responsibility for what occurred because of his state of intoxication. Mr Keenan should have exercised greater control over his consumption of alcohol in order to ensure that he was able to control his behaviour and comply with LBAJV's policies at what was an official work function. However, it is the nature of alcohol that it tends to induce a loss of self-restraint and a sense of responsibility. The extent of this effect differs from person to person, but it obviously had a significant effect in Mr Keenan's case."²¹

[23] However, it is also acknowledged that Mr Vai has to bear some responsibility for becoming intoxicated, a situation which was contributed to by the fact he had been drinking prior to attending the Christmas function.

[24] He also submits that the Christmas party should not be considered to be an official ALDI function, and therefore his conduct cannot constitute a rejection of his employment contract. It was organised by the Section Leaders and no Managers attended and he points to the absence of "anything like managerial control."²² Instead "the boss"²³ has simply agreed to pay "for the beer and wine and whatever else".²⁴ The employees who attended the function were also not in uniform.

[25] Mr Vai relies on the decision in *Rose v Telstra Corporation Limited* (*'Rose'*)²⁵ in this context and submits that it is relevant to have regard to the nature of the event; the timing of the incident; whether there was any prior arrangement about responsible service of alcohol; whether any instructions were given to employees about appropriate standards of behaviour; and whether anyone was acting with managerial responsibility during the evening. He submits, in conclusion, that if it is not considered to be a work related function then he cannot have acted in breach of ALDI's policies or his employment contract.

[26] He also submits that there is no evidence of any adverse publicity attaching to ALDI as a consequence of what occurred, and there is no evidence of any express or implied breach of his contract of employment, and the behaviour cannot be said to have crossed a line that justified his employment being terminated. He submits instead that what occurred was "a low level matter"²⁶ that did not result in any damage to ALDI's interests.

[27] However, he submits in the alternative that if it is considered to be a function associated with his workplace then ALDI failed to comply with its own policies because he has been treated differently as a result of drinking alcohol at "an outside function,"²⁷ compared to how he would be treated if found to have been drinking at the work site.

[28] It is also submitted that ALDI has not demonstrated how Mr Vai has breached his employment contract. Firstly, there is no evidence of serious damage being caused to the employment relationship, or to ALDI's interests. Unlike the circumstances involved in *Rose* there is nothing that directs an employee's attention to the consequences associated with the conduct outside of work. He also submits there is nothing that points to the fact that an employee can be held responsible by ALDI for their own "conduct 24/7, 52 weeks of the year."²⁸ In his submission there were actually no limits on his behaviour at the function in terms of the impact on the employment relationship, given it was not connected to his work. The Employee Handbook and the Code of Conduct, relied upon by ALDI, were only directed to circumstances involving the work site, and the normal work environment, and if they were intended to have wider application then this should have been made clear to employees.

[29] He also submits that it is necessary to consider whether ALDI had entered into any arrangement with the venue about the responsible service of alcohol. The evidence also makes clear that there were no instructions or direction given to employees in advance of the function about what standards of behaviour were considered to be appropriate.

[30] Mr Vai continues to submit in the alternative that if the alleged behaviour was found to have occurred then it did not warrant the termination of his employment, and the decision to dismiss him was disproportionate to the gravity of the conduct involved. There were clearly other options available to ALDI. He could have been given a final warning. In addition, other employees, including one of the Section Leaders, had been complicit in obtaining drinks for him after he was refused service by the bar staff. He was also not provided with any detail about what was alleged to have happened in his initial meeting with Mr Schreiber and, as a consequence, he was not in a position to be able to provide an appropriate response at that time. He was also not provided with a letter of termination.

[31] He submits, in conclusion, that it has not been established that there was a valid reason for his termination that can be said to be sound, well-founded or defensible. He was also not given an adequate opportunity to respond to the reasons for his dismissal.

[32] Mr Vai also submits that his length of service should have been given more consideration, and this again highlights the lack of proportionality in terms of the decision to dismiss him. He also points to the fact that no significant ongoing consequences for ALDI have been identified as a consequence of his behaviour.

[33] In terms of remedy he does not seek to be reinstated as he has been able to obtain employment elsewhere. However, he seeks an amount of compensation equivalent to \$32,442.80. This is based on a view that he would likely have continued in employment for a further period of two years. Some deduction has been made on the basis that he has mitigated his losses by obtaining work elsewhere, however, he rejects the suggestion that a significant reduction in the amount of compensation should be made on account of his conduct.

The Respondent's Submissions and Evidence

Mr Erich Schreiber

[34] Mr Schreiber is employed as a Logistics Manager with ALDI and has responsibility for the Dandenong region. Mr Vai worked in the Distribution Centre at Dandenong and reported to the Goods In Section Leader. The Section Leaders report to Mr Schreiber. All

employees, including Mr Vai, are required to comply with the ALDI Employee Handbook, which contains various policies and procedures that are intended to regulate employee conduct. This obligation is also set out in each employee's employment contract and reiterated in the job descriptions provided to them. Mr Vai signed the acknowledgement of receipt in the Employee Handbook on 2 December 2013.

[35] Mr Schreiber's witness statement made reference to the following extracts from the Code of Conduct contained in the Employee Handbook:

“Section 2 – CODE OF CONDUCT

PRINCIPLES

High standards of behaviour and performance are necessary so that a harmonious and safe working environment can exist. It is expected that ALDI employees at all levels will act in a responsible manner towards other employees, customers, visitors and contractors.

...

Personal Behaviour

All employees are expected to conduct themselves in a professional and socially acceptable manner e.g. threats, abuse, bullying, physical or verbal violence are not permitted. Provocation will not be accepted as an excuse.

...

Safety Procedures

... Any employee who disobeys any safety procedures or instruction, or who acts in an unsafe manner towards themselves or their fellow employees may be summarily dismissed.”²⁹

[36] He also makes reference to the safety procedures in the Code of Conduct which state:

“Aldi is fully committed to, and takes responsibility for, the health and safety of all employees at work. However, it is also the responsibility of every employee to work in a safe and responsible manner, thereby ensuring a safe work environment for all. Any employee who disobeys any safety procedures or instruction, or who acts in an unsafe manner towards themselves or their fellow employees may be summarily dismissed.”³⁰

[37] Mr Schreiber continued to state that ALDI organises a Christmas party for the Warehouse Operators at the Dandenong Distribution Centre each year. It is organised by the Section Leaders and paid for by ALDI, and the Warehouse Operators and Section Leaders are the only employees who attend. It is considered to be an official ALDI function and the venue has appropriate security arrangements in place.

[38] On the morning of Monday, 27 November last year Mr Schreiber was made aware of the alleged incident involving Mr Vai and immediately commenced an investigation into what

occurred. He arranged to visit the Hotel later that day to view the CCTV footage, and attended with the Logistics Manager, Mr Tony Radcliffe. The Hotel would not give him a copy of the footage and he asked that a copy be retained in case it was required in the future. It was eventually provided to ALDI after the directions were issued in these proceedings.

[39] Mr Schreiber said the footage shows:

- a. Mr Vai walking away from the bar holding a full glass of beer. Mr Vai was wearing black trousers and a bright orange t-shirt.
- b. Eight seconds later, another party attendee drops a glass near the entrance to the bar. A security guard walked towards the person involved.
- c. Mr Vai is visible at the top of the screen, standing next to and apparently talking to a person seated at a table. While his head is not visible, you can see his body and his bright orange shirt.
- d. After five seconds elapse, Mr Vai throws a full glass of beer past the heads of several employees who are seated at a table in between Mr Vai and the entrance to the bar. A glass of beer hits a lamp and sprays over the seated employees, the lamp, the wall, and other people standing nearby.
- e. The security guard turns around to assess what had just happened. Several people walked towards Mr Vai.”³¹

[40] Mr Schreiber said he then collected statements from employees who witnessed the incident including Ms Leanne Nicoll, an Assistant Section Leader, and Mr John Dunlop, a Section Leader. A further written statement was also received from another Assistant Section Leader, Mr Ashley Wilde. Mr Schreiber said none of the Section Leaders made any reference to hearing any racist remarks directed at Mr Vai, and none had received any complaint from him about such behaviour.

[41] Mr Schreiber contacted Mr Vai on the following day to arrange a time to interview him about the incident, and the interview was arranged for 29 November 2017. Mr Vai was told he could bring a support person to the interview. Mr Schreiber said that prior to the meeting he again attended the Hotel to view the CCTV footage as he “wanted to be certain that it was Mr Vai who threw the glass.”³²

[42] Mr Schreiber said that Mr Vai did not bring a support person to the meeting and asked why he had been suspended. He was told that an allegation had been received about his conduct at the Christmas party, and his suspension was normal process to allow for the allegation to be investigated. Mr Schreiber then told Mr Vai that it was alleged he had conducted himself in an unsociable manner during the Christmas party and had thrown a beer glass toward a security guard and other ALDI employees, including two Section Leaders. Mr Vai did not say anything initially in response.

[43] He then asked him what happened at the Christmas party and Mr Vai explained that after a period of time the bar staff had refused to give him another drink. He also said they began calling him a “coconut man” and after that he became a bit louder because they had refused to serve him. He also indicated that three of the Section Leaders had spoken to him

about his behaviour, and had tried to calm him down. However, he did not tell the Section Leaders that the bar staff had directed a racial slur at him. He also said that he did not remember doing anything wrong and thought it was his friend, Rowan Chand, who had thrown the glass towards the security guard.

[44] Mr Schreiber said that at the conclusion of the meeting he told Mr Vai that once he had completed his investigation he would contact him again to arrange a final meeting and there was the potential for the outcome of the process to involve disciplinary action.

[45] Mr Schreiber then interviewed Ms Jana Papuni, who is employed as a Warehouse Palletiser at the Distribution Centre. She told him she was sitting at a table with a colleague when everyone started cheering. She turned around and saw that Mr Dunlop had dropped a glass of beer on the floor behind her, and seconds later a glass of beer flew in front of her face. She said the glass was thrown by Mr Vai.

[46] Mr Schreiber then returned to the Hotel again, following Mr Vai's suggestion that Mr Chand had thrown the glass. After again reviewing the footage Mr Schreiber was certain it showed the glass being thrown by Mr Vai. He also interviewed Mr Chand on 30 November, who told him he had dropped a glass on the ground outside the venue, but had not thrown a glass at anyone.

[47] Mr Schreiber then concluded that there was "irrefutable evidence"³³ that Mr Vai had become intoxicated at the Christmas party, and had thrown a full glass of beer past two employees who were sitting at a table. The glass then broke when it hit a lamp and covered other employees with beer. In his view his behaviour amounted to serious misconduct and breached a number of ALDI's policies and procedures. His investigation also concluded that Mr Vai did not tell anyone during the course of the evening about the claim that the bar staff had made racist or discriminatory comments to him.

[48] On 30 November Mr Schreiber telephoned Mr Vai to arrange a further meeting. He told him that he had completed his investigation into the alleged incident, and the meeting was intended to provide him with an opportunity to respond to the findings of the investigation. He was invited to bring a support person and Mr Vai attended with Ms Monique Elers.

[49] Mr Schreiber said Mr Vai told him that he was a happy person, but the bar staff had upset him and called him a coconut. He also indicated that he was responsible for his behaviour, "but I do like to drink a bit of kava."³⁴ Mr Vai also told him that he could not remember throwing the glass. Mr Schreiber then took Mr Vai to the Employee Handbook and the Code of Conduct, and told him that if he had been racially abused during the course of the evening then he should have brought that to the attention of one of the Section Leaders.

[50] Mr Schreiber then took a break from the meeting to consider Mr Vai's responses and when he returned told him that his employment had been "... terminated because he threw a glass after having been spoken to by three Section Leaders."³⁵ He also noted "... that as per company policy, provocation is not accepted as an excuse for physical violence."³⁶

[51] Mr Schreiber also acknowledged in cross-examination that he was not a witness to the events at the Christmas party, and was only able to corroborate any of the statements provided by the vision he had seen on the CCTV. He also indicated that the decision to

terminate Mr Vai's employment was based on what happened at the Christmas party, and not on any other issues to do with his behaviour or performance. He also acknowledged that the Code of Conduct did not specifically state that it applies outside of the workplace.

[52] However, he also indicated that he believed the circumstances involved in drinking alcohol at a Christmas function were different to those involved in drinking on the premises at work. He continued to state, "If I have to now give an opinion, it's on the premises, we are dealing with heavy machinery and we would be talking a different outcome if they are drunk or under the influence within the premises at work. While we are celebrating a good year is a completely different thing. We are there to celebrate. We are there to - you know - and we are all adults. We would know our responsibility. That's why - so the difference. If we are influenced - under the influence of alcohol or drugs at the workplace, the outcome of an injury would be way - you know, it would be potentially devastating or fatal. We can tolerate that and in a function that you are celebrating the good year, well, you know, it's a completely different scenario, therefore, in my opinion."³⁷

[53] He also denied that ALDI had supplied unlimited alcohol at the function and there was instead a limit on the amount to be served. The venue also was required to adhere to the responsible service of alcohol. However, he acknowledged that over a period of three hours people may become intoxicated. He also believed the Christmas party to be an official function because, "It's an ALDI organised Christmas party for the employees for the section leaders to celebrate with the operators their year."³⁸ He was also not aware that any instructions had been provided to employees in advance of the function about the standards of behaviour that were expected.

[54] He also indicated in cross-examination that when he attended the Hotel to view the CCTV he mentioned to the Manager about Mr Vai claiming to have been racially abused, but she said that no mention had been made about anything like that, and no complaint had been made by anyone. He also made the same enquiries of the Section Leaders but they had no knowledge of it either.

Ms Leanne Nicoll

[55] Ms Nicoll is an Assistant Section Leader at the Dandenong Distribution Centre and since taking on that role has been to most of the Christmas parties held with the Warehouse Operators. The Section Leaders are expected to go to the party in order to oversee the event.

[56] She arrived at the party at the Brownstone Micro Brewery at around 6.30 p.m. At around 8.30 p.m. she noticed Mr Vai appeared very agitated and was causing a commotion. She asked what was going on and was told by colleagues that he was intoxicated and the bar staff had "cut him off."³⁹ She went over to him and said words to the effect of that maybe he had enough to drink tonight, but he responded by indicating that it was not for the bar staff to tell him when he had had enough, and he was entitled to drink at his Christmas party. She suggested that if he wanted to continue drinking he should go to a different venue, but was unable to reason with him, and he walked away. Ms Nicoll said that at no time during this discussion, or at any time during the night, did he say that someone had called him "a coconut," or had used any other racist term.

[57] Ms Nicoll said that approximately 10-15 minutes later she noticed another person, who was not an ALDI employee, with Mr Vai. She asked a colleague who he was, and was told he was a friend of Mr Vai's. She then saw this person at the bar trying to get a drink.

[58] At approximately 8.45 p.m. Ms Nicholl said she was talking to another Section Leader, Mr John Dunlop, and other colleagues when Mr Dunlop accidentally dropped his class which smashed on the ground. The noise attracted attention and other people reacted with yells and cheers. Almost immediately afterwards she saw Mr Vai standing to her left, about five metres away, and saw him throw something in her direction. She then found herself covered in beer and saw a broken glass on the floor. She then realised he had thrown a glass of beer. She immediately made eye contact and yelled at him, "Are you for real?"⁴⁰

[59] Mr Vai was immediately taken outside. She then left the party shortly after 9 p.m., after being told by other colleagues that the venue had shut the bar and the party was over. She drank 2 glasses of wine during the evening.

[60] On 27 November Ms Nicoll was asked to by Mr Stephen Smith to send an email to himself and Mr Schreiber setting out what she knew about the incident at the Christmas party. She sent the email later that morning.

[61] Ms Nicholl also acknowledged in cross-examination that none of the Managers from the Distribution Centre attended the party. She also acknowledged that some of the Section Leaders who attended left during the course of the evening, although "[t]here were still two, if I recall rightly, that were still there that night."⁴¹ She also acknowledged in cross-examination that she did not think the glass of beer was intentionally thrown toward her but, "I don't know what it was or who it was directed at. I'm really not sure, that's why I was very shocked to wear it."⁴²

[62] She also stated that she did not know Mr Vai very well, but as far as she was aware his behaviour at the Christmas party was out of character. She had also heard that other employees were continuing to supply him with alcohol after he had been denied access by the bar staff, but she had no first-hand knowledge of this.

Mr Ashley Wilde

[63] Mr Wilde is an Assistant Section Leader at the Dandenong Distribution Centre. He had previously worked in the Goods In team and Mr Vai reported to him at the time. They had a good relationship, and he had helped Mr Vai with some personal issues in the past.

[64] Mr Wilde attended the party at the Brownstone Micro Brewery at the Hotel and understood his role was to make sure the event ran smoothly, and to take action if employees were not behaving appropriately. He arrived at approximately 5.30 p.m. and was aware the party was being held in a room at the Hotel that was closed to members of the public.

[65] Mr Wilde spoke to Mr Vai at an early point in the evening, but at around 8 p.m. he noticed he was becoming boisterous with the bar staff. He appeared to be intoxicated and after a discussion with another colleague it was agreed they would talk to Mr Vai. They were also told at around the same time by the Bar Manager that Mr Vai was abusing staff and was intoxicated. He also said if his behaviour did not improve he would be removed from the

venue. Mr Wilde was also aware that the bar staff had stopped serving multiple drinks and would only give each person one drink.

[66] Mr Wilde then spoke to Mr Vai and told him he needed to calm down and act appropriately or he would be asked to leave. He appeared upset and told him that the bar staff would not serve him. Mr Wilde then told him to go and get one drink and to calm down, which he appeared to do.

[67] Mr Wilde said he then left the party around 30 minutes later. He spoke briefly to Mr Vai before leaving, and said that at no time did Mr Vai tell him that anyone had used racist or discriminatory language towards him. Mr Wilde also said he did not hear anyone refer to Mr Vai as “a coconut.”⁴³

[68] On 27 November he was requested by Mr Rowan Williams to forward an email setting out his recollection of the events, which he did immediately.

ALDI's Submissions

[69] ALDI submits that the Commission is entitled to rely on the interview records attached to Mr Schreiber’s witness statement. While they are hearsay they were prepared for the purposes of the investigation into Mr Vai’s behaviour and as such are admissible. In any case it continues to submit that there is no evidence to contradict the evidence of Ms Nicholl about the glass and its contents being thrown. It is “incontrovertible,”⁴⁴ based on the CCTV footage, that Mr Vai threw both the beer glass and its contents.

[70] It continues to submit that there is no dispute about the fact Mr Vai was not happy about being denied further drinks by the bar staff. He has also acknowledged that he did not tell any of the Section Leaders during the course of the evening that he had been subjected to a racial slur. He also has no recollection of the relevant events. ALDI also submits that it does not rely only on the evidence of Ms Nicholl, and points to the interview notes from Ms Papuni, which also make clear that a glass of beer and its contents flew between her and a colleague, who were seated at a table near where the glass smashed on the wall. It also submits that none of this evidence has been contradicted.

[71] It continues to submit that ALDI had a “valid reason” to dismiss Mr Vai. While the Employee Handbook did not apply in all circumstances, it did apply in this context because there was a sufficient connection between Mr Vai’s conduct and his employment. It makes the following points in this context. It was a work Christmas function. It was paid for by ALDI. It was organised by ALDI Section Leaders at the direction of an ALDI manager. It was exclusively for ALDI employees, and was held in a private room at the Hotel that was only accessible to those employees. The Section Leaders attended to ensure that the employees remained within acceptable bounds of behaviour. Their role in this context was evidenced by the fact that three of them spoke to Mr Vai at different times during the course of the evening in an attempt to moderate his behaviour. There was also a security guard in attendance. It continues to submit that the question of whether ALDI had a “valid reason” is emphasised when it is considered what might have been the consequences if the glass and its contents had actually hit someone at the party.

[72] It also submits that the scope of the Employee Handbook is “not limited to the four corners of the employee’s premises,”⁴⁵ but applies to any behaviour that can impact on other

colleagues at work. It also submits that the drug and alcohol policy was not intended to apply in the context of a Christmas party. It obviously prohibits drinking on company premises, but it is a distraction to suggest it applies beyond that context. It continues to submit that an Employee Handbook is not required to be able to understand that Mr Vai's behaviour was "completely inappropriate".⁴⁶

[73] It continues to submit that his conduct was sufficiently connected with his employment to warrant the disciplinary action, and in this context relies on the decision in *Rose*.⁴⁷ It submits that the conduct must be such that when viewed objectively it is likely to cause serious damage to the relationship between the employer and the employee. It again reiterates that the consequences of Mr Vai's behaviour could have been much more significant, and ALDI cannot be sure he will not act in that way again. To that extent the relationship between ALDI and Mr Vai has been seriously damaged. It continues to submit that the suggestion that "anything goes"⁴⁸ at a function like this must be rejected. There was instead in this case a level of aggression that constituted misconduct and justified Mr Vai's termination.

[74] It also submits that Mr Vai's evidence about the racial slur must be treated with caution, given his "less than perfect"⁴⁹ recollection of the night, and the lack of any corroborating evidence. In any case it submits it cannot be an excuse for his behaviour even if it was the cause of what occurred.

[75] It also submits that the allegations were explained to Mr Vai by Mr Schreiber, who also told him that an investigation was being carried out into what occurred. He was then provided with an adequate opportunity to respond. As part of this process Mr Schreiber spoke with Mr Chand, and with the Section Leaders who were present on the evening. He also viewed the CCTV at the Hotel on 3 occasions in order to confirm what it showed. It also submits that Mr Schreiber's evidence makes clear that he weighed up all of the circumstances concerning Mr Vai's behaviour before the decision was made to terminate his employment. It also submits that ALDI took a compassionate approach toward him when it decided to provide him with payment in lieu of notice, and it should not be criticised for having done so.

[76] In its submission the decision in *Keenan*⁵⁰ can also be distinguished on the basis that it involved unlimited service of alcohol. In the present matter there were instead restrictions on the service of alcohol and this was, in large part, why Mr Vai became annoyed when he was denied service by the bar staff.

Consideration

[77] As indicated at the outset in coming to a decision in this matter the Commission is required to consider whether Mr Vai's dismissal was 'harsh, unjust or unreasonable.' What is required in that context was considered in the often quoted decision in *Byrne v Australian Airlines Ltd*⁵¹ when McHugh and Gummow JJ held:

"...It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its

consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”⁵²

[78] Vice President Ross, as he then was, in *Rose*⁵³ restated the above proposition, and also added (references omitted):

“In my view whether there has been a *‘fair go all round’* is a matter which I think is relevant and hence I am to have regard to it determining whether the termination was harsh, unjust or unreasonable. It is not necessarily determinative but it is a factor to be taken into account.”⁵⁴

[79] I have had regard to these authorities in coming to a decision in this matter. As indicated, the Commission is also required to take into account each of the considerations in s.387. I now turn to deal with the application having regard to each of those matters.

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees)

[80] It is noted at the outset that the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*⁵⁵ is often referred to in considering what constitutes a “valid reason.” His Honour came to the following conclusions:

“The reasons of an employer for terminating the employment of an employee are solely within the knowledge of the employer. The employer may state a reason but that reason need not be the actual reason nor need it be the only reason. This is the rationale for the onus of proof provisions contained in s 170EDA.

Section 170DE(1) refers to “a valid reason, or valid reasons”, but the Act does not give a meaning to those phrases or the adjective “valid”. A reference to dictionaries shows that the word “valid” has a number of different meanings depending on the context in which it is used. In the *Shorter Oxford Dictionary*, the relevant meaning given is: “2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.” In the *Macquarie Dictionary* the relevant meaning is “sound, just, or well founded; a valid reason”

In its context in s 170DE(1), the adjective ‘valid’ should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must ‘be applied in a practical, commonsense way to ensure that’ the employer and employee are each treated fairly...”⁵⁶

[81] In addition, in *Parmalat Food Products Pty Ltd v Wililo*⁵⁷ the Full Bench came to the following conclusion:

“The existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair. The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open.”⁵⁸

[82] The Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post*⁵⁹ (*Australian Postal Corporation*) also provides a useful summary of the approach to be taken in weighing the factors to be considered:

“Reaching an overall determination of whether a given dismissal was “harsh, unjust or unreasonable” notwithstanding the existence of a “valid reason” involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh:

(i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable;

against

(ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.”⁶⁰

[83] It follows from these authorities that a “valid reason” is one that is “sound, defensible and well founded,” as opposed to one that is capricious, spiteful or prejudiced. It must also be “valid” in the context of both the employee’s capacity or conduct and the operational requirements of the business. The test must also be applied in a practical, common sense way to ensure the parties are treated fairly in circumstances where each has rights and privileges, but duties and obligations as well.

[84] As the decision in *Australian Postal Corporation* also makes clear consideration of “valid reason” inevitably involves weighing different considerations, including the conduct involved and any other mitigating or other relevant matters. I have sought to adopt the approach of these authorities in coming to a decision in this matter.

[85] I am satisfied that in considering whether ALDI had a valid reason to dismiss Mr Vai the Commission is required to do a number of things. It is first necessary to establish what occurred on the evening of 25 November last year. It is then necessary to come to a conclusion about the significance of what occurred.

[86] The Commission is then required to consider whether the function can be considered to have been work-related in that it was sufficiently connected to Mr Vai’s employment to be the subject of legitimate employer supervision, and so normal standards of employee behaviour could be expected to be observed as a consequence.

[87] However, if the function is not characterised in that way, and it was instead an “out of hours” event, then it is necessary in terms of the decision in *Rose* to consider whether the circumstances involved a sufficient connection between the conduct and the Applicant’s employment to bring it within the scope of ALDI’s legitimate supervision.

[88] I turn first to consider the evidence about what actually happened on the evening of 25 November. Mr Vai indicated in cross-examination that he had been drinking kava that afternoon while watching television with his Uncle. No evidence was provided about how much he had to drink during this time but clearly he had consumed some alcohol before arriving at the Christmas party. He arrived at the Hotel after walking from his home with another work colleague who had met him there. His evidence makes clear he then consumed a significant amount of alcohol to the extent that he has no recollection of the incident that led to his dismissal. It is also clear from his own evidence that he became annoyed with the bar staff, who initially refused his request to obtain more than one drink at a time, and then refused to serve him at all. However, other employees at the party continued to obtain drinks for him, and this included on at least one occasion a Section Leader, Mr Ashley Wilde. This was acknowledged in Mr Wilde’s evidence however, he said he did so in an endeavour to try and calm Mr Vai down.

[89] Mr Vai was also spoken to by other Section Leaders at various times during the evening. The statement provided by Mr Wilde indicates he spoke to Mr Vai at around 8.10p.m. in an effort to calm him down as he was becoming “boisterous”.⁶¹ Mr Wilde said the conversation ended on the basis that Mr Vai acknowledged he needed to act appropriately. Ms Nicholl also spoke to him. Reference was also made to his displeasure at being restricted or denied drinks by the bar staff.

[90] Mr Vai also states that he was upset because someone among the bar staff directed a racial slur at him. It is acknowledged, in response, that any such behaviour is totally unacceptable. However, in attempting to determine what actually happened on the evening it seems unusual that Mr Vai made no reference about this to anyone during the course of the evening, despite the various discussions he had with the Section Leaders and with others at the function. He was also quite open in his complaints about the restrictions placed on him by the bar staff in obtaining drinks. There is also no evidence of anyone else hearing the alleged comments. The first time that any mention was made about them was only when Mr Vai was interviewed by Mr Schreiber on the following Monday morning.

[91] It has already been made clear that any such comments are totally unacceptable. However, the available evidence makes it difficult to establish whether the comments were actually made at all, or whether they may instead have been raised by Mr Vai in his discussions with Mr Schreiber in an attempt to justify his behaviour.

[92] I turn now to consider the alleged incident that led to Mr Vai’s dismissal. He firstly has no recollection of the incident at all. He also provided no other evidence about what occurred, although the submissions provided on his behalf question whether a glass of beer was thrown, or only the contents of the glass. Regardless, it is submitted that it can only have occurred due to a momentary lapse or “an instance of simply aberrant behaviour that justifies any description.”⁶²

[93] ALDI relies on the evidence of Ms Nicoll, who describes a glass and its contents being thrown in her direction and smashing on a wall nearby. Her surprise at what occurred was emphasised by her immediate reaction. Her witness statement indicates she immediately stared straight back at Mr Vai and said “[a]re you for real?”⁶³ It also relies on the statement of Ms Papuni, who said the glass was thrown between her and a colleague seated at a table nearby. ALDI also makes reference to the CCTV footage obtained from the Hotel. While it is not necessarily conclusive in terms of what was thrown it makes clear that something was thrown towards Ms Nicoll in the way she describes. I am also satisfied that her evidence was not seriously challenged in cross-examination.

[94] I am satisfied, in conclusion, that the available evidence indicates that Mr Vai threw a glass of beer and its contents in the general direction of Ms Nicoll and some other employees, narrowly missing them and smashing into the wall behind them. No one was injured, but his actions had the potential to cause significant injury if someone had been hit in the face, for example, by the full glass of beer. The evidence of Ms Nicoll also indicates that the incident was generally considered significant in that shortly after it occurred the bar was closed and the party ended.

[95] I am satisfied as a consequence that if the incident involving Mr Vai can be said to have occurred in a work context then it provided a valid reason for his termination.

[96] It is therefore necessary to now consider whether the Christmas party can be said to have been a work function. Mr Vai submits it should not be considered in this way, however, ALDI has a different view. I have had regard to the decision in *Keenan* in this context, which also involved a work Christmas function held at a Hotel. However, the circumstances in that matter also involved conduct that occurred after the Christmas party, when some of those present decided to “kick on,” as it might be described colloquially, and headed to an upstairs bar where further drinks were had. Hatcher VP concluded in response to this situation at [101]:

“[101] I do not consider that conduct which occurred at the upstairs bar can be said to be in connection with Mr Keenan’s employment. The social interaction which occurred there was not in any sense organised, authorised, proposed or induced by LBAJV. Those who gathered there did so entirely of their own volition. It was in a public place. There was nothing in LBAJV’s Code of Conduct or relevant policies which suggested that they had any application to social activities of this nature. Mr Macourt gave evidence that he expected that LBAJV’s standards of behaviour would apply until all employees were safely home that night, but there was no evidence that any such expectation was communicated to employees or that employees generally had any understanding that this expectation existed. Mr Keenan’s conduct in the upstairs bar was merely incidental to his employment.”⁶⁴

[97] However, the Vice President did not take issue with whether what occurred at the Christmas function could be the subject of legitimate supervision by the employer. He also noted that Mr Keenan had not contested this proposition when he concluded at [113]:

“[113] That leaves for consideration Mr Keenan’s conduct at the Christmas function itself. Mr Keenan did not contest the proposition that what occurred at the Christmas function could be the subject of legitimate employer supervision by LBAJV. This implicit concession was properly made. The function was an official one which was

organised and paid for by LBAJV, and, critically, LBAJV made it clear that compliance with its standards of behaviour was expected on the part of those who attended.”⁶⁵

[98] However, the Vice President clearly had regard to some further issues, which were referred to in the decision under the heading of “Organisation of the Christmas function.” In this context he noted, firstly, that the organisation of the function was assigned to an “Executive Team Coordinator”⁶⁶ and “an Administrator”.⁶⁷ He continued to indicate, “[n]either was an employee with a managerial or supervisory status.”⁶⁸ He also noted that the Supervisors were asked to remind employees about appropriate standards of behaviour at the function prior to it taking place, and this was done in a variety of ways. However, “[n]o manager was tasked with supervising the overall running of the Christmas function or the conduct of staff.”⁶⁹

[99] He also concluded that there appeared to be no restriction on the alcohol served at the function, and the evidence indicated that the attendees were able to help themselves to bottled beer that was kept in what he described as a large “Eskey type container.”⁷⁰

[100] The evidence also indicated that the Applicant was never refused service of alcohol, and beyond a certain point in the evening he was simply “serving himself with beer. Nor did anyone remonstrate with him about his behaviour or suggest that he stop drinking or leave the function while he was in the Endeavour Room.”⁷¹

[101] The evidence in the present matter can be contrasted with those circumstances in a number of respects. ALDI had entered into an arrangement with the Hotel whereby it would fund the cost of a certain amount of food and alcohol. The function was not organised directly by a Manager, but it was organised by the Section Leaders or Supervisors at the direction of Management, as had been the case with Christmas parties held in the recent past. A number of Section Leaders attended the function and the evidence makes clear their presence was intended to ensure appropriate standards of behaviour were observed and maintained. The evidence also indicates that at least three of those Section Leaders had cause to speak to Mr Vai during the course of the evening about their concerns with his behaviour. There is also no evidence indicating that the judgement of any of the Section Leaders was impaired by excessive consumption of alcohol. Both Ms Nicoll and Mr Dunlop, for example, indicated that they had only had a couple of drinks during the course of the evening.

[102] A security guard had also been assigned to the function, and Ms Nicolls states in her evidence that she spoke to that person on at least one occasion about her concerns with Mr Vai’s behaviour as part of her role in attempting to maintain appropriate standards of behaviour. The evidence also indicates that the bar staff were aware of their responsibilities in regard to the responsible service of alcohol. They initially restricted and then prevented Mr Vai from being served in accordance with these responsibilities. Their actions, in fact, appear to have been a significant contributor to Mr Vai’s becoming annoyed during the course of the evening, and him feeling he was being singled out and treated differently. It is suggested in response that Mr Vai well might have been treated differently by the bar staff, but this was due to the fact he was intoxicated, rather than having anything to do with his appearance

[103] In summary, while it appears that ALDI did not make a specific efforts to speak with the employees in advance of the function to confirm what standards of behaviour were expected, the evidence indicates that a number of steps were taken to put in place

arrangements designed to ensure the behaviour of those attending did not get out of hand. They can also be considered to be steps that might reasonably be expected to be taken in order to ensure, as far as possible, that the function takes place in an orderly manner and with appropriate standards of behaviour being observed.

[104] However, ALDI was confronted with a situation where an employee had been drinking before attending the function, and then continued to drink on arrival to the extent where he has no recollection of the events that ultimately led to his employment being terminated. He also acknowledged that he was annoyed and anxious because he was not able to obtain service at the bar. He then threw a glass of beer and its contents in the direction of two Section Leaders and other employees. Fortunately, the glass did not actually hit anyone, but could have done so with potentially serious consequences.

[105] I am satisfied that any employer who decides to hold a Christmas party has an obligation to take reasonable steps to ensure appropriate standards of behaviour are maintained, and the safety of those attending is protected. However, I am also satisfied that any employee attending has a responsibility to act within reasonable bounds. I am not satisfied, in response, that Mr Vai can be said to have acted in this way. It is also instructive to compare the behaviour that led to his employment being terminated with the behaviour involved in the matter of *Keenan*. Hatcher VP considered a range of behaviour in *Keenan* that the employer relied on to provide a valid reason for termination. However, he was of the view that several of those matters did not constitute a valid reason for termination. However he also had regard to other behaviour, which he described in the following terms:

“[121] To repeat, Mr Keenan said to Ms Stokes, in a manner that was entirely unprovoked, *“What do you even do?”*, and when Ms Stokes laughed in response, said *“No seriously. Who the fuck are you? What do you even do here?”*. I consider that to be, objectively speaking, aggressive, intimidatory and bullying behaviour on Mr Keenan’s part, particularly given that Mr Keenan was an intoxicated middle-aged male and Ms Stokes was a much younger and smaller female. The behaviour was intentional. The robustness of Ms Stokes’ response in simply turning and walking away from Mr Keenan does not diminish the seriousness of that behaviour. LBAJV’s policy against bullying did not give it a definition, but on any reasonable view Mr Keenan’s behaviour did constitute bullying (noting that we are not here concerned with the special legislative definition of bullying in s.789FD of the FW Act).”⁷²

[106] Hatcher VP indicated in conclusion, “I consider that this constituted a valid reason for the dismissal.”⁷³

[107] I do not seek to take issue with the Vice President’s conclusions in this regard, or his views about the behaviour involved. However, I am satisfied that Mr Vai’s behaviour in the present matter was just as significant and serious, if not more so, given the potential for significant physical injury to have resulted. I am satisfied, in conclusion, that in all the circumstances ALDI had a valid reason to dismiss Mr Vai.

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[108] I am satisfied that it is appropriate to consider these matters together. Mr Vai's evidence indicates that when he was initially called into a meeting with Mr Schreiber on the Monday morning following the Christmas party he was not aware of what he wanted to speak to him about. This was apparently because Mr Vai had no recollection of the events at the Christmas party. He said this initially made it difficult for him to respond, given he was not aware of what the concerns were. I accept that this may have been the case at the outset, however, I am also satisfied that during the various discussions that then took place with Mr Vai he was made aware of what had occurred, and had an adequate opportunity to respond.

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[109] There is no indication of any unreasonable refusal by ALDI to allow Mr Vai to have a support person present at any discussions relating to his dismissal, and he did in fact have a support person present in some of those discussions.

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal

[110] This consideration is not relevant in the context of this matter.

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal.

[111] ALDI is obviously a large employer and can be expected to be aware of the appropriate procedures to be gone through in dismissing an employee.

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal.

[112] The same considerations apply as indicated above in regard to sub clause (f).

(h) any other matters that the FWC considers relevant

[113] Mr Vai again relies on the decision in *Keenan*, and some of the matters that Hatcher VP considered relevant to whether the dismissal of Mr Keenan was harsh, unjust or unreasonable. Mr Vai's submissions made reference to these in the following terms:

“a. The lack of any significant ongoing workplace consequences

b. Good employment record.

c. The isolated and aberrant nature of the conduct.

d. The fact that the applicant was intoxicated as a result of alcohol consumption at a Christmas function when he engaged in the relevant behaviour.

e. The manner of the service of alcohol in the Christmas function, including the respondent's failure to exercise any real control over this (in the event that this was an Official function)

f. The alternatives to dismissal which were proportionate to the conduct involved.”⁷⁴

[114] I turn now to deal with these matters. It is noted, firstly, that in the matter of *Keenan Hatcher VP* concluded that dismissal was not necessary to properly protect Ms Stokes' position in the workforce, given Mr Keenan only had limited day-to-day contact with her, and the lack of any indication that his comments had an effect on her ability to perform her duties. He also noted that Mr Keenan had only received one warning previously about a relatively obscure matter, and there was no evidence he had engaged in any similar conduct previously. It is accepted that some of the same considerations exist in this matter. However, I am also satisfied that ALDI was entitled to be concerned that Mr Vai might again act in a random and unprovoked way, particularly if alcohol was involved, with possibly serious consequences. Mr Vai would also have had an ongoing working relationship with the Section Leaders who attended the Christmas function if he remained in employment.

[115] The Vice President also took the view in *Keenan* that the fact that the Applicant was intoxicated was a mitigating factor, although this did not mean he could divest himself of all responsibility for what occurred. However, he also noted that, “[a]n exacerbating factor in that respect was the manner in which alcohol was served at the function.”⁷⁵ He concluded by stating that it was “contradictory and self-defeating”⁷⁶ for an employer to require compliance with normal standards of behaviour, but to not impose any controls over the service of alcohol at the function.

[116] It follows from the decision in *Keenan* that the fact that Mr Vai was intoxicated might be viewed as a mitigating factor, but it does not enable him to avoid responsibility for what occurred. His own evidence indicated he had been drinking prior to attending the function, and he continued to drink heavily after arriving. He also acknowledged that he was prone to behaving erratically in such circumstances. I am satisfied, in response, that he should accept much of the responsibility for placing himself in these circumstances.

[117] I am also satisfied that the circumstances involving the availability of alcohol in the present matter are very different to those in *Keenan*. This was not a situation in which it was a case of “help yourself” in regard to obtaining drinks. I have already referred in some detail to the measures put in place to ensure responsible service of alcohol. I have also indicated that I consider those steps to be reasonable. The amount of alcohol that ALDI budgeted for was also limited, and this was not a situation where unlimited supplies were available throughout the course of the evening.

[118] Mr Vai also submits that his dismissal was not a proportionate response, and other alternatives could have been considered. I have obviously given consideration to these submissions, and whether he could have been given a warning instead. However, I am not satisfied that this would have been an appropriate response, given the circumstances involved. It is not necessary to recount those circumstances, but they involve a full glass of beer being thrown in the direction of other employees, which could have had significant consequences if they had been hit by the glass and its contents. Fortunately, for Mr Vai they were not. However, this does not lessen the potential significance of what occurred.

Conclusion

[119] I am not satisfied, in conclusion, that Mr Vai was unfairly dismissed. In coming to this conclusion I have had particular regard to whether ALDI had a valid reason to dismiss Mr Vai. His application is accordingly dismissed.



COMMISSIONER

Appearances:

G Dircks and T Koletsos for the Applicant.

B Avallone of Counsel for the Respondent.

Hearing details:

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Melbourne:

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¹ *Fair Work Act 2009* (Cth) s 385(b).

² *Ibid*, s 387.

³ Exhibit V1, [6].

⁴ *Ibid*, [17].

⁵ *Ibid*, [20].

⁶ *Ibid*, [22].

⁷ *Ibid*, [34].

⁸ *Ibid*, [35].

⁹ *Ibid*, 43].

¹⁰ *Ibid*, [44].

¹¹ *Ibid*, [47].

¹² Transcript, 11 April 2018, PN 135.

¹³ *Ibid*, PN 300.

¹⁴ Transcript, 11 April 2018, PN 456.

¹⁵ Submissions of Applicant, dated 26 February 2018, [3].

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- ¹⁶ Transcript, 11 April 2018, PN 963.
- ¹⁷ Submissions of Applicant, dated 26 February 2018, [11].
- ¹⁸ *Tenix Defence Systems Pty Ltd v Fearnley* (unreported, AIRCFB, Ross VP, Polites SDP, Smith C, 22 May 2000).
- ¹⁹ Submissions of Applicant, dated 26 February 2018, [18].
- ²⁰ [2015] FWC 3156.
- ²¹ *Ibid*, [132].
- ²² Transcript, 11 April 2018, PN1031.
- ²³ *Ibid*.
- ²⁴ *Ibid*.
- ²⁵ Print Q9292 [1998] AIRC 1592 (4 December 1998).
- ²⁶ Transcript, 11 April 2018, PN 1054.
- ²⁷ *Ibid*, PN966.
- ²⁸ *Ibid*, PN991.
- ²⁹ Exhibit A2, Attachment ES 2, p 14 and 16.
- ³⁰ *Ibid*, Attachment ES 2, p 15.
- ³¹ *Ibid*, [27].
- ³² *Ibid*, [36].
- ³³ *Ibid*, [64].
- ³⁴ *Ibid*, [72].
- ³⁵ *Ibid*, [84].
- ³⁶ *Ibid*.
- ³⁷ Transcript, 11 April 2018, PN 717.
- ³⁸ *Ibid*, PN 750.
- ³⁹ *Ibid*, PN 7.
- ⁴⁰ Exhibit A1, [13].
- ⁴¹ Transcript, 11 April 2018, PN 503.
- ⁴² *Ibid*, PN 557.
- ⁴³ Exhibit A4, [21].
- ⁴⁴ Submissions of Respondent, dated 19 March 2018, [9].
- ⁴⁵ Transcript, 11 April 2018, PN 1077.
- ⁴⁶ *Ibid*, PN 1078.
- ⁴⁷ Print Q9292 [1998] AIRC 1592 (4 December 1998).
- ⁴⁸ Transcript, 11 April 2018, PN 1077.
- ⁴⁹ *Ibid*, PN 1108.
- ⁵⁰ *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156 ('*Keenan*').
- ⁵¹ (1995) 185 CLR 410.
- ⁵² *Ibid*, 465.
- ⁵³ Print Q9292 [1998] AIRC 1592 (4 December 1998).
- ⁵⁴ *Ibid*.
- ⁵⁵ (1995) 62 IR 371.
- ⁵⁶ *Ibid*, 373.
- ⁵⁷ [2011] FWAFB 1166.
- ⁵⁸ *Ibid*, [24].
- ⁵⁹ [2013] FWCFB 6191.
- ⁶⁰ *Ibid*, [58].
- ⁶¹ Exhibit A4, [11].
- ⁶² Transcript, 11 April 2018, PN 963.

⁶³ Exhibit A1, [13].

⁶⁴ *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156.

⁶⁵ *Ibid.*, [113].

⁶⁶ *Ibid.*, [16].

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, [21].

⁷⁰ *Ibid.*, [19].

⁷¹ *Ibid.*, [23].

⁷² *Ibid.*, [121].

⁷³ *Ibid.*, [122].

⁷⁴ Submissions of Applicant, dated 26 February 2018, [72].

⁷⁵ *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156, [133].

⁷⁶ *Ibid.*