

[2019] FWC 4113 [Note: This decision has been quashed - refer to Full Bench decision dated 28 February 2020 [\[2020\] FWCFB 820](#). A further Full Bench decision dated 10 August 2020 [\[2020\] FWCFB 4206](#) has been issued.]



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Scott Tracey

v

BP Refinery (Kwinana) Pty Ltd
(U2019/1141)

DEPUTY PRESIDENT BINET

PERTH, 2 SEPTEMBER 2019

Application for an unfair dismissal remedy.

Introduction

[1] On 4 February 2019, Mr Scott Tracey (**Mr Tracey**) filed an application (**Application**) pursuant to section 394 of *Fair Work Act 2009 (Cth)* (**FW Act**) with the Fair Work Commission (**FWC**) for a remedy with respect to his dismissal by BP Refinery (Kwinana) Pty Ltd (**BP**) from his position of Operations Technician at the BP Refinery in Kwinana, Western Australia (**Refinery**).

[2] On 14 February 2019, BP filed a Form F3 Employer Response, noting it had no jurisdictional objections to the Application.

[3] The parties participated in conciliation on 6 March 2019 and 19 March 2019 but the issues in dispute could not be resolved.

[4] Taking into account the parties wishes and circumstances I determined that a hearing rather than a determinative conference would be the most effective and efficient way to determine the Application. Consequently, the Application was listed for hearing in Perth on 8,9 and 10 May 2019.

[5] Directions for the filing of materials in advance of the Hearing were issued to the parties on 22 March 2019 (**Directions**).

Permission to be represented

[6] The Directions invited the parties to make submissions as to whether the FWC should grant permission to the parties to be represented. Both parties sought permission to be represented by a lawyer or paid agent at the Hearing.

[7] Having considered the submissions of the parties leave was granted to both parties to be represented pursuant to section 596(2)(a) of the FW Act on the grounds that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[8] At the hearing Mr Tracey was represented by Mr Stephen Edwards, a paid agent (**Mr Edwards**). A witness statement was tendered at the Hearing for the following witnesses:

- a. Mr Tracey.
- b. Mrs Rhyanna Tracey – Mr Tracey’s wife (**Mrs Tracey**)
- c. Mr Anthony Kelvin Crookes – Control Technician at BP (**Mr Crookes**)
- d. Mr Mark Ellis – Control Technician at BP (**Mr Ellis**)
- e. Mr Gregg Johnson Carey – Control Technician at BP (**Mr Carey**)
- f. Mr Dale O’Neil – Control Technician at BP (**Mr O’Neil**)

[9] Mr and Mrs Tracey also gave oral evidence at the Hearing. A witness statement of Ms Alana Herbert (**Ms Herbert**)– an Australian Workers Union (**AWU**) organiser – was filed, however she did not attend the Hearing and give evidence and her witness statement was not tendered as an exhibit at the Hearing.

[10] At the Hearing BP was represented by Ms Rosemary Roach, of Corrs Chambers Westgarth (**Ms Roach**). The following witnesses provided written and oral evidence on behalf of BP:

- a. Ms Allyson Maree Woodford Black – Operations Manager at BP (**Ms Woodford**)
- b. Ms Sharon Jane Rudderham – Human Resource Business Partner at BP (**Ms Rudderham**)
- c. Ms Lisa Jane Archbold – Head of Performance – AsPac Fuels (**Ms Archbold**)

[11] Final written submissions were filed on behalf of Mr Tracey on 13 June 2019. Final written submissions were filed by BP on 4 July 2019.

[12] In his Closing Submissions Mr Tracey made extensive submissions with respect to the credibility of BP’s witnesses. On the whole I found that BP’s witnesses provided cogent evidence consistent with the contemporaneous documentation.

[13] In comparison I note that Mrs Tracey was unable to explain many of the words and concepts in the video she claimed to have created.¹ I also note that some of Mr Crookes’ evidence was inconsistent with the contemporaneous records² and that I had cause to remind Mr Tracey of the implications which might be drawn from him appearing to evade questions put to him by the Counsel for BP.³ With the exception of Mr Crookes and Mr Tracey the other of Mr Tracey’s witnesses did not attend the hearing and were not cross examined so there was limited opportunity to assess their credibility.

Background

[14] Mr Tracey commenced employment with BP on 16 January 2012 as a Process Technician pursuant to an employment contract dated 21 October 2011.⁴

[15] At the time of his dismissal his employment was covered by the *BP Refinery (Kwinana) Pty Ltd & AWU Operations & Laboratory Employees Agreement 2014 (2014 Agreement)*.⁵

[16] In or around June 2017 BP and its AWU workforce commenced bargaining for a replacement agreement for the 2014 Agreement. BP's bargaining team was initially led by Mr Brett Swayn – Refinery Manager (**Mr Swayn**) until early 2018 when Ms Marina Campbell - Health, Safety, Security, Environment and Quality Manager (**Ms Campbell**) took over.⁶

[17] As the negotiations dragged on without resolution the industrial environment became increasingly tense. In early 2018 the parties decided to participate in facilitated bargaining in the FWC. During the facilitated bargaining participants were provided with access to confidential commercial information. The facilitated negotiations eventually broke down and following protected industrial action an order was issued on 4 January 2019 in Print [PR703616](#) pursuant to section 424 of the FW Act triggering a workplace determination. A Full Bench of the FWC is currently considering a workplace determination which will replace the 2014 Agreement.

[18] Mrs Tracey says that on or about 3 September 2018 she created a video titled 'Hitler Parody EA Negotiations' (**Hitler Video**). The website used to create and host the video is www.captiongenerator.com (**Caption Website**).⁷

[19] The Hitler Video is an extract from the German language film Downfall which purports to artistically portray the final days of Adolf Hitler's life. In the extract Hitler responds in a highly agitated and aggressive manner to advice from his Generals that his regime has lost the Second World War.

[20] The Caption Website allows individuals to add captions to the extract from the film. The captions added to the Hitler Video make reference to events associated with the EBA negotiations. Ms Rudderham in her evidence identified the elements of the dialogue contained in the captions which were linked to events which occurred or were occurring at the Refinery at that time as follows:

“The video appeared to depict a number of BPRK employees as Nazi's and referenced very specific information related to what was happening at BPRK at the time and the ongoing BPRK enterprise agreement negotiations, such as:

- (a) *The title of the video is 'Hitler Parody EA Negotiation' and the description of the video is 'Hitler Parody EA Negotiations not going the companies way', which I understood to refer to the ongoing enterprise agreement negotiations at BPRK and the unsuccessful votes which returned strong 'No' outcomes on the proposed roster options and proposed enterprise agreement.*
- (b) *'We deleted key clauses and put confusing worded statements here' and 'Despite what we told them what the "Intent" of the clause is', which I understood to be references to the enterprise agreement negotiations;*
- (c) *'98% voted "NO" and there were only 4 "YES" votes', which is an almost identical outcome to the vote undertaken by the operations and laboratory*

employees in relation to a proposed enterprise agreement. In particular, 98% of employees voted 'no' and 2% voted 'yes';

- (d) *'Everyone not on the negotiating team get out', which I understood to mean that the individuals left in the room were intended to depict the BP negotiating team;*
- (e) *'I offered the carrot, I tried using the stick', which are words that I have heard being used by employees throughout the negotiation process and I understood to refer to something Brett Swain had said at a series of presentations to the workforce. When I spoke with Brett on 10 April 2019, he said to me in substance that:*
 - A. *whilst in the role of Operations Manager, and leading negotiations for the enterprise agreement, he conducted a series of presentations in or around July 2017;*
 - B. *in these presentations, he had used a PowerPoint slide which had the picture of a carrot and the words 'carrot' and 'stick' on it; and*
 - C. *he said to the attendees words to the effect, "We are trying to find more carrots for people instead of using a stick" in the context of discussing the concept of individual performance management and reward. Attached and marked "SJR-3" is a copy of this presentation.*
- (f) *'We went to IBB', which I understood to be a reference to the facilitated interest based bargaining negotiations process;*
- (g) *'We even bought out that useless Solomon information that no one understands', which I understood to be a reference to the outcome of global industry benchmarking process facilitated by Solomon Associates regarding BPRK's performance against peers on a wide variety of metrics. I am aware that the negotiating team made reference to these metric outcomes during a number of negotiating meetings, including the interest based bargaining process, and in various presentations and communications with the Operations & Laboratory workforce (though I do not know the exact dates);*
- (h) *'We made up facts and figures to suit our case', which I understood to be a reference to the fact that the union delegates and the Operations & Laboratory workforce did not believe the information provided to them in the presentations and communications referred to at paragraph 11(g) above;*
- (i) *'I let them keep their "5 Panel Roster"... ', which I understood to be a reference to a key item discussed through the negotiation period, including during interest based bargaining, where BPRK proposed amending the current five panel roster. I am aware that a vote specifically on the roster pattern was held August 2018 where employees were able to vote on four different roster patterns, however elected to retain their current five panel roster. Given the outcome of this vote, the five panel roster was included in the proposed agreement voted on by employees between 21 August and 1 September;*

- (j) *'I offered them a sign on bonus', which I understood to be a reference to the sign on bonus the company offered to the Operations and Laboratory workforce as part of the offer that was being voted on;*
- (k) *'And what's is #BBD... I see it on stickers, coffee cups, signs and now painted on the road', which I understood to be a reference to the #BBD slogan that I had seen on stickers placed around the BPRK site, and written on signs along, and painted on, Mason Road, BPRK refinery access road;*
- (l) *'I offered the carrot, I tried using the stick ... Don't they know I'm in charge? ... But I made promises to London ... I can't afford to get fired from another job again... Plans "D" and "E" won't work either', which I understood to be a reference to Brett for the following reasons:*
- A. *As stated at paragraph 11(e) above, Brett said to me in substance that he used words to the effect of "we are trying to find more carrots for people instead of using a stick" in the context of discussing the concept of individual performance management and reward at shift presentations in July 2017;*
 - B. *Brett is the Refinery Manager of BPRK;*
 - C. *At the relevant time, Brett reported through to Nick Spencer (Global Refining Vice President, who is based in London) and Andy Holmes (Chief Operating Officer Fuels AsPac & Air BP and Head of Country Australia), who reported to Tufan Erginbilgic (Chief Executive, Downstream, who is based in London);*
 - D. *I am aware that Brett had been made redundant from a previous job prior to joining BPRK;*
 - E. *I was aware that Brett attended a negotiation meeting with the delegates and BPRK company negotiation team representatives in or about April 2018 where he reinforced key messages and the business context. Brett said to me on 10 April 2019 in substance that he used words during that meeting to the effect of "I want to be honest, we have plans C and D, but we don't want to have to enact them" to the delegates. Brett also said to me that he only said this once to the delegates.*
- (m) *'I threatened to cancel the agreement and go back to the award', which I understood to be a reference to the fact that on numerous occasions during the enterprise agreement negotiation process, Brett (and other members of the negotiating team) discussed that BPRK may seek to terminate the existing enterprise agreement with the delegates and the workforce. Attached and marked "SJR-4" is a copy of a presentation given by Brett during shift presentations in July 2018 which, on slide 16, outlined options if the EA was not accepted. One of those options is 'apply to the FWC to terminate current EA'.*
- (n) *'They are threatening Protected Industrial Action', which I understood to be a reference to the fact that during the negotiation process the Australian Workers' Union (AWU) and BPRK discussed the option of employees taking protected industrial action with the workforce. This was addressed in the*

presentation given by Brett in July 2018, which is attached and marked "SJR-4". Slide 16 of that presentation outlined a number of options if the EA was not accepted. One of those options is to 'apply for protected industrial action'."

[21] Mrs Tracey says that the video was not intended to be about or directed to any particular person however she was unable to point to any aspect of the dialogue which was not factually accurate.⁸

[22] Mr Tracey says that the Hitler Video was intended to be a humorous parody of discussions between members of the BP senior management team participating in enterprise agreement negotiations which were at that time being facilitated by the FWC.

[23] BP describe the video as follows:⁹

"The video attributes to Hitler's character comments which Mr Brett Swayn, BP Refinery Manager, made to the BPRK workforce during enterprise bargaining negotiations. In the video, Hitler is shown railing at his Nazi acolytes about the workforces' refusal to accept the deal offered to them. Hitler lists the proposals which BPRK have made during the negotiation process and expresses his fury at the workforces' refusal to agree to the deal despite these concessions. The video draws a parallel between Hitler and his officers, on the one hand, and Brett Swayn, and BPRK management, on the other"

[24] In light of a reference to the FWC's involvement in the facilitated bargaining I invited the parties to inform me if they believed I should recuse myself from determining this Application. Both parties indicated that they wished me to proceed and determine the Application.

[25] On 3 September 2018 Mr Tracey posted a link to the Hitler Video on a social media 'page' hosted by Facebook called Tea Tree Taverners (**TTT Facebook Group**). The TTT Facebook Group is a private group which only members of the TTT Facebook Group can access.¹⁰ Mr Tracey says that the members of the TTT Facebook Group are all employees of BP employed at the Kwinana Refinery.¹¹ There is evidence that suggests that many of the 2014 Agreement covered workforce are members of the TTT Facebook Group.¹²

[26] On 3 September 2018, Mr Tracey showed the video to other BP employees working nightshift by:¹³

- a. accessing the video via his Facebook account on a BP computer then being used by another employee already logged into BP's systems; and
- b. showing the video to other employees using his personal device.

[27] Upon learning of the existence of the Hitler Video, BP commenced an investigation into the creation and distribution of the video (**Investigation**). Ms Rudderham was charged with conducting the Investigation as the rest of the members of the human resource team based at the Refinery had been involved in the negotiations which were the subject of the Hitler Video. On or around 11 October 2018 Ms Rudderham created an investigation plan for that purpose (**Investigation Plan**).¹⁴

[28] At 8.30am on 31 October 2018 Mr Tracey was called into a meeting in the Shift Manager's office with Mr Gary Budd and Mr Mike Stoner, both Shift Managers (**Initial**

Meeting). Mr Greg Cay, a Control Technician, attended the meeting as a support person for Mr Tracey.¹⁵

[29] At the Initial Meeting Mr Tracey was presented with a letter informing him that he was to be interviewed at 7.00pm on 1 November 2018 in regards to allegations regarding instances of a sustained campaign of inappropriate material within the 2014 Agreement covered workforce.¹⁶

[30] Mr Tracey elected to bring his interview forward and it was scheduled for 1.00pm on 31 October 2018.¹⁷

[31] Mr Tracey was formally interviewed at 1.00pm on 31 October 2018 by Ms Rudderham in the presence of Mr Stoner (**Investigation Interview**). Ms Herbert attended the Investigation Interview as a support person for Mr Tracey.¹⁸

[32] At the Investigation Meeting Mr Tracey answered questions about his involvement in the creation and distribution of the Hitler Video. He admitted he had shared the video but in response to questions regarding the creation of the video stated words to the effect that he was 'not comfortable naming people' and he 'did not wish to implicate anyone' and that he would have to 'speak with a HR lawyer'.¹⁹

[33] Following the interview on 31 October 2018, Mr Tracey was stood down from work on full pay until the Investigation had been concluded. This was confirmed in a letter from BP emailed to Mr Tracey on 1 November 2018 (**Stand Down Letter**).²⁰ The Stand Down Letter outlined the allegations against Mr Tracey and the conditions under which he was being stood down.²¹

[34] The Stand Down Letter described the allegations as follows:²²

"It is alleged that you:

- *Have shared and distributed material which is highly offensive and inappropriate;*
- *Utilised another employee's BP logon to share the material;*
- *Were involved in creating this material; and*
- *Are aware of other/s involved in creating the material and are potentially covering up."*

[35] The Stand Down Letter stated that if substantiated the allegations could constitute breaches of BP Policies which might result in the termination of Mr Tracey's employment. The Stand Down Letter contained an invitation for Mr Tracey to make an appointment with Mr Stoner or Ms Rudderham if he wished to provide any additional information which may assist the Investigation.²³

[36] On 2 November 2018 and on 5 November 2018, Mr Tracey asked for further information in respect of the allegations against him.²⁴

[37] On 6 November, Ms Rudderham responded to Mr Tracey's questions and provided copies of a number of BP's policies. In addition, Ms Rudderham reminded Mr Tracey of the opportunity to have a further meeting (with a support person in attendance) during which he could respond to the allegations in person (**6 November Email**).²⁵

[38] On 13 November 2018, Ms Rudderham again wrote to Mr Tracey reminding him of the opportunity to further respond to the allegations, including by having a further meeting (with a support person in attendance) during which he could respond to the allegations in person (**13 November Email**).²⁶

[39] On 19 November 2018 Mr Tracey emailed a letter to BP providing additional information (**Investigation Response**).²⁷ In relation to the allegations he explained inter alia that:

- a. He had not intended to offend anyone.
- b. The Hitler Video was intended to be humourous and boost moral.
- c. He had satisfied himself that he was not in breach of company policy before he shared the video.
- d. The video did not specifically identify BP or any individual.
- e. It was shared on a private Facebook page and was not intended to be viewed by BP Management or those in the BP negotiation team.
- f. He removed the link as soon as he became aware that it had been viewed by someone outside of the Facebook Page and that it may have caused offence.
- g. His wife had created the video and that he had been reluctant to reveal this at the Initial Meeting because he didn't want to do harm to her or affect her future employment opportunities.

[40] He also asked that BP take into account a number of factors in mitigation including that:

- a. He suffers from a mental illness which he notified his employer of in 2016 which impacts on his thought processes including a tendency to impulsivity and poor judgement.
- b. He had an unblemished work record of 7 years.
- c. He found the Code of Conduct unclear and vague.

[41] After meeting with Mr Tracey and reading his written response, Ms Rudderham decided that objectively the contents of the Hitler Video were offensive and inappropriate and that factually a number of BP employees had found it so. She prepared a detailed investigation report (**Investigation Report**).²⁸

[42] The Investigation Report was then provided to Ms Archbold, the BP decision maker in respect of the misconduct allegations against Mr Tracey. Ms Archbold was selected as the decision maker because the video referenced the BP negotiation team which included a number of senior members of the Refinery management team. Ms Archbold is employed by BP Australia Pty Ltd and is based in Melbourne. BP considered independent of the Refinery and therefore in a position to make an objective decision.²⁹

[43] Ms Archbold was responsible for reviewing the Investigation Report, determining whether she needed any further information, considering any information provided by Mr Tracey and deciding whether to accept Ms Rudderham's Investigation Report finding (that Mr Tracey's actions had breached BP policies). If Ms Archbold agreed with Ms Rudderham's finding that Mr Tracey had engaged in misconduct, Ms Archbold was also required to consider any mitigating factors and determine the appropriate sanction to be imposed on Mr Tracey.³⁰

[44] On 14 December 2018 Mr Tracey attended a meeting to be informed of the findings of the Investigation (**Show Cause Meeting**). BP were represented at the meeting in person by Ms Woodford, and Ms Taya Hill, BP HR Advisor (**Ms Hill**) and by telephone by Ms Archbold, and Mr Chris Lokum, Vice President HR Fuels AsPac & HR Director BP Australia & New Zealand (**Mr Lokum**). Mr Ross Walker, a Shift Team Leader, attended as a support person for Mr Tracey.³¹

[45] At the Show Cause Meeting Mr Tracey was advised that the finding of the investigation was that the allegations against him had been substantiated and that this conduct constituted serious breaches of the BP Code of Conduct, Values and Behaviours, BP Respect & Equal Opportunity Policy and the BP Protecting Our Information Policy. Mr Tracey was invited to provide details of any mitigating factors he wished BP to take into account in determining the appropriate disciplinary action. He listed a number during the meeting and indicated that he would provide a more detailed response in writing.³²

[46] Later on 14 December 2018 Ms Rudderham sent an email to Mr Tracey with a summary of matters discussed during the Show Cause Meeting including the following summary of the allegations found to have been substantiated (**14 December Email**):³³

“It was alleged that you were involved in creating, and made available, shared and distributed an offensive and inappropriate video depicting BP representatives involved in the current Operations and Laboratory Employee Agreement (EA) employee agreement negotiations as Nazis. It was also alleged that you utilized another employee’s BP logon to show the video to others.”

[47] Later the same day Mr Tracey sent an email to Ms Rudderham seeking further clarification regarding the findings of the Investigation.³⁴

[48] On 17 December 2018 Mr Tracey emailed a document titled ‘Investigation Report and Mitigating Factors’ to Ms Archbold (**Show Cause Response**). In the 34 page document Mr Tracey identified what he said were flaws in the investigation process, disputed the offensiveness of the Hitler Video, asserted that the relevant BP policies were vague and detailed the matters which he asked BP to take into account in mitigation.³⁵

[49] On 8 January 2019 Ms Rudderham responded to Mr Tracey’s email seeking further clarification regarding the findings of the Investigation and provided responses to each query raised by Mr Tracey (**8 January 2019 Email**). Ms Rudderham also provided Mr Tracey with a further opportunity to provide information in light of her response.³⁶

[50] Between 17 December and 15 January Ms Archbold considered the information provided by Mr Tracey and reviewed the Investigation Report in light of that information. On 8 January 2019 she received an email from Mr Lokum informing her that Ms Rudderham had given Mr Tracey another opportunity to provide further information. Ms Archbold sent an email to Mr Tracey the same day informing him that she would give him time to provide that information before making her decision.³⁷

[51] Ms Archbold considered Mr Tracey’s responses, oral and written, and the investigation findings reached by Ms Rudderham and then reached her conclusions. Based on all of that material, Ms Archbold decided that the allegations had been substantiated. Ms

Archbold then considered the mitigating factors raised by Mr Tracey and what the appropriate sanction was in the circumstances. Ms Archbold ultimately reached the conclusion that the appropriate sanction was summary dismissal, but with the sum equivalent to notice to be paid to Mr Tracey.³⁸

[52] On 18 January 2019 at 10.00am Mr Tracey attended a meeting to be informed of the final outcome of the Investigation including any disciplinary actions (**Dismissal Meeting**). The meeting was also attended in person by Ms Woodford and Ms Hill and by telephone by Ms Archbold. Mr Clive Hacking, a Control Technician and AWU delegate, attended as support person for Mr Tracey.³⁹

[53] At this meeting, Mr Tracey was advised that his employment was to be terminated effective immediately and handed a letter confirming this in writing (**Dismissal Letter**).⁴⁰ The Dismissal Letter described the grounds for his dismissal as follows:⁴¹

*“Allegation 1 - You created, made available, shared and/or distributed an offensive and inappropriate video which purportedly depicted BP representatives involved in the current Operations and Laboratory Agreement negotiations as Nazis.
This allegation was substantiated and is a breach of:*

1. *BP Code of Conduct, specifically:
Employee Responsibilities
BP Values and Behaviours (Respect)
Section 2 of the Code which relates to People*
2. *BP Respect & Equal Opportunities Policy, specifically:
Clause 8 of the policy which relates to harassment and bullying
Clause 13 of the policy which relates to roles and responsibilities.*

Allegation 2 - You inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video.

This allegation was substantiated and is a breach of:

1. *BP Code of Conduct, specifically:
Section 5 of the Code which relates to – our assets and financial integrity*
2. *BP Protecting Our Information Policy, specifically:*
 - a. *Clause 5.2 which relates to acceptable use of IT equipment*
 - b. *Clause 5.4 which relates to being discreet in public and online.”*

[54] Mr Tracey was paid 4 weeks’ pay in lieu of notice of termination.⁴²

[55] Mr Tracey submits he was unfairly dismissed and seeks an Order that he be reinstated with continuity of employment and be compensated for his lost pay.⁴³

Is Mr Tracey protected from unfair dismissal?

[56] An order for reinstatement may only be issued if Mr Tracey was protected from unfair dismissal at the time of his dismissal.

[57] Section 382 of the FW Act sets out the circumstances that must exist for Mr Tracey to be protected from unfair dismissal:

“382 When a person is protected from unfair dismissal

*A person is **protected from unfair dismissal** at a time if, at that time:*

- (a) *the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and*
- (b) *one or more of the following apply:*
 - (i) *a modern award covers the person;*
 - (ii) *an enterprise agreement applies to the person in relation to the employment;*
 - (iii) *the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.”*

[58] Mr Tracey commenced employment with BP, which is a national system employer, on 16 January 2012. He has therefore completed the minimum employment period and, since his employment is covered by the 2014 Agreement, he is protected from unfair dismissal.⁴⁴

Was Mr Tracey’s dismissal unfair?

[59] Section 385 of the FW Act sets out the circumstances in which a dismissal will be considered unfair:

“385 What is an unfair dismissal

*A person has been **unfairly dismissed** if the Commission is satisfied that:*

- (a) *the person has been dismissed; and*
- (b) *the dismissal was harsh, unjust or unreasonable; and*
- (c) *the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
- (d) *the dismissal was not a case of genuine redundancy.*

*Note: For the definition of **consistent with the Small Business Fair Dismissal Code**: see section 388.”*

[60] The parties agreed that BP is not a small business for the purposes of the FW Act and that Mr Tracey was dismissed by BP for misconduct. The parties disagree as to whether Mr Tracey’s dismissal was harsh, unjust or unreasonable.

Was Mr Tracey’s dismissal harsh, unjust or unreasonable?

[61] The criteria which must be taken into account when assessing whether a dismissal was harsh, unjust or unreasonable are set out at section 387 of the FW Act:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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 Commission considers relevant.”*

[62] The ambit of the conduct which may fall within the phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

“... 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.”

[63] Mr Tracey submits his dismissal was harsh, unjust and unreasonable because his conduct did not constitute misconduct and did not contravene BP's lawful and reasonable policies. Even if it did, Mr Tracey submits that in all the circumstances the penalty of dismissal in relation to the policy breaches in his personal circumstances was manifestly harsh. Mr Tracey also submits that his dismissal was unjust because BP failed to follow its own policies or provide necessary clarification in relation to those policies.⁴⁵

[64] BP submit the dismissal was not harsh, unjust or unreasonable on the grounds that Mr Tracey's actions in creating and sharing the Hitler Video were inappropriate, offensive and in breach of BP's policies. BP submit that this conduct constituted a valid reason for Mr Tracey's dismissal which they say was conducted in a procedurally fair way.

Was there a valid reason for Mr Tracey's dismissal?(s.387(a))

[65] An employer must have a valid reason for the dismissal of an employee protected from unfair dismissal. A valid reason is one which is 'sound, defensible and well-founded'⁴⁶ and not 'capricious, fanciful, spiteful or prejudiced.'⁴⁷ The reason or reasons relied upon by an employer as a valid reason for dismissal need not be the ones given to the employee at the time of the dismissal.⁴⁸ The requirement to be reasonable must be applied in a practical common sense way to ensure that the employer and employee are each treated fairly.⁴⁹

[66] The Termination Letter described the grounds for Mr Tracey's dismissal as follows:⁵⁰

"Allegation 1 - You created, made available, shared and/or distributed an offensive and inappropriate video which purportedly depicted BP representatives involved in the current Operations and Laboratory Agreement negotiations as Nazis. This allegation was substantiated and is a breach of:

1. *BP Code of Conduct, specifically:
Employee Responsibilities
BP Values and Behaviors (Respect)
Section 2 of the Code which relates to People*
2. *BP Respect & Equal Opportunities Policy, specifically:
Clause 8 of the policy which relates to harassment and bullying
Clause 13 of the policy which relates to roles and responsibilities.*

Allegation 2 - You inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video.

This allegation was substantiated and is a breach of:

1. *BP Code of Conduct, specifically:
Section 5 of the Code which relates to – our assets and financial integrity*
2. *BP Protecting Our Information Policy, specifically:
c. Clause 5.2 which relates to acceptable use of IT equipment
d. Clause 5.4 which relates to being discreet in public and online."*

Did Mr Tracey create, make available, share and/or distribute the Hitler Video?

[67] BP submit that Mr Tracey was involved in the creation of the Hitler Video by providing his wife with ideas about what dialogue to include. BP submit that Mr Tracey made the video available, shared and/or distributed the video when he posted it to the TTT Facebook Group and showed it to his colleagues on his personal device and on BP assets.⁵¹

[68] Mr Tracey submits that he did not create the video and that it was created by his wife of her own volition. In his closing submissions Mr Tracey states that:⁵²

“Mrs Tracey explained in her evidence to the Commissioner that she, and she alone created the parody video ...”

[69] It is true that Mrs Tracey initially stated that: *“I did not speak to Scott about the video when I was making it.”* However, she went on to admit on transcript that she mentioned to Mr Tracey that she was creating the video and that she discussed with him content that was subsequently included in the Hitler Video.⁵³

[70] This is consistent with Mr Tracey’s Show Cause Response in which he conceded that she did not create all the dialogue and that he and she *“... discussed other things that could be added to fill in the gaps.”*⁵⁴

[71] Ms Rudderham in her evidence explained how the dialogue contained in the captions referenced specific factual events which occurred or were occurring.

[72] Mrs Tracey is employed as a Pharmacy Retail Manager at a Terry White Chemist in Halls Head. She has worked for Terry White Chemists for 15 years and has not been employed by BP or employed at the Refinery.⁵⁵

[73] I note that Mrs Tracey was unable to explain many of the words and concepts in the video she claimed to have created.⁵⁶ Given she has not been employed at BP this is not unsurprising however, it is inconsistent with her assertion that she made the video with minimal input from Mr Tracey.⁵⁷

[74] I am satisfied that Mr Tracey was involved in the ‘creation’ of the Hitler Video and that his contribution was significantly more extensive than his, or Mrs Tracey’s, evidence suggested.

[75] Furthermore, the reasons for Mr Tracey’s dismissal are expressed in the alternative. Even if he could not be said to have ‘created’ the Hitler Video for the reasons set out below I am satisfied that he made available, shared and/or distributed the Hitler Video.

[76] Mr Tracey submits that the video automatically became publicly accessible and available online when it was created by his wife and therefore it was not him that made the Hitler Video ‘available’. Mr Tracey further submits that he did not share or distribute the video. Mr Tracey admits that he shared a link to the video but says that this is materially different to sharing the video because the terms ‘sharing’ or ‘distributing’ refer to the act of duplicating or creating additional copies. Whereas a link merely alerts others to the existence of the video and its location. Mr Tracey points out that the TTT Facebook Group has privacy settings which limit access to the link he posted to the members of the TTT Facebook Group.⁵⁸

[77] With respect, Mr Tracey's submissions amount to semantics. To make something 'available' is not an act which can only occur once. While a film might have a premiere, it is made available to the public by the cinema each time the cinema shows the film.

[78] Whether the video was posted on the TTT Facebook Page or a link to the video was posted, the existence of the video was shared, distributed and made available to those who could access the TTT Facebook Group. The actual video was made available, shared and/or distributed when Mr Tracey showed the video to his colleagues using his Facebook account.

[79] Notwithstanding that the TTT Facebook Group is a private group which only members of the TTT Facebook Group can access,⁵⁹ the evidence is that many of the 2014 Agreement covered workforce are members of the TTT Facebook Group.⁶⁰ While a member of the public would be unlikely to relate the video to the industrial events then occurring at BP, the members of the TTT Facebook Group were familiar with the negotiations and the identities of those involved and could easily draw parallels between the words attributed to Hitler and the Nazi generals via the captions and events which occurred during the negotiations.

[80] It was in fact conceded on Mr Tracey's behalf at the Hearing that he did not suggest "*that a reasonable person at BP would not be entitled to view the video as being about events at BP and the BP employers negotiating team*" In fact Mr Tracey's counsel conceded that his client accepted "... *that a reasonable person at BP could construe the video as being about BP employees, and even Brett Swayn and the negotiating team.*"⁶¹

[81] The members of the TTT Facebook Group are people that Mr Swayn and his senior management team are charged with leading and with whom they must establish a critical relationship of mutual trust and confidence given the highly volatile and dangerous product, systems and equipment with which they all work.

[82] Notwithstanding that the audience of the TTT Facebook Group was restricted, the very identity of that audience made the sharing and distribution of more significance than a larger audience with no relationship to the BP worksite.

Was the Video Offensive and/or Inappropriate?

[83] BP submit that the video was offensive and/or inappropriate because they say the video creates a parallel between Hitler and Nazi officers on the one hand and Mr Swayn and his management team on the other.

[84] BP submit that by synchronising Hitler's speech with words said by BP senior managers, the video likens one with the other. According to BP the implication that the two groups bear similarities exists (and offends) because of the video's content regardless of Mr and Mrs Tracey's intentions in creating, making available, sharing and distributing the Hitler Video.⁶²

[85] Mr Tracey submits that BP predetermined the Hitler Video was offensive at the outset of the Investigation but have failed to establish that the Hitler Video did cause, or could reasonably cause, offence.⁶³

[86] Having reviewed all the evidence before me I am not of the view that BPs intention was from the outset to dismiss Mr Tracey nor that the Investigation was corrupted by bias or

conflicts of interest.⁶⁴ The evidence before me is that BP undertook a careful and detailed investigation which provided Mr Tracey with multiple opportunities to respond to the reasons for which he was dismissed and in particular whether the Hitler Video was offensive and/or inappropriate.

[87] Mr Tracey says that BP did not call as witnesses any of those individuals it says were portrayed in the Hitler Video to give evidence that they were offended by the Video. Mr Tracey submits that the FWC should attribute little weight to the BP witness' hearsay evidence that Mr Swayn was offended by the Hitler Video in light of BP's unexplained decision not to call Mr Swayn to give evidence or to make Mr Swayn available for cross examination.⁶⁵ In this regard I note that both parties submit that the relevant test is whether a reasonable person would find the Hitler Video offensive rather than the individuals depicted in the Hitler Video.

[88] Notwithstanding Mr Tracey's submission to the contrary, BP did call witnesses who gave evidence that they believed themselves to have been depicted in the Hitler Video and that they were offended by the Hitler Video. BP also tendered documentary evidence that other BP employees including Mr Swayn believed the Hitler Video was inappropriate and were in fact offended by it.

[89] Ms Rudderham explained that she believed that:

*"... the behaviour Mr Tracey engaged in was a serious breach of the Code of Conduct because the video is inappropriate. In particular, it is a parody about the Kwinana Refinery and its management team (without their permission), in which it compares Brett Swayn to Hitler (who was a man who committed genocide and mass murder)."*⁶⁶

[90] Ms Woodford gave evidence that⁶⁷:

"I recall feeling shocked that whoever had made the video was specifically targeting Brett and BPRK, and thinking that the video was intentionally made at the expense of Brett. I thought it was really unfair and offensive.

...

In my view the less people who says the video, the better as I felt that the video was derisive and offensive. I wanted to limit the video's distribution and employees exposure to it, as far as possible."

[91] She also indicated that she believed that the video potentially depicted herself and Ms Campbell.⁶⁸

[92] Ms Archbold, the ultimate decision maker, gave evidence that after viewing the Hitler Video multiple times she reached the view that the video was 'offensive and inappropriate'.⁶⁹

[93] There is also contemporaneous documentary evidence that a number of the individuals who formed part of the BP negotiating team including Mr Swayn found the Hitler Video offensive and inappropriate in an email exchange tendered as an exhibit at the Hearing.⁷⁰

[94] I am satisfied that the Hitler Video did in fact cause offence to a number of BP employees.

[95] Mr Tracey submits that the parody video cannot objectively be regarded as being offensive to a reasonable person employed at the Refinery, because it is unreasonable to interpret it as depicting BP employees involved in the enterprise bargaining as Hitler and Nazis or as having traits popularly associated with Hitler and the Nazi regime such as being mass murderers or lunatics.

[96] Mr Tracey submits that the view of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. That is that the test is therefore an “impersonal standard”.⁷¹ According to Mr Tracey the test requires the Commission to review the video, constituted by its context (a parody) and its images and dialogue and to then determine what it would be interpreted to mean by a reasonable person, a person of reasonable intelligence and knowledge of the world.⁷²

[97] While conceding that the video is “*artistically based partly upon events*” at the Refinery at BP, Mr Tracey submits that the Hitler Video can not be said to depict members of BP’s senior management team as Nazis or to attribute to them traits attributed to the Nazi regime because the Hitler Video was intended to be a parody.

[98] According to Mr Tracey:⁷³

“By definition a parody assumes and pre-supposes that what is being conveyed is humour, it is poking fun, it is taking the mickey, it is hilariously “sending up” characters portrayed by it; its purpose by definition is use absurdity to make a light point.”

[99] I do not accept that by labelling something as a parody is a ‘get out of jail free card’ and necessarily means something is not offensive. A racist joke is by name humour but is likely to offend a person of the nationality at which it is aimed.

[100] Depending on the circumstances in which it occurs ‘poking fun’, ‘taking the mickey’ or ‘sending up’ might be disrespectful, rude, demeaning and/or offensive. For example ‘sending up’ a religious deity might be deeply offensive to some groups of people.

[101] The FWC and its predecessors have previously considered cases in which an employee has made references, or likened their employer, to Hitler or the Nazi regime. In *APS Group (Placements) Pty Ltd v O’Loughlin* [2011] FWAFB 5230 it was held that carving the words “*Welcome to hell*” and etching a swastika into an ice block in protest of the conditions of work in a freezer room was insulting and offensive conduct (whether or not the business employed Jewish people or the employee intended to offend anyone). Such conduct was held to have been a valid reason for the relevant employee’s dismissal.

[102] In *CPSU v Australian Broadcasting Corporation* [2005] AIRC 737 SDP Drake held that calling an employer a ‘Nazi’ was ‘*inappropriate and offensive*’ even in the ‘*context of a heated industrial meeting*’.⁷⁴

[103] In *Pitt v Woolworths (SA) Pty Ltd* [2003] AIRC 673 an employee’s actions in calling his employers ‘Nazis’ was found to amount to a valid reason for his dismissal.

[104] Mr Tracey made reference to a decision of a Hong Kong court in *Grant David Vincent Williams v Jefferies Hong Kong Ltd.*⁷⁵ In that case the applicant was awarded

damages after being dismissed for sharing a link to a captioned extract of the Downfall film. Self-evidently the decision involved the application of different laws and cultural norms. The decision is also distinguishable on its facts. While Judge Seagroatt expressed views about the offensiveness of the captioned video, relevantly the dismissal was held to be wrongful because the employee was not in fact responsible for the distribution of the link to the video. The link was embedded in a client newsletter that internal protocols dictated should have been vetted by a nominated senior employee before being distributed. The newsletter was distributed by an administrative staff member and not the applicant. In addition, the disciplinary process was swift and without reference to the most basic principles of procedural fairness.

[105] I am satisfied that when viewed in context that a reasonable person would consider the Hitler Video inappropriate and offensive.

Was Mr Tracey's conduct in breach of BP Policies?

[106] BP submit that Mr Tracey's conduct constituted a breach of the BP Code of Conduct and the BP Respect and Equal Opportunity Policy.

[107] Mr Tracey denies that his conduct breached BP's policies. Mr Tracey submits that sharing the video to a private Facebook group does not constitute workplace harassment. He further submits that there is no evidence that Ms Archbold applied a reasonable person test to determining whether the Hitler Video was in fact offensive for the purposes of the relevant policies.

[108] Ms Archbold evidence was that she did apply such a test:⁷⁶

"39. As a decision maker, it was important to me that I felt that I was assessing Mr Tracey's conduct against the relevant BP policies that were in place at the time and that I considered the appropriate tests when assessing the nature of the video and Mr Tracey's conduct in relation to the video. I understand that the relevant test when determining whether something is offensive involves looking at a 'reasonable person' and whether the 'reasonable person' would be of the impression that the material was offensive."

[109] The BP Code of Conduct provides that BP employees must act in accordance with the Code of Conduct and with BP Values and Behaviours. The BP Values and Behaviours in relation to Respect state that:

"We hold ourselves to the highest ethical standards and behave in ways that earn the trust of others. We depend on the relationships we have and respect each other and those we work with."

[110] Section 2 of the Code relevantly requires BP employees to 'treat everyone with respect' and 'be respectful of cultural differences'; and states that 'offensive messages, derogatory remarks and inappropriate jokes are never acceptable'.

[111] The BP Respect and Equal Opportunities Policy relevantly includes in clause 8 a prohibition against harassment and bullying in the workplace and in clause 13 a statement that

BP *‘employees are responsible for treating all colleagues and customers with respect and professionalism without regard to non-relevant, unlawful criteria or distinctions’.*

[112] For the reasons set out earlier in this decision I am satisfied that the Hitler Video offended and was objectively inappropriate and/or offensive in the circumstances. The Hitler Video had the potential to undermine, demean and denigrate the BP senior management team amongst an audience which they were charged to lead. Sharing the Hitler Video amongst his colleagues could not reasonably be described as Mr Tracey treating BP senior managers with respect or professionalism. The sharing or distribution of the Hitler Video was not a single occurrence. Mr Tracey shared it to the TTT Facebook Group then shared it further to a colleague who would not have otherwise accessed it via Facebook.

[113] Mr Tracey submits that he was not responsible for offence being taken by any individual who claims to be offended by the Hitler Video because he only distributed or shared the Hitler Video among the workforce covered by the 2014 Agreement by way of his Facebook post and by showing the Hitler Video to colleagues. He says those who claimed to be offended by the Hitler Video became aware of the Video via Mr Stoner who located the video on the Caption Website, the publicly accessible site where the Hitler Video was initially created by his wife. In effect, Mr Tracey is asserting that his wife is responsible for an offence which occurred.

[114] The possibility that the Hitler Video would eventually be leaked to management is not vague or remote but a real possibility that Mr Tracey ought to have considered when he chose to share the video among his work colleagues: not only by showing the Hitler Video to work colleagues while at work but by posting the link to the Hitler Video in the TTT Facebook Group.

[115] That Mr Tracey did not share or distribute the video directly with those offended does not exculpate him. The effect of the Hitler Video was to demean, denigrate and undermine the standing of senior BP management. The possibility that the existence of the Hitler Video would come to the attention of BP was not unlikely or improbable. A parallel can be drawn with explicit posters in crib rooms which can have harassing and intimidatory effect on women employed in roles elsewhere in the business and notwithstanding they may not be members of the workgroups using the crib rooms on a day to day basis.

[116] In addition, Mr Tracey submits that the relevant policies are too vague and subjective to be enforceable. In support of this assertion he points to evidence that he and other employees raised questions in relation to the meaning of the current Code of Conduct when it was introduced.⁷⁷

[117] The current Code of Conduct which condensed the previous 84 page Code to 28 pages was introduced in an effort to make the document more accessible and consequently more readily complied with.

[118] Codes of Conduct are commonly expressed in general terms. Such is the diversity of human behavior and the variability of circumstance in which such behaviour might occur that it is almost impossible to codify acceptable behaviour in a documentary form that is not impermeably long and detailed. It is unavoidable that application of Codes of Conduct of any sensible length require the exercise of sensible judgement by those who are required to comply with or enforce such Codes. I am not satisfied that the guidance with respect to

acceptable behaviour contained in the Code of Conduct was so lacking that it created a gap in instructions capable of resulting in misapprehension or misunderstanding which made Mr Tracey's dismissal unjust for that reason.⁷⁸

[119] Mr Tracey also submits that he should not be bound by the relevant policies because he asserts that BP do not consistently apply their policies. He identifies the following as examples of BP not consistently applying their policies:⁷⁹

- a. The "Management of Concerns and Investigations within BP" policy when deciding when and how to conduct the Investigation.
- b. The Code of Conduct by senior management themselves being offensive and disrespectful, by Mr Stoner not following the correct reporting channels and Ms Rudderham and Mr Stoner failing to disclose their conflicts of interests by being involved with the concerns being investigated, their lack of objectivity from their personal opinions and that Mr Swayn is their superior.
- c. The 2014 Agreement which in the case of serious misconduct requires that the employee be stood down immediately pending an investigation.

[120] While in an ideal world the Investigation might have been completed within a shorter time frame, Mr Tracey was unable to identify any breaches of policy that satisfy me that the Investigation was conducted in a manner which invalidated what were otherwise valid reasons for his dismissal.

[121] I do not accept that the conduct on the part of BP which Mr Tracey describes as offensive and disrespectful, such as informing the workforce that BP may exercise its statutory right to apply to terminate the 2014 Agreement is in fact objectively either offensive or disrespectful.

[122] Having reviewed all the evidence it does not lead me to a conclusion that Ms Rudderham or Mr Stoner lacked objectivity or were swayed inappropriately by Mr Swayn's position relative to them. Nor that the Investigation more broadly was otherwise tainted by predetermination, bias or conflict of interest.

[123] Furthermore, Mr Tracey alleges that Code of Conduct violations are insufficiently investigated and frequently dismissed and that therefore dismissing him for breaching the Code can not form a valid reason for his dismissal.⁸⁰ He cites as evidence in support of this assertion complaints filed by Mr Ellis and Mr O'Neill alleging senior management were conducting a deliberate campaign of threats and intimidation. These allegations appear to relate to events which occurred during negotiations for the new industrial instrument. The evidence of both gentlemen is that they were informed that their allegations were investigated and found to have been unsubstantiated. There is insufficient evidence before me to determine that this was not a valid outcome.⁸¹

[124] I am satisfied that Mr Tracey made available, shared and or distributed the Hitler Video. I find that in doing so he breached BP policies and that his conduct was destructive of the necessary trust and confidence that are an essential element of any employment relationship. I therefore find that there was a valid reason for Mr Tracey's dismissal.

Did Mr Tracey inappropriately use BP computers, logins and/or networks to create, access, share and/or distribute the Hitler Video?

[125] BP submit that Mr Tracey breached clauses 5.2.19 and 5.4.5 of the BP Protecting Our Information Policy by using the BP IT system to access and share material which was inconsistent with its policies and likely to cause offence. BP submit that these breaches form a valid reason for Mr Tracey's dismissal.

[126] Mr Tracey submits that there is no evidence that he used BP computers, logins and/or networks to create the Hitler Video, rather the Hitler Video was created by his wife at the Caption Website. Mr Tracey asserts that he posted the link to the video on Facebook using his personal mobile device.⁸²

[127] The allegation is expressed in the alternative. That Mr Tracey may not have created or distributed the Hitler Video using BP facilities is not a defence to the allegation that he used BP facilities to access or share the Hitler Video.

[128] Mr Tracey admits that he accessed the Hitler Video via the BP IT system using another employee's login but submits that this does not constitute a breach of the relevant policies because the BP Protecting our Information Policy provides that BP's IT systems may be used for limited personal use.⁸³

[129] I am satisfied that showing his colleague the Hitler Video using the BP IT system constituted both accessing and sharing the Hitler Video for the purposes of the relevant policy.

[130] The BP Protecting Our Information Policy⁸⁴ relevantly states in clause 5.2.19 that:

"Where limited personal use of BP IT systems is permissible, you shall ... Not break local laws, cause harm or offence to others or negatively impact BP's reputation or interests."

[131] Clause 5.4.5 of the same policy states:

"You shall not use BP IT systems to deliberately access, store, transmit or publish material that is sexually explicit, harassing, defamatory, promotes terrorism or intolerance, or that is in any way inconsistent with BP's policies, including those covering non-harassment and equal opportunities, or otherwise contravenes BP's Code of Conduct or local laws."

[132] For the reasons set out earlier in this decision I am satisfied that the Hitler Video did cause offence to others and objectively could be viewed as offensive in breach of clause 5.2.19 of the BP Protecting Our Information Policy. That Mr Tracey did not share or distribute the video directly with those offended does not exculpate him. The effect of the Hitler Video was to demean, denigrate and undermine the standing of senior BP management. The possibility that the existence of the Hitler Video would come to the attention of BP was not unlikely or improbable.

[133] I am therefore satisfied that Mr Tracey's conduct was not authorized limited personal use for the purposes of the BP Protecting Our Information Policy.

[134] Not all failures to comply with policy or procedure will justify summary dismissal or even dismissal on notice.

[135] It is lawful and reasonable for an employer to require an employee to comply with policies and directions which control the nature of communications over the employer's electronic communications system and to discipline, and where appropriate, terminate the employment of an employee who is found to have breached those policies.⁸⁵

[136] In particular a Full Bench of the FWC in *Anderson v Thiess Pty Ltd* [2015] FWCFB 478 held at [27] that:

“... objectively inappropriate and offensive communications by an employee in the workplace may, depending on the circumstances, constitute a valid reason for dismissal.”

in relation to an employee dismissed for forwarding a religiously intolerant email in breach of the prevailing company policy.

[137] The relevant policies clearly state that termination of employment was a possible outcome of breaches of the policy of the nature of those committed by Mr Tracey.

[138] I am satisfied that Mr Tracey breached the BP Protecting Our Information Policy by using the BP IT system to access and share material which was inappropriate and likely to cause offence. I find that in all the circumstances that this conduct formed a valid reason for Mr Tracey's dismissal.

Was Mr Tracey notified of the reason for his dismissal? (s.387(b))

[139] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made,⁸⁶ in explicit terms,⁸⁷ and in plain and clear terms.⁸⁸ In *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151, a Full Bench of the Australian Industrial Relations Commission, dealing with a similar provision of the *Workplace Relations Act 1996* (Cth), stated that:

“As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their 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 170CG(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.”

[140] Mr Tracey was dismissed for creating, making available, sharing and/or distributing the Hitler Video in breach of BP policies and for using BP computers, logins and/or networks to create, access, share and/or distribute the Hitler Video in breach of BP policies.

[141] At the Initial Meeting at 8.30am on 31 October 2018 Mr Tracey was presented with a letter which informed him that he was to be interviewed in regards to allegations regarding instances of a 'sustained campaign of inappropriate material' within the 2014 Agreement covered workforce which may constitute a breach of BP policies.⁸⁹

[142] Later the same day at the Investigation Interview Ms Rudderham asked Mr Tracey numerous questions about the Hitler Video including who created it, whether he shared it, how he shared it and whether he considered it was inappropriate or offensive.⁹⁰

[143] On 1 November 2018 the Stand Down Letter outlining the allegations against Mr Tracey and the conditions under which he was being stood down was emailed to Mr Tracey.⁹¹

[144] The Stand Down Letter described the allegations as follows⁹²:

“It is alleged that you:

- *Have shared and distributed material which is highly offensive and inappropriate;*
- *Utilised another employee’s BP logon to share the material;*
- *Were involved in creating this material; and*
- *Are aware of other/s involved in creating the material and are potentially covering up.”*

[145] The Stand Down Letter stated that if substantiated the allegations could constitute breaches of BP Policies which might result in the termination of Mr Tracey’s employment.

[146] On 2 November 2018, Mr Tracey asked for further information in respect of the allegations against him.⁹³ In the 6 November Email Ms Rudderham responded to Mr Tracey’s request and provided copies of a number of BP’s policies.

[147] At the Show Cause Meeting on 14 December 2018, Mr Tracey was advised that the finding of the Investigation was that the allegations against him had been substantiated and this conduct constituted serious breaches of the BP Code of Conduct, Values and Behaviours, BP Respect & Equal Opportunity Policy and the BP Protecting Our Information Policy.⁹⁴

[148] In the 14 December Email, Ms Rudderham provided Mr Tracey with a written summary of matters discussed during the Show Cause Meeting including details of the allegations found to have been substantiated which she described as follows:⁹⁵

“It was alleged that you were involved in creating, and made available, shared and distributed an offensive and inappropriate video depicting BP representatives involved in the current Operations and Laboratory Employee Agreement (EA) employee agreement negotiations as Nazis. It was also alleged that you utilized another employee’s BP logon to show the video to others.”

[149] In the 8 January Email Ms Rudderham provided Mr Tracey with further clarification in relation to the allegations.⁹⁶

[150] At the Dismissal Meeting held on 18 January 2019, Mr Tracey was advised that his employment was to be terminated effective immediately and handed a letter confirming this in writing.⁹⁷ The Dismissal Letter described the grounds for Mr Tracey’s dismissal as follows:⁹⁸

“Allegation 1 - You created, made available, shared and/or distributed an offensive and inappropriate video which purportedly depicted BP representatives involved in the current Operations and Laboratory Agreement negotiations as Nazis.

This allegation was substantiated and is a breach of:

3. *BP Code of Conduct, specifically:
Employee Responsibilities
BP Values and Behaviors (Respect)
Section 2 of the Code which relates to People*
4. *BP Respect & Equal Opportunities Policy, specifically:
Clause 8 of the policy which relates to harassment and bullying
Clause 13 of the policy which relates to roles and responsibilities.*

Allegation 2 - *You inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video.*

This allegation was substantiated and is a breach of:

3. *BP Code of Conduct, specifically:
Section 5 of the Code which relates to – our assets and financial integrity*
4. *BP Protecting Our Information Policy, specifically:
e. Clause 5.2 which relates to acceptable use of IT equipment
f. Clause 5.4 which relates to being discreet in public and online.”*

[151] The Stand Down Letter, the 14 December Email and the Dismissal Letter each set out the allegations made against Mr Tracey. On each occasion the allegations were worded slightly differently. This reflected developments in the investigation and is consistent with an investigation that did not prejudice the guilt or otherwise of Mr Tracey. For example, the scope of the Investigation was appropriately narrowed to remove the allegation that Mr Tracey was ‘potentially covering up’ the identity of the creator of the Hitler Video after Mr Tracey revealed that his partner was the primary creator of the video.

[152] Other differences in the manner in which the allegations were expressed were in the nature of providing additional details or particulars with respect to existing allegations. For example, the 14 December 2019 email gave particulars as to why the video was considered offensive and inappropriate, namely that it depicted BP representatives as Nazis. The additional detail did not constitute new and additional allegations rather it provided particulars of the allegations which were discussed with Mr Tracey verbally. In addition, Mr Tracey was provided with verbal explanations of the allegations at the Investigation Meeting, Show Cause Meeting and Dismissal Meeting.

[153] In light of all of the above, I find that Mr Tracey was notified of the reasons for his dismissal.

Was Mr Tracey provided with an opportunity to respond to the reasons for his dismissal? (s.387(c))

[154] An employee protected from unfair dismissal must be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the employee. This criterion is to be applied in a ‘common sense’ way to ensure the employee is treated fairly and should not be burdened with formality.⁹⁹

[155] At the Investigation Meeting held on 31 October 2018 Mr Tracey answered questions about his involvement in the creation and distribution of the Hitler Video.¹⁰⁰

[156] The Stand Down Letter contained an invitation for Mr Tracey to make an appointment with Mr Stoner or Ms Rudderham if he wished to provide any additional information which may assist the Investigation.¹⁰¹

[157] In the 6 November Email, Ms Rudderham reminded Mr Tracey of the opportunity to have a further meeting (with a support person in attendance) during which he could respond to the allegations in person.¹⁰²

[158] In the 13 November Email, Ms Rudderham again wrote to Mr Tracey reminding him of the opportunity to further respond to the allegations, including by having a further meeting (with a support person in attendance) during which he could respond to the allegations in person.¹⁰³

[159] Mr Tracey provided a written response to the allegations in the Investigation Response which he emailed to BP on 19 November 2018. In this seven page document Mr Tracey responded to the allegations and asked BP to take into account a number of factors in mitigation.

[160] At the Show Cause Meeting held on 14 December 2018, Mr Tracey was advised that the finding of the Investigation was that the allegations against him had been substantiated and this conduct constituted serious breaches of the BP Code of Conduct, Values and Behaviours, BP Respect & Equal Opportunity Policy and the BP Protecting Our Information Policy. Mr Tracey was invited to provide details of any mitigating factors he wished BP to take into account in determining the appropriate disciplinary action. He listed a number during the meeting and indicated that he would provide a more detailed response in writing.¹⁰⁴

[161] On 17 December 2018 Mr Tracey emailed the Show Cause Response to Ms Archbold. In the 34-page document, Mr Tracey identified what he said were flaws in the investigation process, disputed the offensiveness of the Hitler Video, asserted that the relevant BP policies were vague and detailed the matters which he asked BP to take into account in mitigation.¹⁰⁵

[162] In the 8 January Email 2019, Ms Rudderham provided Mr Tracey with a further opportunity to provide information.¹⁰⁶

[163] Mr Tracey submits that he was not provided with an opportunity to respond to the reasons for his dismissal as required by the FW Act because:

- a. He was not provided with details of the allegations prior to the Investigation Interview.
- b. He was not provided with specific details of how the Hitler Video was considered offensive and inappropriate despite requesting further particulars.
- c. The assertion that the Hitler Video depicted BP representatives involved in the negotiations as Nazis was not included in the allegation put to him in the Stand Down Letter but was found to be substantiated at the Show Cause Meeting after the Investigation had concluded thereby denying him the opportunity to respond to this allegation.

- d. The allegation that he inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video was first put to him in the Dismissal Letter.
- e. The allegations were framed differently in each of the Stand Down Letter, 14 December Email and the Dismissal Letter.

[164] I will deal with each of these assertions sequentially below.

[165] Mr Tracey submits that he was not provided with an opportunity to respond to the reasons for his dismissal because he was not provided with details of the allegations prior to the Investigation Interview. The purpose of the Investigation Interview was to establish what, if any, involvement Mr Tracey had inter alia in the creation, sharing and/or distribution of the Hitler Video. It would have been inappropriate for BP to precisely formulate the allegations that Mr Tracey should be required to answer until it established the extent of his involvement in the creation, sharing and distribution of the Hitler Video. For example, if as a matter of fact another employee had created the video and Mr Tracey had informed BP that this was the case at the Investigation Interview, then the assertion that Mr Tracey created the Hitler Video would not have been an allegation necessary to put to him in the Show Cause Letter.

[166] Mr Tracey submits that he was not provided with an opportunity to respond to the reasons for his dismissal because he was not provided with specific details of how the video was considered offensive and inappropriate, despite requesting further particulars. Throughout the Investigation and in fact these proceedings, Mr Tracey disputed whether the video could reasonably be considered offensive or inappropriate. The notes of the Investigation Interview reveal that efforts were made to explain to Mr Tracey why BP considered the Hitler Video offensive and inappropriate, including that the individuals targeted were linked to Hitler and the Nazi's.¹⁰⁷ The allegation that the video was offensive and inappropriate was further particularized at the Show Cause Meeting on 14 December 2018 and in the 14 December Email with the addition of the words "... depicting BP representatives involved in the current Operations and Laboratory Employee Agreement (EA) employee agreement negotiations as Nazis." Further explanation of how the video was considered offensive and inappropriate was provided in the 8 January Email. It is not the case that Mr Tracey was not provided with an explanation of how the video was considered offensive and inappropriate, rather it appears to be the case that he did not accept, and still does not accept, that the video could reasonably be considered offensive and inappropriate.

[167] Mr Tracey submits that he was not provided with an opportunity to respond to the reasons for his dismissal because the assertion that the Hitler Video depicted BP representatives involved in the negotiations as Nazis was not included in the allegation put to him in the Stand Down Letter, but was found to be substantiated at the Show Cause Meeting after the Investigation had concluded, thereby denying him the opportunity to respond to this allegation.

[168] The assertion that the Hitler Video depicted BP representatives involved in the negotiations as Nazis was put to Mr Tracey at the Investigation Interview held on 31 October 2018. He had the opportunity to address this and did so at the Investigation Interview.¹⁰⁸ He had a further opportunity to do so in the written Investigation Response which he provided to BP on 19 November 2018 or alternatively he could have taken up the offers of further interviews made to him in the 6 November Email and 13 November Email.

[169] It seems difficult to understand how Mr Tracey could not have understood that BP took the view that the Hitler Video was offensive or inappropriate because they believed it depicted senior management representatives as Nazis, but even if that were the case Mr Tracey had the opportunity to specifically address this issue and did so at the Show Cause Meeting held on 14 December 2018 when the allegation was put to him.¹⁰⁹ He also had the opportunity to address it in his Show Cause Response forwarded to BP on 17 December 2018.¹¹⁰

[170] In the 8 January Email, Ms Rudderham provided Mr Tracey with a further explanation as to why BP held the view that the Hitler Video depicted its senior managers as Nazis. While Ms Rudderham notes that the Investigation had closed, she nevertheless provided Mr Tracey with yet another opportunity to respond to the allegations and the investigation findings.¹¹¹

[171] Ms Archbold, the ultimate decision maker, gave evidence that she took into account all of the information provided by Mr Tracey, including any information provided after the Show Cause Meeting.

[172] Given the manner in which the Investigation Process was conducted, there is no evidence to support the assertion that BP did not and would not take into account any additional information provided by Mr Tracey up until the point at which the decision was made on 18 January 2019 to terminate his employment.¹¹²

[173] I am satisfied that Mr Tracey was provided with, and took advantage of, multiple opportunities to respond to allegations made against him generally and in particular that the Hitler Video depicted BP senior managers as Nazi's.

[174] Mr Tracey submits that he was not provided with an opportunity to respond to the reasons for his dismissal because the allegation that he inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video was first put to him in the Dismissal Letter.

[175] I do not agree that the allegation that Mr Tracey inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video was first put to him in the Dismissal Letter.

[176] The Stand Down Letter described the allegations he faced as follows¹¹³:

“It is alleged that you:

- *Have shared and distributed material which is highly offensive and inappropriate,*
- *Utilised another employee's BP logon to share the material,*
- *Were involved in creating this material, and*
- *Are aware of other/s involved in creating the material and are potentially covering up.”*

[177] The Stand Down Letter stated that if substantiated the allegations could constitute breaches of BP Policies which might result in the termination of Mr Tracey's employment.

[178] In the 14 December Email Ms Rudderham provided Mr Tracey with a written summary of matters discussed during the Show Cause Meeting including details of the allegations found to have been substantiated which she described as follows:¹¹⁴

“It was alleged that you were involved in creating, and made available, shared and distributed an offensive and inappropriate video depicting BP representatives involved in the current Operations and Laboratory Employee Agreement (EA) employee agreement negotiations as Nazis. It was also alleged that you utilized another employee’s BP logon to show the video to others.”

[179] At the Show Cause Meeting and in the 14 December Email it was made clear to Mr Tracey that this conduct was considered a breach of the BP Code of Conduct, Values and Behaviours: Respect, BP Respect and Equal Opportunity Policy, BP Protecting our Information Policy.

[180] The Stand Down Letter, the 14 December Email and the Dismissal Letter each set out the allegations made against Mr Tracey. On each occasion the allegations were worded slightly differently however the substance of the allegations were substantively the same that he utilized BP assets to show other employees the Hitler Video.

[181] I find Mr Tracey was given an opportunity to respond to the reasons for his dismissal.

Was Mr Tracey unreasonably refused a support person? (s.387(d))

[182] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present. There is however, no positive obligation on an employer to offer an employee the opportunity to have a support person.¹¹⁵

[183] Mr Tracey was accompanied by a support person to the Investigation Interview, Show Cause Meeting and the Dismissal Meeting. During the course of the Investigation he was repeatedly offered the opportunity to attend additional meetings with a support person.

[184] I find BP did not unreasonably refuse to allow Mr Tracey to have a support person present at discussions relating to his dismissal.

Was Mr Tracey given warnings regarding his unsatisfactory performance? (s.387(e))

[185] 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. Unsatisfactory performance is more likely to relate to an employee’s capacity than their conduct.¹¹⁶

[186] Mr Tracey was dismissed for misconduct not for poor performance therefore this factor is neutral.

What is the impact of the size of BP and the presence or absence of dedicated human resources management specialist/expertise on the procedures followed? (s.387(f) and s.387(g))?

[187] The size of an employer’s enterprise and/or the absence of dedicated human resource management expertise may impact on the procedures followed by an employer in effecting a dismissal.

[188] BP is a large employer with extensive internal human resource management, industrial relations and legal expertise and has the financial capacity to access specialist external expertise. This is reflected in the planning and execution of the Investigation.

[189] I find the size of the employer's enterprise and the presence of dedicated human resource management specialist/expertise did not adversely impact on the procedures followed in effecting Mr Tracey's dismissal. Therefore, I have considered these factors as neutral.

Are there any other relevant matters? (s.387(h))?

[190] Section 387(h) provides the FWC with a broad scope to consider any other matters it considers relevant to the determination of whether the dismissal of an employee was harsh, unjust or unreasonable.

[191] Mr Tracey submits that I should take into account in determining whether his dismissal was harsh, unjust or unreasonable:

- a. He had no malicious intent when he shared the video, rather his intention was to raise morale.
- b. His mental illness.
- c. The conduct of management (which Mr Tracey considered offensive and disrespectful).
- d. He is a scapegoat for the ill will BP management hold for the 2014 Agreement covered workforce.
- e. His conduct was a once off event and unlikely to be repeated.
- f. He was contrite and removed the video without being directed to do so.
- g. There is only evidence of eight people viewing the Facebook post currently before the FWC.
- h. BP took no action to have the post removed from Facebook or from the caption generating website.
- i. The combination of the investigation into the Hitler Video with inquiries with respect to another matter.
- j. Delays in investigation and the total duration of the Investigation.
- k. Flaws he says exist in the Investigation Report.
- l. Failure on the part of BP to follow its own policies and procedures.
- m. The industrial context in which the events occurred.
- n. The length and standard of his service with BP.
- o. The disciplinary consequence was summary dismissal and this was disproportionate to the conduct.
- p. The financial impact on him of his dismissal and the limited likelihood he will obtain equally as lucrative alternative residential employment.
- q. The effect of the dismissal on his physical and mental health.
- r. The difficulty he will experience in finding another job at a similar salary.
- s. The strain it is putting on his marriage.
- t. Any breakdown in confidence between him and BP is not necessarily irreconcilable and given the size of the organisation any breakdown in personal relationships is not insurmountable.

[192] A number of these matters I have considered elsewhere in this decision. Where I have done so I have also separately considered their relevance to section 387(h), if appropriate. However, I have not repeated my reasoning here if it would be repetitious to do so. I have also considered all of the above matters even if not specifically mentioned here or elsewhere in this decision.

[193] I am satisfied that Mr Tracey made available, shared and or distributed the Hitler Video. I find that in doing so he breached BP policies and that his conduct was destructive of the necessary trust and confidence that are an essential element of any employment relationship.

[194] He may well have been endeavouring to raise morale but did so by demeaning, undermining and denigrating the leaders in his organisation. I note in this regard that those involved in the facilitated bargaining were not limited to very senior management representatives like Mr Swayn who might only have irregular contact with Mr Tracey, but included Mr Mike Stoner - Operations Shift Manager, Mr Paul Mace the Operations Superintendent and Ms Campbell.

[195] Had a member of BP management team created a video portraying delegates and union officials in a similar manner for a management function I would anticipate it would have rightly caused uproar among the workforce and led to its creator's swift removal from the organisation.

[196] Mr Tracey points out that there is only evidence of eight people viewing the Facebook Post. I note that the evidence is that many of the 2014 Agreement covered workforce are members of the TTT Facebook Group. The evidence currently before the FWC of who viewed the video is limited to evidence that BP could obtain itself, for example by searching its own servers. BP endeavoured to obtain production from Facebook of further information, but this was resisted by Facebook. Mr Tracey's membership of the Facebook group meant he knew who else was a member as well. When given the opportunity to put on evidence as to the composition of the Facebook group - evidence exclusively in his possession as the only witness before the FWC who was a member of the Facebook group - Mr Tracey declined to put on any evidence. I have concluded that the membership of the TTT Facebook Group is significantly wider than the 8 identified in the evidence and most probably included a significant proportion of the 2014 Agreement covered workforce.

[197] While the symptoms identified by Mr Tracey as associated with the mental health condition he suffers might lead to intemperate decisions, given Mr Tracey's evidence with respect to his unblemished employment record, if he does suffer from such symptoms they appear to be well managed by his medication. I am not satisfied that his medical condition provides an explanation for his conduct.

[198] I suspect that it was the heated industrial environment in which the events occurred which played a more significant part in Mr Tracey's decision-making process. There are vast differences between the entitlements contained in the 2014 Agreement and the relevant Award. The workforce are understandably keen to preserve and protect their current conditions. Their efforts to do so and the company's efforts to make change need to occur within a framework of some minimum level of civility. Mr Tracey's conduct unfortunately overstepped this mark.

[199] During the course of the Investigation and in these proceedings Mr Tracey sought to justify his conduct by reference to conduct by BP senior management which he viewed as inappropriate and which he variously described as offensive and disrespectful.

[200] Examples of such conduct cited by Mr Tracey include BP appropriately informing the 2014 Agreement covered workforce that it was considering exercising the statutory right, available to be exercised by both employers and employees, of applying to terminate an agreement which has reached its nominal expiry date. I am not satisfied that the conduct of BP management identified by Mr Tracey could reasonably be relied on as justification for his conduct. But I note that the language which he uses and his attribution of bad intent to the exercise of lawful rights, demonstrates a fundamental chasm in his relationship of trust and respect with his employer.

[201] Mr Tracey also submits that his dismissal was harsh, unjust and unreasonable because, he says, the investigation was not fair or unbiased. He says that he was refused access to documents and information necessary for his right to respond to the allegations. He is critical of the investigational techniques and asserts that the outcome was pre-determined.¹¹⁷

[202] I am not satisfied on the evidence before me that the Investigation was unfair or biased. To the contrary, the Investigation was delayed by BP's efforts to ensure that the investigation was conducted in a methodical manner and that Mr Tracey was provided with multiple opportunities to respond to the allegations and the proposed disciplinary outcomes both verbally and in writing. Mr Tracey submitted two detailed, considered and lengthy written responses before his employment was terminated. The evidence of Ms Archibald, the decision maker, is that she took into account the full content of these documents before ultimately deciding that Mr Tracey's employment should be terminated.¹¹⁸ Mr Tracey did not tender any further oral or written evidence at the Hearing which leads me to conclude that BP did not have a valid reason for his dismissal or that the dismissal was procedurally unfair.

[203] The Letter of Dismissal states that Mr Tracey's conduct was found to constitute misconduct warranting summary dismissal. Notwithstanding this, BP paid Mr Tracey four weeks' pay in lieu of notice.

[204] Mr Tracey disputes that his conduct constituted misconduct warranting summary dismissal because his conduct didn't evidence a repudiation or rejection of his contractual obligations and at worst were simply an error of judgement. He submits that a number of consequences flow from this. Firstly, under the disciplinary procedure contained in the 2014 Agreement, he should have been provided with an opportunity to improve and that a failure to comply with that process made his dismissal procedurally unfair. Secondly, that the strength of evidence needed to establish the allegations was necessarily higher and wasn't met.¹¹⁹ Thirdly, that the disciplinary action was a disproportionate response to the conduct complained of and what might otherwise constitute a valid reason for dismissal on notice is not a valid reason for summary dismissal.

[205] I am satisfied that Mr Tracey's conduct provided a valid reason for his dismissal and that the necessary evidentiary burden to establish this conduct was met. The consequence of summary dismissal is the loss of wages during the relevant period of notice. To the extent that any harshness arose from BP choosing to dismiss Mr Tracey summarily rather than on notice, this was addressed by BP making an 'ex gratia' payment of notice.

[206] Mr Tracey submits that allowing him to continue working after BP became aware of his involvement in the Hitler Video is inconsistent with summary dismissal. It is not always the case that it is appropriate or feasible to immediately stand down an employee who is subsequently found guilty of serious misconduct warranting summary dismissal. A power to suspend with or without pay should be exercised with care as it has significant reputational consequences, potential adverse health and welfare impacts and in some circumstances, financial implications for the affected employee. BP did in fact stand Mr Tracey down during the course of the Investigation but only after establishing that there were prima facie grounds for doing so. In doing so, BP exercised its right to suspend in a judicious manner but not such that it invalidates a subsequent decision to find Mr Tracey guilty of serious misconduct.

[207] While Mr Tracey expressed remorse during the Investigation and in these proceedings, his remorse is expressed in terms of him not intending to cause offence, if it occurred. He does not appear to accept that his conduct did cause offence or that it could reasonably be said to cause offence. Given this lack of insight it is likely that he would come into further conflict with his employer.

[208] In all the circumstances, and taking into account the heavy emotional and financial impact of the dismissal on Mr Tracey and his family, and taking into account the payment in lieu of notice, I am satisfied that his dismissal was not harsh, unjust and unreasonable.

Conclusion

[209] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Mr Tracey was not harsh, unjust or unreasonable. Accordingly, I find his dismissal was not unfair. An order to this effect [PR711895] will be issued with this decision.



DEPUTY PRESIDENT

Appearances:

Mr S. Edwards for the Applicant

Ms Miller for the Respondent

Hearing details:

2019

Perth

8 May

Final written submissions:

Applicant, 13 June 2019

Respondent, 4 July 2019

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<PR709331>

¹ Transcript PN387, PN245, PN251-PN255, PN258-267, Pn282-297, PN305-315, PN327

² Transcript at PN141-PN143

³ Transcript PN514-PN522

⁴ Exhibit R2 Attachment SJR-1

⁵ Exhibit E1 at [1]-[2]

⁶ Exhibit R1 at [14]

⁷ Exhibit E1 at [7], Exhibit A2 at [14]-[16]

⁸ Transcript at 11:15am

⁹ Respondent's Submissions at [2]

¹⁰ Exhibit E1 at [8]

¹¹ Exhibit A1 at Attachment 12

¹² Exhibit R2 Statement at Attachment SRJ 25

¹³ Exhibit E1 at [9]

¹⁴ Exhibit R2 at [12]-[19] and at Attachment SJR-9

¹⁵ Exhibit E1 at [10]

¹⁶ Exhibit E1 at [11] and Exhibit A3 at Attachment 3

¹⁷ Exhibit E1 at [12]

¹⁸ Exhibit E1 at [14]

¹⁹ Exhibit E1 at [15]

²⁰ Exhibit E1 at [16]

²¹ Exhibit A1 at Attachment 4

²² Exhibit A1 at Attachment 4

²³ Exhibit A1 at Attachment 4

²⁴ Exhibit R2 at Attachment SJR-16

²⁵ Exhibit R2 at Attachment SJR-18

²⁶ Exhibit R2 at Attachment SJR-26

²⁷ Exhibit E1 at [19]

²⁸ Transcript at PN1260, Exhibit R2 at Annexure SJR8

²⁹ Exhibit R3 at [1]-[10]

- ³⁰ Exhibit R3 at [18]
- ³¹ Exhibit E1 at [20]
- ³² Exhibit E1 at [21]-[22]
- ³³ Exhibit R2 at Attachment SJR26
- ³⁴ Exhibit A3 at Attachment 18
- ³⁵ Exhibit E1 at [23] and Exhibit A3 at Attachment 20
- ³⁶ Exhibit A3 at Attachment 22
- ³⁷ Exhibit R3 at [31]-[37]
- ³⁸ Transcript PN1373-1386
- ³⁹ Exhibit E1 at [24]
- ⁴⁰ Exhibit E1 at [25]-[26]
- ⁴¹ Exhibit A3 at Attachment 23
- ⁴² Exhibit E1 at [27]
- ⁴³ Applicant's Outline of Submissions at [1]
- ⁴⁴ Applicant's Closing Submissions at [2]
- ⁴⁵ Applicant's Closing Submissions at [15], [100]-[147]
- ⁴⁶ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373
- ⁴⁷ *Ibid.*
- ⁴⁸ *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373 and 377-378.
- ⁴⁹ *Ibid.*
- ⁵⁰ Exhibit A3 at Attachment 23
- ⁵¹ Applicant's Outline of Submissions at [35]
- ⁵² Applicant's Closing Submissions at [6]
- ⁵³ Transcript PN187
- ⁵⁴ Exhibit R2 at Attachment SJR-29
- ⁵⁵ Exhibit A2
- ⁵⁶ Transcript PN387, PN245, PN251-PN255, PN258-267, Pn282-297, PN305-315, PN327
- ⁵⁷ Transcript at PN187-PN188
- ⁵⁸ Applicant's Outline of Submissions at [6]-[11], [13]-[15] and Applicant's Closing Submissions at [37]
- ⁵⁹ Exhibit E1 at [8]
- ⁶⁰ Exhibit R2 Statement at Attachment SRJ 25
- ⁶¹ Transcript at PN583, PN598-PN599
- ⁶² Applicant's Outline of Submissions at [40]
- ⁶³ Applicant's Closing Submissions at [20] and [112]-[123]
- ⁶⁴ Applicant's Closing Submissions at [112]-[128]
- ⁶⁵ Applicant's Closing Submissions at [20]
- ⁶⁶ Exhibit R1 at [39]
- ⁶⁷ Exhibit R1 at [19] and [22]
- ⁶⁸ Exhibit R1 at [42]
- ⁶⁹ Exhibit R3 at [26]
- ⁷⁰ Exhibit R2 at Attachment SJR-6
- ⁷¹ Applicant's Closing Submissions at [15]-[19]
- ⁷² Applicant's Closing Submissions at [19]
- ⁷³ Applicant's Closing Submissions at [19]
- ⁷⁴ [2005] AIRC 737 at [47]
- ⁷⁵ (HCA 320/2011 Judge Seagroatt 20 June 2013)
- ⁷⁶ Exhibit R3 at [39]

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- ⁷⁷ Applicant's Outline of Submissions at [32], Applicant's Closing Submissions at [134]-135]
- ⁷⁸ *Dissanayake v State Transit Authority* (2016) 260 IR 441
- ⁷⁹ Applicant's Outline of Submissions at [31] and Applicant's Closing Submissions at [111]
- ⁸⁰ Applicant's Closing Submissions at [135]
- ⁸¹ Exhibit A5 and Exhibit A6
- ⁸² Applicant's Closing Submissions at [39]
- ⁸³ Applicant's Outline of Submissions at [12], Exhibit R2 at Annexure SJR15
- ⁸⁴ Exhibit R2 at Attachment SJR-21
- ⁸⁵ *Wake v Queensland Rail* [2006] AIRC 663 (PR973936) at [95]
- ⁸⁶ *Chubb Security Australia Pty Ltd v Thomas* (Print S2679) at [41].
- ⁸⁷ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [151].
- ⁸⁸ *Previsic v Australian Quarantine Inspection Services* (Print Q3730).
- ⁸⁹ Exhibit E1 at [11] and Exhibit A3 at Attachment 3
- ⁹⁰ Exhibit R2 at SJR-11
- ⁹¹ Exhibit A1 at Attachment 4
- ⁹² Exhibit A1 at Attachment 4
- ⁹³ Exhibit R2 at Attachment SJR-16
- ⁹⁴ Exhibit E1 at [21]-[22]
- ⁹⁵ Exhibit R2 at Attachment SJR26
- ⁹⁶ Exhibit A3 at Attachment 22
- ⁹⁷ Exhibit E1 at [25]-[26]
- ⁹⁸ Exhibit A3 at Attachment 23
- ⁹⁹ *RMIT v Asher* (2010) 194 IR 1, 14–15.
- ¹⁰⁰ Exhibit E1 at [15]
- ¹⁰¹ Exhibit A1 at Attachment 4
- ¹⁰² Exhibit R2 at Attachment SJR-18
- ¹⁰³ Exhibit R2 at Attachment SJR-26
- ¹⁰⁴ Exhibit E1 at [21]-[22]
- ¹⁰⁵ Exhibit E1 at [23] and Exhibit A3 at Attachment 20
- ¹⁰⁶ Exhibit A3 at Attachment 22
- ¹⁰⁷ Exhibit R2 at Attachment SJR-11
- ¹⁰⁸ Exhibit R2 at Attachment SJR-11
- ¹⁰⁹ Exhibit R2 at Attachment SJR-41 and Exhibit A3 at [101]-[102]
- ¹¹⁰ Exhibit E1 at [23] and Exhibit A3 at Attachment 20
- ¹¹¹ Exhibit A3 at Attachment 22
- ¹¹² Exhibit A3 at [38]
- ¹¹³ Exhibit A1 at Attachment 4
- ¹¹⁴ Exhibit R2 at Attachment SJR26
- ¹¹⁵ *Explanatory Memorandum, Fair Work Bill 2008* (Cth) at [1542].
- ¹¹⁶ *Annetta v Ansett Australia Ltd* (2000) 98 IR 233 at 237.
- ¹¹⁷ Applicant's Outline of Submissions at [24]-[29]
- ¹¹⁸ Exhibit R3 at [31]-[39]
- ¹¹⁹ Applicant's Closing Submissions at [79] – [98]