DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Ms Tara Odgers
v
Central Queensland Services Pty Ltd
(U2019/4118)

COMMISSIONER HUNT BRISBANE, 15 OCTOBER 2019

Application for an unfair dismissal remedy – Applicant placed sex toy in another employee's flight carry-on baggage – airport incident not put to applicant for several months - applicant appeared in uniform in inappropriate picture with other employees which was posted to Facebook - applicant dismissed for misconduct in airport and photo incidents – Procedural errors in respondent's approach to misconduct – valid reason for dismissal but dismissal unjust or unreasonable – compensation ordered – amount reduced for applicant's misconduct.

[1] On 10 April 2019, Ms Tara Odgers made an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) alleging that her dismissal from Central Queensland Services Pty Ltd (CQS, BHP, BMA or the respondent) was harsh, unjust or unreasonable.

[2] Ms Odgers commenced employment with CQS in early 2014 as a Mine Employee at the Caval Ridge Mine and was dismissed with effect from 26 March 2019. The reasons for dismissal related to the findings of an investigation, which a termination letter of 26 March 2019 set out as follows:

> "*1. Airport incident*
>
> - *On 16 October 2018 at Moranbah Airport, you placed butter knives and a sex toy in another colleague's hand luggage which was then flagged with airport security.*
> - *You admitted doing so and said you did so to 'get back' at that employee*
> - *You told me no one else was involved in the incident.*
>
> *2. Photograph taken at site*
>
> - *On Saturday 2 March 2019, you posed in a photo with two (2) female colleagues which showed you all opening your BHP work-issue shirts exposing your bras.*
> - *The photo was taken by a colleague of yours, Mr Dennis James, as a 'selfie'.*
> - *BHP logos can be seen in the photograph on employee's work-issued shirts.*
> - *The image was taken, and left on Ms Sharon James', Operation Production, mobile phone.*
> - *The photo was taken on site at a Crib Hut.*

- *The image was later shared by Ms James on Facebook to 'friends' of hers which included a number of other employees engaged as Operators at Caval Ridge Mine.*"

[3] The matter was heard before me in Brisbane on 16 and 17 July 2019. Ms Odgers was represented at hearing by Mr Troy Spence of Counsel, instructed by Fair Work Employment Lawyers. CQS was represented by Mr James McLean, Legal Counsel – Employee Relations, from BHP Legal. I note that Mr McLean, whilst employed in-house is employed by a different entity to the respondent. I granted permission pursuant to s.596(2)(a) of the Act to both parties on the basis that I was satisfied that the matter would be dealt with more efficiently if permission were granted, taking into account the complexity of the matter.

[4] Ms Odgers gave evidence on her own behalf and was cross-examined. Mr Les Brown, who was at the time Superintendent Production Coal at Caval Ridge Mine, also gave evidence and was cross-examined. Mr Bryan Hill, Supervisor Production was contacted during the hearing and gave evidence by telephone as new evidence arose during the hearing.

[5] There are no jurisdictional issues for me to determine. I am satisfied that Ms Odgers is a person protected from unfair dismissal pursuant to s.382 of the Act. Ms Odgers' application was made within the 21-day statutory time limit. The only matter that I must determine is whether Ms Odgers' dismissal was harsh, unjust or unreasonable pursuant to s.387 of the Act.

Procedural matters

[6] As is the usual course, Directions were issued to the parties requiring them each to file and serve witness statements and submissions. The Directions specified as follows:

"*The submissions must include all relevant facts, dates and incidents to support all claims made including remedy.*

The witness statements are required to outline the evidence-in-chief of each witness the party intends to call at the hearing and are to be provided in the form of a signed statement. All documents referred to in the witness statement are required to be attached as an annexure to that witness statement, and numbered accordingly.

The witness statements are designed to take the place of evidence-in-chief and accordingly leave must be sought at the hearing to adduce further evidence-in-chief."

[7] Ms Odgers was granted an extension of time to comply with these directions. When Ms Odgers' witness statement was filed and served, it clearly contained some significant errors of fact.[1] Further, some parts of her evidence was not included in her witness statement and was given either in cross-examination, re-examination or in answering questions from me.

[8] A number of objections were taken to Ms Odgers' statement in these proceedings,[2] including that some parts of it was in the form of opinion or submissions, and not evidence. For the reasons given on transcript, I upheld a number of objections and refused to admit into evidence a number of paragraphs and I have not had regard to them.[3] As I expressed at the hearing, it was disappointing that a statement with a reasonable amount of objectionable material in it was filed in circumstances where Ms Odgers was represented at the time of making the statement by Supportah Ops Pty Ltd T/A Industrial Relations Claims.

[9] The issue in relation to the state of the evidence-in-chief was not entirely limited to Ms Odgers' case. The Commission raised with the parties at the hearing that it was disappointing that new and significant evidence was being uncovered at the hearing.[4]

Evidence of Ms Odgers

[10] Ms Odgers was stood down from work, on full pay, effective 13 March 2019. On 26 March 2019, Ms Odgers received a letter from CQS terminating her employment (the Termination Letter). Ms Odgers recalls that the Termination Letter, which was not annexed to her statement in accordance with Directions, outlined "*the butterknife incident and sex toy that was placed in another colleague's hand luggage on 16 October 2018*".[5] Ms Odgers states that she took "sole responsibility" for this incident[6] and apologised for the incident.[7] In the statement Ms Odgers did not say how or when she did these things.

[11] In relation to the "butterknife incident", Ms Odgers' evidence-in-chief is:

> "No one involved in the butterknife incident was in uniform
>
> There were no photos, and nothing was published to social media or any other medium
>
> The incident was spoken about later that same day, and everything was fine
>
> BHP were aware of this incident in October of 2018 and chose to take no disciplinary action
>
> They (BHP) rested their right to respond, and only brought this incident up formally 6 months later
>
> As BHP waited so long to raise this issue, they did not follow their own disciplinary procedure"[8]

[12] In relation to the second reason for termination, the photograph issue, Ms Odgers' evidence-in-chief is:

> "Point 2 of the letter from BHP dates 26 March 2018 (sic) outlined the findings of the 'photograph taken at' (sic)
>
> I acknowledge I posed for a photo on Saturday 2 March 2019
>
> I posed for the photo, along with two (2) other female colleagues, all of which as stated in the letter were opening our BHP work-issued shirts, exposing our bras on site at a Crib Hut
>
> The photo was taken by Mr Denis James, a colleague of mine
>
> The photo was taken on, and left on Ms Sharon James' phone (Operator Production)
>
> I did not publish the photo, nor did I ask for the photo to be published/shared on social media

The photo was later published by Ms Sharon James on her Facebook account to 'her friends' which did include a number of employees of the Caval Ridge Mine

It is not clear in the photo who the individuals are, or the company logos on the shirts

The two (2) other female staff as noted in the letter from BHP were also exposing their bras in work-issued shirts

These two (2) female colleagues did not lose their jobs

The person taking the photo did not lose his job

The publisher of the photo has not lost their job

I believe this to be completely unfair, and an inconsistent application of policy"[9]

[13] That final paragraph is arguably not evidence other than of the Applicant's belief that the decision to dismiss her, and not her colleagues, was unfair and an inconsistent application of policy. I will treat this evidence as that, and not as evidence that it was unfair or was an inconsistent application of policy. Those are conclusions and matters that I must determine.

[14] Ms Odgers states that she finds it "embarrassing"[10] that CQS dismissed her for conduct, but not her colleagues, who acknowledge that they engaged in the same behaviour. To evidence her claims of differential treatment, Ms Odgers points to the circumstances of a number of her former colleagues.

[15] Ms Tiffany West, who was also involved in the photo incident, was featured in an article in the Cairns Post. Ms Odgers' statement indicates that this article was published on 7 January 2019. The article is in evidence before the Commission and indicates it was published on 7 January 2015. The title of the article is 'Women digging into mining jobs in the Far North'. The article features two photos of Ms West, one of which is Ms West in a hard hat, a high-vis shirt and is captioned 'Cairns miner Tiffany West on the job at Moranbah'. The second photo is a picture of Ms West with a caption, in part, "GIRL POWER: Tiffany West is a truck operator for BHP Billiton Mitsubishi Alliance's Caval Ridge mine west of Mackay…"

[16] The article notes that Ms West is employed as a truck driver at the Caval Ridge coal mine. Ms West is quoted in the article as saying "[I]t is a sausage fest out there". Ms Odgers also refers to Ms West's facebook and states that Ms West has published negative comments regarding the mine. None of these negative comments are attached to Ms Odgers' statement; Ms Odgers gives no specifics of the comments she relies upon in making this statement.

[17] In relation to Ms West, Ms Odgers' states:

"*Ms West…has only ever received a warning*

This again highlights the inconsistent application of policy, and the procedural unfairness that has been applied in my matter

...

Per the reasons supplied in my own termination of employment letter from BHP, Ms West should have lost her position also"[11]

[18] Again, arguably, this amounts to a submission or conclusion. To the extent that this evidence is in the form of a submission or conclusion I have not given it weight. I have only given it weight as to Ms Odgers' belief or opinion.

[19] Next, Ms Odgers turns her attention to another colleague, whom Ms Odgers initially called in her statement "Jacko", but amended her statement to identify the colleague as "Freo". In relation to Freo, Ms Odgers states:

"*Excavator 351 fell of bench twice in approximately eight (8) weeks*

The first time excavator 351 fell, lead by "Freo" and his crew, he and his crew were all heard over the radio talking about the deep cut and how they would split it, with him and his merry men.

Freo and his crew were mocking the Applicant's crew

Freo's crew had identified a hazard and chose to ignore it

This was a breach of safety policy

As a result of Freo and his crew's behaviour the excavator fell off the bench, costing the company millions

Not to mention the potential fatalities it could have caused

All three (3) men from the crew, are still employed despite their reckless and harmful behaviour

This happened again approximately six (6) weeks later under a different operator

This time the digger was written off

The crew and all those involved are still employed

As per the letter issued to me from BHP outlining my dismissal, those involved in the falling of the digger should by BHP's own admission have been dismissed

As those involved were not dismissed, I believe this only highlights their inconsistency relating to my dismissal"[12] (errors in original)

[20] Ms Odgers has given no particulars of these instances to make this evidence helpful. And again, arguably, this amounts to a submission or conclusion. To the extent that this evidence is in the form of a submission or conclusion I have not given it weight. I have only given it weight as to Ms Odgers' belief or opinion.

[21] Noting Ms Odgers' assertion in her first statement that she had not been disciplined about the 'Airport incident', and the respondent's material set out in detail what occurred between Ms Odgers and Mr Les Brown on 28 February 2019, Ms Odgers appeared to contradict her first statement, by giving evidence in her second statement that the following occurred:

> "I attended an interview with Mr Les Brown on 28 February 2019 to discuss the 'Airport incident'.
>
> In this interview, I was not provided with the Ethicspoint report which was lodged with the Respondent notifying them about this incident, or any other documentation or evidence concerning the incident.
>
> I believe this to be completely unfair as I was asked to respond to the allegations concerning the incident.
>
> After this interview, Mr Les Brown told me that he would interview additional people, and then 'get back to me'.
>
> No additional steps by the Respondent were taken until I was stood aside, pending investigation, on full pay effective 13 March 2019."[13]

[22] Ms Odgers alleges that in taking this course of action, CQS has not complied with the disciplinary policy contained in the BMA Guideline to Fair Play Policy (the Fair Play Policy).

[23] Ms Odgers submits that the Fair Play Policy establishes a four step disciplinary process. In relation to that process, Ms Odgers states:

> "Steps 2 and 3, which state that formal and final warnings are to be given to an employee subject to a disciplinary process, did not occur as I never received any formal or final warnings.
>
> Had I been given a warning about the airport incident, there is no way I would have participated in the photo incident.
>
> My supervisor Brian Hill took no action in October 2018 to warn me.
>
> There was an industrial relations specialist aware of the airport incident sometime between late December 2018 and February 2019.
>
> Furthermore, Mr Rob Scrivon, operator, a key witness to the 'Airport incident', was not interviewed as part of the investigation into my conduct."[14]

[24] Ms Odgers takes issue with Mr Brown's evidence that CQS takes all EthicsPoint complaints extremely serious and ensures that they are actioned appropriately. In relation to the airport incident, the complaint was made in November 2018, and Mr Leroux Louw, Principal Employee Relations, informed Mr Brown of the complaint on 13 February 2019. In turn, Ms Odgers was only notified of the complaint on 28 February 2019.

[25] In relation to the photo incident, Ms Odgers states that dismissing her for this behaviour is inconsistent as employees walking to or from the camp gym, who are on occasion in sports bras and tights, are not disciplined.

[26] Ms Odgers also believes that the disciplinary action taken against her was "extremely disproportionate".[15] Ms Odgers makes reference to a digger incident, in or around November 2018, in which Ms Odgers says that $4 million worth of damage was done. According to Ms Odgers, the employees involved in that incident are still employed by CQS.

Cross-examination

[27] In cross-examination Ms Odgers conceded the following matters:

- she is reasonably familiar with BHP's code of conduct and charter values;[16]
- the values are displayed around site;[17]
- the code of conduct is accessible on the employee intranet;[18]
- it was a requirement of her contract of employment that she comply with the code of conduct at all time;[19]
- she has received training on the code of conduct and the charter values;[20]
- she is aware of the respectful behaviours program and the emphasis on that program throughout 2018 and 2019.[21]

[28] Ms Odgers resiled slightly from her concession in respect of the code of conduct, clarifying that she has never actually read the code of conduct but has watched a 15 minute video in relation to the code.[22]

[29] In relation to Ms West, Ms Odgers maintained that in her view, what Ms West had done was in contravention of the values and the code of conduct.[23] Ms Odgers formed this view for two reasons: the use of the phrase "sausage fest"[24] and a prohibition on engaging with the media without the respondent's consent.[25]

[30] Ms Odgers had never heard the term "sausage fest" before,[26] but her reading or interpretation of the use of the phrase "sausage fest" connotes that people on site are sleeping with each other,[27] that it's a "free-for-all".[28] Ms Odgers did not accept that the more commonly understood meaning was "a preponderance of men".[29] Ms Odgers did accept that there are more men than women at the Caval Ridge mine, and that if "sausage fest" means more men than women it would be "actually factually correct to describe Caval Ridge as a sausage fest",[30] but she viewed that it would then rest on the interpretation of the phrase.[31]

[31] Ms Odgers is aware that as a result of the article, Ms West was investigated.[32] She conceded that she was not present in the conversations Ms West had with her supervisor, and she does not know what was said to Ms West by her supervisor in that process.[33] Ms Odgers does not know Ms West's personal circumstances or employment history,[34] or what promises, commitments or undertakings Ms West may have given the respondent during the disciplinary process.[35]

[32] As relates to Ms West's contact with the media, Ms Odgers conceded that it is reasonable for CQS to prohibit employees speaking to the media without permission.[36] Ms Odgers conceded that it was reasonable for CQS to want to do so, so that it could control its own media presence and protect its reputation.[37] Ms Odgers accepted that the code of

conduct required employees to protect BHP's property and that BHP's property includes its reputation and therefore, Ms Odgers was obliged to protect BHP's reputation.[38]

[33] Ms Odgers was asked during cross-examination to explain in her own words why she considered the dismissal to be unfair. Ms Odgers responded:

> "*I think that it was quite harsh. The punishment didn't fit the crime in regards to my supervisor knew about the airport incident before it happened, was there when it happened and then after the fact didn't even discuss anything with me about it at all. I feel that if he - when he knew about it beforehand, probably would have been helpful if he had said, "You will lose your job if you do this. This is going to cause you a problem*."[39]

[34] This evidence relates to the airport incident. Ms Odgers' supervisor at the time was Mr Bryan Hill.[40] Ms Odgers' *initial* evidence was that Mr Hill was on the same flight as her on 16 October 2018,[41] and he was at the security check point at the time of the incident.[42] However, Ms Odgers can't recall seeing Mr Hill on the flight, but knows that he also flies to Cairns, that there's only one flight to Cairns, and does recall seeing him at the airport.[43]

[35] Ms Odgers original evidence is that Mr Hill saw the incident, although he was not at the airport security screening point at the time.[44] Whilst Mr Hill was not at security, he was in the airport, which is a small airport.[45] Ms Odgers conceded that she was not looking at Mr Hill during the incident, and that he was a "reasonable distance" away from Ms Odgers at the time.[46] Ms Odgers conceded that he could have been on his phone, talking to someone else or looking out the window.[47] Ultimately, Ms Odgers accepted that she does not know whether Mr Hill saw the incident,[48] although she stated that he would know what was going on because "the whole airport clapped".[49] This evidence is somewhat difficult to reconcile with Ms Odgers' subsequent evidence, which is discussed below.

[36] Ms Odgers and Mr Hill did not have a discussion about the incident; the incident was "not even spoken about".[50] Similarly, Ms Odgers did not discuss the matter with Mr Brown at the time; he did not know about it at the time, and Ms Odgers has no reason to believe that Mr Brown knew about the incident prior to 2019.[51]

[37] On the day of the airport incident, Ms Odgers finished her shift at 6:00pm, and showered and changed. She caught the BMA-supplied bus to the airport, of which there are three or four, each carrying 50 or 60 people; all of whom are involved with the mine. She arrived at the airport about 7:30pm.[52] When Ms Odgers was at the airport she sat at a table and was responsible for a number of bags of a few colleagues, who were outside the airport having a cigarette.[53] There was no formal arrangement about Ms Odgers minding the bags while others smoked; however Ms Odgers accepted that these people were putting their trust in Ms Odgers to make sure nothing happened to their bags.[54]

[38] Ms Odgers put the butterknives with a sex toy in her colleague's bag, as retaliation for some horseplay on site a few months earlier where the same colleague had put pizza on the roof of Ms Odgers' room at camp.[55] Her colleague, Mr Scrivon, was having a cigarette outside of the airport when she did this. Mr Scrivon is, incidentally, Ms Odgers' housemate.[56]

[39] Ms Odgers agreed that it was apparent that the object was a sex toy.[57] She stated that she purchased it in Cairns before doing the relevant swing, and she purchased it for the

specific purpose of putting it in her colleague's bag.[58] The butterknives, however, were removed by Ms Odgers from the camp dining room and were BHP property.[59] Ms Odgers did not ask if she could remove those knives from camp, and once they were discovered by airport security they were not returned to Ms Odgers, or BHP.[60]

[40] Ms Odgers went through security screening earlier than her colleagues so that she could watch Mr Scrivon go through security.[61] At the time Mr Scrivon went through security there were a lot of people going through the screening point as well[62], with about four or five airport staff on the checkpoint[63]. When Mr Scrivon went through security, the x-ray machine flagged the bag and it was searched by the security attendant. The security attendant pulled various items out of the bag, including some personal items.[64] The butterknives and sex toy were also pulled out and placed on the counter where others could have viewed the sex toy.[65] Ms Odgers conceded that it is possible someone could have been offended by the sex toy,[66] although Ms Odgers maintained that there was no possibility whatsoever of Mr Scrivon being offended[67]. At the time, Ms Odgers did not think about the potential for someone to have been offended by the sex toy.[68]

[41] Ms Odgers did not accept that her actions showed a lack of respect for her colleague, or that it breached her colleague's trust.[69] Ms Odgers and the colleague involved in the incident have a "very good relationship"[70] and joke with each other a lot. [71]

[42] Outside the screening point at Moranbah Airport is a warning sign. Ms Odgers has seen the sign on many occasions.[72] That sign contains a warning that prohibited items must not be taken past the screening point and that the maximum penalty exceeds $10,000.[73] Ms Odgers didn't think that a butterknife would be a prohibited item but agreed that she didn't "bother to check".[74] Ms Odgers accepted that she was putting her colleague at risk of being fined, but stated that she thought that they would see the joke of it, and if her colleague actually got fined she would have paid it.[75] Ms Odgers conceded that if the butterknives were, legally, a prohibited item, that would make her conduct more serious[76] and would be a breach of the requirements of the site.[77]

[43] As discussed above, Ms Odgers went through security before her colleague so that she could watch the colleague go through security. Ms Odgers also filmed Mr Scrivon going through security on her mobile phone.[78] Further, Ms Odgers alerted others that they should also watch Mr Scrivon as he went through security.[79] Some of these people also filmed the incident, although Ms Odgers is not sure how many people.[80]

[44] Ms Odgers was required by airport staff to hand over her phone after the incident.[81] Ms Odgers assumes others were required to hand over the phones, but she walked off after handing her phone to airport staff and walked to see her colleague.[82] She stated that airport staff were "very stern"[83] with her about the footage, and, because of that, Ms Odgers assumes that others who filmed the incident no longer have the footage.

[45] Ms Odgers' recording of the incident included the colleague going through security, a security attended unpacking the contents of his bag, and putting the sex toy on the table.[84] Ms Odgers wasn't, at the time of hearing, sure why she filmed the incident and wasn't, at the time of the incident, aware that it was not appropriate to film airport security.[85]

[46] Ms Odgers accepts that on 28 February 2019, Mr Brown put the allegation to her that other people were filming the airport incident and her response to Mr Brown was that no other

people were filming the incident. Ms Odgers knew that this response to Mr Brown was a lie, but she was motivated not to get others into trouble over the incident.[86]

[47] Ms Odgers conceded that her behaviour in the airport incident did not reflect positively on BHP.[87]

[48] In relation to the photograph incident, Ms Odgers explained what she was doing in the photograph as "*hav[ing] our top button undone and exposing our – the top of our chest bra.*"[88] In the photo, and while doing this, Ms Odgers was wearing a pink breast cancer shirt that she had purchased, which has the BMA logo on it, and is BHP uniform.[89] Ms Odgers accepted that when wearing that shirt she is representing BMA.[90] The photograph was taken in the BMA crib room, at a time when Ms Odgers was on day shift.

[49] When asked in cross-examination, Ms Odgers was able to accurately state the colours of the BMA logo; orange, blue and red.[91] Ms Odgers stated that she was able to do so because she was a BHP employee, but that might not be the case for a person who doesn't work at BHP. Ms Odgers conceded however, if a person knew what the BHP logo looked like and saw the photo they could determine that the shirt being worn by one of Ms Odgers' colleagues in the photo was a BMA shirt, if you were able to zoom in on the picture.[92] Without this ability, Ms Odgers maintains that she could not clearly discern the logo, although she ultimately accepted she could see the white square and some of the blue.[93]

[50] Ms Odgers maintained that the photograph was not inappropriate, nor could it be considered offensive[94]; it was just cleavage[95]. Ms Odgers did ultimately concede that it is possible that others could have found the photo offensive, even though Ms Odgers did not.[96] In her show case response of 22 March 2019[97], Ms Odgers stated:

> "*I agree that the photo is highly inappropriate but is (sic) was not taken with intent to be disrespectful or offend.*"[98]

[51] Ms Odgers was taken to this response and her evidence given in these proceedings, which Ms Odgers accepted was inconsistent with each other[99], although Ms Odgers maintained that her response in the show cause process was true[100]. This matter was taken up with Ms Odgers by me, where I had the following exchange with her:

> "Ms Odgers, I've written on my post it note, "Are you remorseful?". And I wrote that before you then said that you didn't think the photo incident was inappropriate?---I meant it in the sense of there's just [cleavage], there's no - there's nothing else showing.
>
> You wouldn't do it here today, would you?---Hell, no.
>
> And you wouldn't do it in other environments, would you?---No.
>
> It's a work environment. I mean you (indistinct) less on a beach, I accept that?---That's how I sort of looked at it at the time, it wasn't - - -
>
> But the point that Mr McLean's been getting to is, imagine if there was a journalist who wrote an article about women in mining?---Yes, I totally do understand.
>
> "This is what happens, women in mining get their gear off"?---Yes.

That would be embarrassing, wouldn't it?---In hindsight, yes.

So I'm trying to understand, you say that you're remorseful but then you say it's not an inappropriate photo?---Only in the sense that there's no - it's not actually showing breast.

It's very sensational though, isn't it?---Mm.

There's a lot of breast from you and Catherine?---Mm.

It's not just a bra?---Mm.

You're actually tilting forward and posing, aren't you?---Mm.

Do you accept that?---Yes, I do.

Again, we see more on the beach, but it's the pose and it's in place of where the photo was taken?---Yes, I agree.

You understand that?---I do.

That's what the Commission has to weigh up?---Yes, I understand."[101]

[52] The photo was uploaded to Facebook by Mrs James, and Mrs James has removed the photo. Ms Odgers maintains that she had no idea that the photo would be uploaded,[102] that it was a possibility and had happened,[103] but did not have an idea of how many people saw the photo before it was removed from Facebook.[104] A screenshot of the Facebook post was in evidence before me.[105] Ms Odgers accepts that the screenshot shows that the photo was posted at 8.27pm on Saturday, 2 March 2019, there are 33 people that have reacted to the photo (liked etc.) and possibly more people than this 33 have seen the photo.[106] Ms Odgers accepted that it is possible that despite the photo being taken off Facebook by Mrs James, others may continue to have a copy of the image.[107]

[53] In her supplementary statement, Ms Odgers stated that had she been warned following the airport incident "*there is no way [she] would have participated in the photo incident.*"[108] Ms Odgers conceded, however, that she attended a meeting with Mr Brown about the airport incident on 28 February 2019, and the photo was taken on 2 March 2019, just two days later. She agreed that she was aware at the time of the photo incident that BHP was investigating her conduct in relation to the airport incident.[109]

[54] While Ms Odgers maintained that it is not possible to identify the employees in the 2 March 2019 photo as BHP employees, Ms Odgers ultimately conceded that there could be negative consequences for BHP's reputation if the individuals were identifiable.[110] Ms Odgers accepts that BHP takes its reputation very seriously and has invested heavily in developing its reputation in the industry and more broadly.[111]

[55] Ms Odgers accepted that she met with Mr Brown on 28 February 2019 in relation to the airport incident and that the notes taken of that meeting[112] accord with her recollection of what happened in the meeting.[113] Ms Odgers accepted that despite her statement in her

supplementary statement that she wasn't provided with an EthicsPoint complaint, the conduct that CQS took issue with is "clearly articulated" in the first two paragraphs of Mr Brown's notes and that she admitted to that conduct.[114]

[56] Ms Odgers has accepted that the letter of 21 March 2019 – which was incorrectly dated as 2018 – make clear that BHP has found that she placed the butter knives and sex toy in her colleague's bag, posed for the photo with colleagues in uniform exposing her bra, and that in BHP's view the conduct amounted to misconduct.[115] Ms Odgers accepts that from at least 28 February 2019 BHP held concerns about the airport incident, and at least from 13 March 2019 that a concern was held about the photograph incident. Ms Odgers was stood down on pay and this provided Ms Odgers with time to consider the allegations up until 22 March 2019.[116]

[57] Ms Odgers has previously been given a verbal warning in 2015 in relation to conduct while in transit between site and home.[117] Ms Odgers accepted that she had been drinking alcohol on a plane trip from the site to home, which is strictly prohibited.[118]

[58] Over objection, I permitted the respondent to put various matters and documents to Ms Odgers concerning a former colleague, Ms Stacey Parker. While the evidence might not strictly be of much weight on its own, Ms Odgers has nonetheless been on notice about these materials since the filing of Mr Brown's statement.[119]

[59] It seems that Ms Parker was a contractor whose engagement with CQS was terminated. Ms Odgers was outspoken in relation to this decision.[120] This outspokenness included Ms Odgers confronting Mr Hill in a prestart meeting, in front of other employees.[121] Ms Odgers accepted that she could have been found to have been loud and aggressive.[122] Ms Odgers accepted that Mr Hill "probably" could have taken this as being disrespectful.[123]

[60] Ms Odgers conceded that while she doesn't specifically recall it could be possible – but she wouldn't "bank on it" – that in discussing Ms Parkers' dismissal in a bus with other employees, she referred to a number of people who made witness statements against Ms Parker as "dogs".[124] Ms Odgers does not have any reason to think why the persons who made statements at the time saying that Ms Odgers did this would be lying.[125] Ms Odgers maintained that she did not refer to the persons at the time as "dogs".[126]

[61] In relation to Ms Odgers' complaint that she was dismissed without having been issued a step 2 or step 3 warning, Ms Odgers does not accept that BHP may dismiss without having reached these steps.[127] During the hearing there was some dispute between the parties about whether the BHP policy, the Fair Play Guidelines applied to Ms Odgers' employment or not, and whether if it did not, the circumstances of that change might be relevant to the Commission's consideration of procedural fairness in this matter.[128] I will return to this matter in dealing with submissions.

[62] As Ms Odgers is pursuing reinstatement the Commission sought some information from Ms Odgers concerning the appropriateness of such a remedy should she be successful in this matter. In particular, given the allegations Ms Odgers has raised regarding some of her former colleagues, would it be appropriate for the Commission to order her back to work? Ms Odgers accepted that if the Commission were to make adverse findings about the conduct of her colleagues, namely "Freo" and Ms West; that might put people off side.[129] Ms Odgers

stated that there are four crews, (A, B, C and D), and placing Ms Odgers on an alternate crew might make the situation workable.

[63] The Commission was also mindful that Ms Odgers has conceded she lied to the respondent during the show cause process. It was specifically put to Ms Odgers that it may pose a difficulty to the Commission to find that Ms Odgers could be reinstated where the evidence may be that the relationship of trust and confidence had been damaged. Ms Odgers restated that she simply didn't want to get others into trouble when she falsely stated that nobody else had been filming the airport incident.[130]

Re-examination

[64] In re-examination, Ms Odgers gave oral evidence that Mr Hill knew about the airport incident *before* the incident happened because Ms Odgers told him it was going to happen.[131] Ms Odgers went further to state that she told Mr Hill "a few days prior to the incident", when she and Mr Hill were in his office, on-site having a discussion.[132] Ms Odgers told him that she was planning on putting a sex toy and butter knives in her colleague's bag when they go through the airport.[133]

[65] As is apparent and was accepted by Ms Odgers' Counsel,[134] this information, at least at this level of detail, was not contained in Ms Odgers' evidence-in-chief. Ms Odgers stated that she thought this was in her evidence and she discussed it with her representative, Mr George Calderon, prior to hearing.[135] It also became apparent, as Ms Odgers conceded, that the information regarding Mr Hill was not in her show cause response prior to her dismissal.[136]

[66] Because of this, the respondent was given an opportunity to cross-examine on the point further. Ms Odgers accepted that this issue with Mr Hill was not mentioned anywhere else in her evidence or prior to hearing, but maintained that it had been discussed with her representative.[137]

[67] Following the luncheon adjournment on the first day of hearing, Ms Odgers' representative sent to my chambers two documents in relation to this issue. The first is an email, in which Ms Odgers waived privilege, dated 26 April 2019, which stated:

> "*Hi George,*
>
> *I have got a couple of phone number here for you. Sharon, Dennis Catherine and Tiffany are all the the photo. I have spoken to them and they were happy for me to pass on there (sic) numbers.*
>
> *[phone numbers redacted]*
>
> *[Name and phone number redacted] was the receiver of the airport toy, he was happy for me to pass his number onto you.*
>
> *I am still chasing down more people from the airport to see if I can pass on there (sic) number to you, so more will come over the weekend when I get a chance to talk to them.*

My supervisor Bryan Hill and our Head Trainer Tim Brady also were at the airport and were aware of what was about to unfold but due to me being restricted to not talk to my employer I haven't made contact with them to ask, but will give you there numbers anyway. [phone number redacted]

Will get more airport witnesses over the next few days. Would there be surveillance footage from the airport?" (errors in original; underlining added)

[68] Further, a screen shot of a text message from Ms Odgers to "Bryan Hill", dated 3 May at 4:10pm was submitted. That text message stated:

"*Hi Bryan. My solicitor will be contact you as a witness to the airport incident. Sorry to bring you into this but it looks like we are going to trial and you will be called because you knew about it and were also there. Any questions give me a call*." (underlining added)

[69] The respondent did not accept that either the text message or the email established the version of events that Ms Odgers was giving for the first time in oral evidence during the hearing. It was submitted that Ms Odgers' evidence was a recent invention.

Evidence as to mitigation of loss

[70] Ms Odgers was unemployed for a period of two and a half months after she was dismissed from her employment with CQS. This amounts to a loss of $9,000.00, taking into account that five weeks' notice was paid upon termination. Ms Odgers also stated she is earning $300 less per week in her current position, when compared with her earnings at CQS and, additionally, Ms Odgers pays for her own flights to and from work in her current employment.

[71] Further evidence-in-chief was adduced at hearing, by leave, in relation to mitigation. In addition to what Ms Odgers stated above in her reply statement, Ms Odgers stated that since termination she has done some painting work. Her evidence as to whether she was remunerated for this work was not entirely straightforward. At hearing, Ms Odgers gave evidence that the payment for painting was "just cash",[138] "food vouchers"[139] and "just in food – dinners and things to help me get by."[140]

[72] Ms Odgers has subsequently found work for another major company.[141] That work is the same work that she was performing at Caval Ridge mine as a truck operator and is a return to the Caval Ridge mine.[142] This is the same job that Ms Odgers had with CQS prior to her dismissal.[143] In her evidence at hearing, Ms Odgers stated that she is required to expend approximately $500 per week in travel and accommodation costs on account of flying commercial flights to get to and from the site.

[73] A number of bank statements were tendered without objection at the hearing.[144] I indicated at hearing, evidence as to Ms Odgers' weekly expenses is not a matter that is relevant to this decision.[145] I may have regard to the statements in relation to additional work-related expenses Ms Odgers has incurred, which may be relevant to remedy.[146] Further statements were filed following the hearing, without objection, in relation to the Applicant's earnings since dismissal.

[74] In relation to her new work arrangements, Ms Odgers accepted that on returning from day shift, she did not have to stay in Mackay overnight. Ms Odgers accepted that she could fly out on the same day, although the flight would have a stopover in Brisbane and total travel time to Cairns would be about 12 hours.[147] On the way to work, Ms Odgers maintained she needed to fly to Mackay the day prior and pay for her own accommodation overnight in order to catch the employer-provided bus the following morning.[148] Ms Odgers accepted that in time she may be able to use private transportation to site, but as she was still fairly new in her employment she didn't know the crew well enough to participate in such private arrangements.[149]

Evidence of Mr Les Brown

[75] During the relevant time, Mr Brown was the Superintendent Production Coal at Caval Ridge mine.[150] In this role, Mr Brown was responsible for making decisions in relation to the handling of misconduct allegations and termination of employment.[151]

[76] The majority of Caval Ridge employees are engaged as FIFO workers; that is 'fly-in, fly-out'. These employees fly in and out of Moranbah Airport. Moranbah Airport is a small airport, which does have some commercial flights landing, but is otherwise most frequently used for charter flights, arranged by BHP for employees.[152] Because BHP assumes responsibility for employees' journey to and from site, there is a duty of care for these employees. Each year, FIFO employees are required to complete a Roster Commute Plan.

[77] BHP's "Our Charter" (the Charter) is described as "the single most important document at BHP", and the "basis for [BHP's] decision making".[153] The Charter comprises BHP's five key values – including sustainability and respect. Sustainability is defined as:

> "*Putting health and safety first, being environmentally responsible and supporting our communities.*"[154]

[78] Respect is defined as:

> "*Embracing openness, trust, teamwork, diversity and relationships that are mutually beneficial.*"[155]

[79] The values identified in the Charter are underpinned by the BHP Code of Conduct (the Code). Under the heading "Workplace equality and inclusion", the Code states that BHP employees should:

> "*<u>Always</u>:*
>
> - *Demonstrate fairness, trust and respect in all your working relationships*
>
> *<u>Never</u>:*
>
> - *Behave in a way that is or may be perceived as offensive, insulting, intimidating, malicious or humiliating to others*
> - *Distribute or display any offensive material including inappropriate photos or cartoons*"[156]

[80] The Code also deals with "Business travel", where it states:

> "*When travelling for business…[y]ou must ensure that your behaviour always reflects positively on your own reputation and the reputation of BHP.*"[157]

[81] Ms Odgers has received training in relation to the Code and Charter, most recently on 12 April 2018.[158]

[82] To support both the values in Charter and the Code, BHP initiated a "Respectful Behaviours" program in the third quarter of 2018.[159] Mr Brown described this program as follows:

> "*…This was an educational campaign that reminded all BHP personnel of their obligation to at all times treat themselves, their co-workers, their community, and the company, with respect. The campaign was rolled out across all BHP sites, and compromised of, amongst other matters, videos, toolbox talks, email circulars, and printed materials…*"[160]

[83] The circulated materials included a message from BHP's CEO, Mr Andrew Mackenzie, in which Mr Mackenzie stated:

> "*As a starting principle and as a Charter value, being respectful to others is the price of entry to work at BHP. The absolute minimum requirement. There is no situation that justifies disrespect in our workplace and it's our collective responsibility to address these behaviours.*"[161]

[84] Mr Mackenzie continues:

> "*Clearly we need to make a stronger connection between Our Code, our Charter values and our behaviour each day. We need to ask each other, 'is that ok with you?' and if the answer is 'no', we must use that opportunity to modify our behaviour and learn from it. This is our chance, all of us, to make a collective change and shape the future culture of BHP.*"[162]

[85] Mr Brown's evidence is that this message was distributed to all employees at the mine, in pre-start meetings in the weeks commencing 18 and 25 September 2018.[163]

[86] Mr Brown is aware of several prior incidents involving Ms Odgers. In this respect, Mr Brown recalls the following:

> "*a. in December 2015, the Applicant was issued with a "Step 1" disciplinary outcome in relation to inappropriate conduct involving alcohol on a BHP Charter Flight;*
>
> *b. in September 2018, the Applicant was involved in several inappropriate exchanges with her supervisor and co-workers after a contractor with whom the Applicant had been friends was removed from site (Contractor Incident). In relation to this incident, I received statements from:*

i. *The Applicant's Supervisor, in which he complained the Applicant had spoken to him in a "loud, aggressive tone" at a pre-start meeting and been "abrupt and rude" toward him in subsequent exchanges;*

ii. *Mr Darren Carrick (Operator), in which Mr Carrick recounted a conversation involving co-workers on a BMA bus. Mr Carrick described the Applicant's behaviour as "angry and vindictive"; and*

iii. *Mr Josh Furness (Operator) in which Mr Furness recounts the same conversation involving the Applicant on a BMA bus. Mr Furness' recollection included the Applicant referring to co-workers as "dogs" for writing statements in relation to the abovementioned Contractor*."

[87] The statements referred to in Mr Brown's evidence were annexed to his statement.[164]

[88] In relation to the airport incident, Mr Brown's evidence is that he was advised of the incident on 13 February 2019 when he was contacted by Mr Leroux Louw, Principal Employee Relations. Mr Louw advised Mr Brown that an EthicsPoint complaint had been made against Ms Odgers in relation to the incident. This is the first time that Mr Brown had become aware of the airport incident, some four months after the incident.[165] EthicsPoint is a service that permits BHP employees and third parties to report incidents and raise concerns on an anonymous basis.

[89] Following receipt of the complaint, Mr Brown made enquiries with staff at Moranbah Airport. Moranbah Airport staff confirmed the incident, as described in the EthicsPoint complaint.[166] Further evidence emerged in relation to these discussions, which is discussed below.

[90] Mr Brown met with the Applicant on 28 February 2019 to discuss the airport incident. Mr Brown asked Ms Odgers if she would like to have a support person present for the meeting, but Ms Odgers declined.[167] Notes of that meeting were taken by Ms Louise Moroney and annexed to Mr Brown's statement.[168] Those notes are as follows:

> "*Would you like a support person we are about to have a serious conversation regarding an event that occurred at the Moranbah Airport back on the 16th October 2018?*
>
> ***Tara – Declined support person***
>
> *There are allegations that you were involved in an event where a number of butter knives we were placed in a box containing an adult sex toy which was then placed in another passenger's hand luggage, this bag was then put through the security scanner at the airport at this time the butter knives were detected and the owner of the bag was asked if they were aware of any prohibited items in their bag?*
>
> ***Tara – It was Scibbos bag, it followed some horse play back at site where Scibbo had put some pizza on the roof of my room in camp, to get back I placed the adult sex toy inside his bag with some butter knives that he was going to carry onto the plane at the Moranbah airport.***

While the bag was being searched by the airport security office a number of people were observed by another airport security officer filming the event with mobiles, were you part of the group filming while the bag was being searched?

Tara – From my recollection I was the only person filming, I was asked to delete the footage and then did so.

Is this type of horse play common practice at the airport?

No

Would you do the same thing at the Brisbane airport?

Tara – Maybe – didn't realise butter knives were an issue

Do you understand the severity of the event?

Tara – I wouldn't do it now that I'm aware of how serious the event was taken, I made a point of ensuring the knives weren't sharp or dangerous

I take full responsibility, no one else was involved

Tara was reminded of the EAP service available to all employees and that it is recognized that this is a stressful time and was encouraged to use the EAP

Also that the investigation is not completed and that all details including the interview are confidential

Tara – I am happy to keep to my self

Tara also stated that she apologises to the staff at the airport and didn't realise the consequences before she put the knives in the bag

Asked Tara if there was anything else she would like to comment on?

Tara – Nothing else to say

Les Brown made commitment to meet again before Tara left site on the Tuesday afternoon"[169] (errors and emphasis in original)

[91] Mr Brown states that it was a real concern for him that Mr Hill may have been aware of the airport incident and failed to bring it to Mr Brown's attention. Mr Brown asked Mr Hill to address this concern in March 2019. At the conclusion of this meeting, Mr Brown advised Mr Hill that BHP was considering disciplinary action.[170]

[92] In relation to the photograph incident, Mr Hill notified Mr Brown on the morning of 5 March 2019 that he believed a photo had been posted to Facebook. Mr Brown was advised by Mr Hill that be believed the photo included three individuals in BHP uniform exposing their bras in a Caval Ridge crib hut. Mr Hill sent the photo to Mr Brown by text message.[171] From the text message, Mr Brown "immediately recognised"[172] that the photo was taken in a crib

hut at Caval Ridge and that the persons in the photo were in BHP uniform. Mr Hill later confirmed the identity of the individuals in the photograph, including Ms Odgers.

[93] On 8 March 2019, each of the employees involved in the photograph incident were stood aside on full pay. On 13 March 2019, Mr Brown met with Ms Odgers at the Rydges Hotel in Cairns. Ms Odgers attended the meeting with a support person, Mr Trent Haddow. Mr Andy Martin, Specialist Employee Relations, attended the meeting with Mr Brown and took notes. Those notes were annexed to Mr Brown's statement in this proceeding.[173] Mr Brown also met with the other individuals involved in the photograph incident.

[94] Ultimately, Mr Brown decided to issue a Final Written Warning to the two other female participants, as Mr Brown concluded that they had participated in the photo. Mr Brown decided not to ask these employees to show cause, because they had not been involved in any comparable prior incident.[174] In relation to the person who posted the picture to Facebook, Mrs James, Mr Brown decided to ask her to show cause why her employment should not be terminated, although ultimately a final written warning was issued[175]. Mr Brown has given evidence that the airport incident was determinative of the different outcome for the employees involved in the photograph incident, when compared with Ms Odgers.[176] Mr James, who took the photo, was also issued with a final written warning.

[95] In relation to Ms Odgers, Mr Brown decided to ask Ms Odgers to show cause because of her participation in the photograph incident *and* the airport incident. Ms Odgers was requested to show cause by letter issued on 21 March 2019. The findings contained in the letter are extracted above. In relation to the alleged 'breaches', the letter went on:

> "*Tara, as you are aware, taking photos on site is prohibited. The photo is highly inappropriate and has the potential to bring the company into disrepute. This conduct is contrary to what BHP is seeking to achieve in promoting and encouraging female participating on site.*
>
> *These findings are serious and constitute* ***misconduct****. Your conduct and behaviour is also in breach of Company policies and procedures including:*
>
> - *Our Chart Values, specifically Respect*
> - *BHP Code of Conduct – Protecting our Company, in particular*
>
> *As you are aware, employees are expected to comply with Company policies and procedure at all times during their employment.*"[177]

[96] The letter states that Mr Brown considered Ms Odgers' conduct to be intentional and that Ms Odgers was aware that such conduct is not tolerated by BHP. Ms Odgers responded to the show case letter by email of 22 March 2019. That response was as follows:

> "*Dear Les,*
>
> *Thank you for giving me the right to reply.*
>
> *I would like to begin by stating how remorseful I am and that I understand BMA is considering disciplinary action against myself which may result in termination of my employment. I never would have believed that what seemed like harmless fun at the*

time would evolve into something so big. After serious self reflection I understand the ramification of my actions. Since I started working in mining I have always been so proud of who I work for and what I do.

Given the gravity and potential outcome being considered by the company I consider it necessary to provide a response to each of the matters contained in the correspondence.

***October 16 2018,** I placed a butter knife and a sex toy into another colleagues hand luggage. At the time, I thought that because I chose a butter knife and nothing sharp that there would be no ramifications, it was just a prank that mates play on mates. The airport security was fine at the time, however they did request that I stop filming and to pass my phone to them to inspect and delete what they felt was necessary. I did this immediately. The airport staff were not aggressive but explained we are not allowed to video tape airport scanners. Completely understanding, I apologised and said that I didn't even see if from that side of the situation and that I meant no disrespect. She made her point but was very nice about it and on departing, and ever since then, it has always been a friendly smile and hello. I would like it to be noted that the colleague in question was not offended. I am still unclear on what company policy or procedure a breached here as there is no reference to this incident in the "breaches" section of the correspondence"*

***March 2 2019**, A Photo of myself and 3 others was taken on the phone of another colleague, that was left in the crib hut.*

This photo was not intended for social media. I was told about the photo, but because I don't bring phone to site, I didn't see it. On the odd occasion when I do bring my phone to site, I leave it in my bath house locker. When I saw the photo on march the 13th I was asked to describe what I saw in the photo. I described what I saw in the room, I asked if I could pinch and zoon the photo to see if I you could clearly read the logos on the shirt. I was told that the photo loses clarity the more you zoom in. If I was a third party looking at the photo I would not be able tell where the photo was taken and where we worked. Our faces were covered and I was not tagged in the photo. There is nothing on my Facebook that mentions that I work for BMA, BHP or Caval Ridge. I would never intentionally compromise the brand of a company that I am very proud to be working for. I agree that the photo is highly inappropriate but is was not taken with intent to be disrespectful or offend. I am not only extremely embarrassed and disappointed, I am also remorseful in my actions.

My start to mining was not a positive one. I was green as green and found myself in this strange land. I was older than the majority female green starters and struggled to fit in. The first 18 months was a difficult time. The learning's I got from that, I have carried with me. I take great pride in mentoring the new people and making them feel welcome. It really is an overwhelming world when you are new, and to have a friendly face around is a great comfort.

Once I settled in, I took off. I started taking on extra duties, ones that no one else seemed to want to do. I started entering all the notifications for maintenance. I liaised with the maintenance department and together we worked out the strategy that would

help both departments. This continues today and has been most effective with keeping faults on equipment current and up to date.

In addition I also took on the responsibility for the up keep of our light vehicle fleet. I implemented a system that enabled us to keep track of damages and services due. I maintained all the pre-start books and recorded any relevant information. I arranged servicing and any towing requirements as well as key drop off and collection. I designed a white board that was easy for all crews to understand and follow. Cleaning of the cars was done on a regular basis by any one who was spare at the end of the day. I set up a cleaning box and put it out the front for whoever was available. This system is what we use today.

I also put together a system that allowed us to have crib hut supplies. One the start of each swing, those who were spare, would go across to stores and collect the order that I had put in before we went on break. It was just a standard order of coffee, tea, milo, cordial, milk, general PPE and cleaning products, just a basic order to start us off for the week. This is to be distributed to the crib huts we are using that week. I feel that I am a productive member of the crew and help out the supervisors where ever possible. I don't wait to be asked, I have been there long enough to know what needs to be done. On night shift, when ever it is possible, I host the trivia game. This helps the entire crew around fatigue times. It has become so popular that other departments chime in and play along.

I have been an outstanding female member of the team and this has reflect in my performance review. My presence reinforces BMA desire to create and inclusive workplace for women and dismissing me will not serve BMA's goal of maintaining and increasing female representing in the work force. There was no intention on my part to cause harm to my fellow workers or the the BMA brand.

I am committed to remain a safe and productive member of the Caval Ridge Mine. I will strictly follow the charter values and always abide by the code of conduct moving forward. Thank you for taking the time to consider this response. I look forward to returning to site and continue to contribute to the success of Caval Ridge Mine."[178] (errors in original)

[97] Mr Brown's evidence is that he had regard to "*all relevant considerations, including the various written and verbal responses provided by the Applicant and the Applicant's employment history*".[179] Mr Brown considered that:

"*a. the Applicant's conduct during the Airport incident demonstrated alarming disrespect for both the company and her co-workers (including the employee whose bag in which the sex toy was placed, and the other employees and airport staff who were exposed to the incident);*

b. the photograph for which the Applicant posed (and in which the Applicant intentionally exposed her bra) was one which, in addition to being highly inappropriate, had the potential (and indeed still could) cause significant reputation damages to BHP;

c. the Applicant's conduct in both the Airport incident and Photograph Incident constituted a serious breach of both the Charter Values and Code; and

d. the Applicant's length of employment was of no real significance in the context of BHP's operations and indeed the industry more broadly."[180]

[98] Mr Brown advised Ms Lori Smith, Manager Coal Mining of his decision. Mr Brown discussed relevant matters with Ms Smith, and Ms Smith endorsed the dismissal. A letter of dismissal was prepared and issued to Ms Odgers on 26 March 2019.

[99] Mr Brown's evidence is that he had lost all trust and confidence in Ms Odgers' ability to abide by BHP's expectations and conduct herself in a manner that would not cause harm to BHP.[181] Mr Brown is aware that Ms Odgers has been performing work at the mine as a contractor but considers it important that Ms Odgers no longer be an employee of BHP.[182] If Ms Odgers is no longer a BHP employee, her conduct can no longer reflect on BHP to the same degree. Mr Brown was not aware that until early July 2019, Ms Odgers had been wearing BHP uniforms when engaged by the contractor. Steps have subsequently been taken to ensure that Ms Odgers does not wear the BHP uniform.

[100] Mr Brown has considered the Cairns Post article referred to by Ms Odgers but does not accept that the comments in that article are comparable to Ms Odgers' conduct relevant to the airport incident.

Cross-examination

[101] Mr Brown does not hold any formal qualifications, including any HR qualifications, but has received coaching from an HR Advisor on conducting workplace investigations, when he first started with BHP.[183]

[102] Mr Brown accepts that the Values and Code apply to everyone equally, including supervisors and himself.[184] Indeed, Mr Brown accepts that all supervisors were involved in the roll-out of the respectful behaviours program and would have received training in the document prior to roll out.[185]

[103] In relation to the Fair Play Guidelines, Mr Brown conceded that the enterprise agreement covering the site provides that where disciplinary processes are being undertaking, the Fair Play Guidelines are to be followed.[186] Mr Brown maintained that the Fair Play Guidelines are to be used as a guide, rather than prescriptive, but conceded that the Fair Play Guidelines don't state that compliance is optional.[187]

[104] Mr Brown accepted that the only prior warning Ms Odgers had received during her employment was the warning in 2015 and that warning was a step 1 warning.[188] The Fair Play Guidelines operate such that after a 12 month period that step 1 warning decreased to no warning.[189]

[105] In relation to the allegations concerning Ms Odgers and comments purportedly made by her in the bus, and being disrespectful to Mr Hill, Mr Brown confirmed that Mr Hill, as Ms Odgers' supervisor, did not commence an investigation in relation to those allegations and, consequently, didn't issue a formal warning.[190]

[106] Mr Brown's evidence is that when he addressed the airport incident with Mr Hill, Mr Hill told him that he had heard rumours, but he did not have any detail about it.[191] When asked by Mr Brown, Mr Hill accepted that he was at the airport the night of the airport incident, but he did not accept having any prior knowledge of what was going to occur that night.[192] However, Mr Brown conceded that the EthicsPoint complaint confirmed that Mr Hill knew about the airport incident, although may not have known the full details of that incident.[193] Mr Brown accepted that Mr Hill could have commenced an investigation into the airport incident when he heard about the rumours, but he did not do so.[194]

[107] In relation to the first meeting concerning the airport incident on 28 February 2019, Mr Brown accepted that the notes of the meeting were an accurate account of what occurred, and there is no reference to the Code, Fair Play Guidelines or the Values, and Ms Odgers was not stood down in relation to the airport incident.[195]

[108] Mr Brown accepted that the EthicsPoint complaint "came in" in during late December 2018, but that it was not brought to his attention until 13 February 2019.[196]

[109] Mr Brown confirmed that as far as he's aware, Ms Odgers wasn't fined by the Commonwealth of Australia in relation to the airport incident, nor was she banned from flying.[197]

[110] Mr Brown was taken to the Code and the expectations of leaders. The Code there states:

> "*We know the standard we walk by is the standard we accept. That's why if you are responsible for leading people at BHP, it's important you role model Our Charter values by:*
>
> - *demonstrating behaviours described in Our Code;*
>
> …
>
> - *holding everyone to account for breaching Our Code.*"[198]

[111] Mr Brown conceded that the way this section of the Code reads is that if a supervisor is aware that something inappropriate has occurred, but walks by, then that's the standard that is accepted, and the supervisor "*condones the behaviour*"[199]. He accepts that Mr Hill should have investigated further so that he could understand what happened at the Moranbah Airport.[200]

[112] Had Mr Hill investigated earlier, Mr Brown accepted that the disciplinary process would have occurred much earlier. Mr Brown conceded that because of the delay by Mr Hill, Ms Odgers was not given disciplinary notice and, as a consequence, wasn't given an opportunity to change her behaviour.[201] Mr Brown accepted that his evidence is that it was the airport incident that distinguished Ms Odgers from other employees in the subsequent disciplinary process, and ultimately led to a more severe penalty for Ms Odgers.[202]

[113] In relation to the photograph incident, Mr Brown first saw the photo on the afternoon of 5 March 2019.[203] He agreed that crib huts are not PPE-free areas, but employees are not

required to have all PPE on when in a crib hut.[204] Mr Brown accepted that in relation to harm, there is no real serious safety risk if an employee unbuttons their shirt in a crib hut.[205]

[114] Mr Brown was taken to Ms Odgers' evidence that zooming in on the photo meant that the quality became difficult to discern the BMA logo, and maintained his evidence that he was able to identify the BMA logo event when the image was zoomed in.[206] Mr Brown did accept that but for the BMA logo, the hi-vis shirts, worn by employees in the photo, were generic across the industry.[207] His evidence is that in the absence of the logo, another employee of the mine would be able to identify the location of the photo as a crib hut at Caval Ridge,[208] but a member of the public who had not been onsite would not be able to identify the location.[209] There is nothing else in the photo, apart from the logo, that ties the photo to BMA or Caval Ridge mine.[210]

[115] Mr Brown was taken to the meeting of 13 March 2019 and the notes of that meeting, which were taken by Mr Martin.[211] Mr Brown accepted that the notes don't refer to the Fair Play Guidelines.[212] Mr Brown did not complete the Fair Play Guidelines in relation to either incident.[213] Similarly, the notes do not reflect that in asking Ms Odgers whether she thought her actions amounted to a breach of the Values any particular part of the Values were put to Ms Odgers.[214]

[116] Mr Brown confirmed that Ms Odgers did not give permission for the image to be shared on Facebook[215] and the intended audience of the photo was Mrs James.[216]

[117] Mr Brown was taken to the show cause letter and accepted that it was his opinion that the photograph was disrespectful.[217] Mr Brown was also taken to an extract from the Code, in relation to "Protecting our assets".[218] As a part of each section of the Code, the Code specifies a list of things employees must "Always" and "Never" do. Mr Brown conceded that he did not conclude that Ms Odgers had engaged in any of the conduct in the "Never" list.[219] In preparing the show case letter, Mr Brown did not rely upon anything in the Code, including the protecting our assets section.[220]

[118] Ms Odgers was asked to show cause why her employment should not be terminated by telephone call and email at about lunch time on Thursday, 21 March 2019. Ms Odgers was given until 4:00pm on the following day, Friday, 22 March 2019. Mr Brown was the person that decided the timeframe Ms Odgers was given in which to respond.[221] He did not accept that it was not much time, saying that it was consistent with other timeframes.[222]

[119] Mr Brown accepted that the termination letter refers to the 'Workplace equality and inclusion" chapter of the Code, which was not put to Ms Odgers in the show cause notice.[223] Mr Brown maintained that it was his opinion that the relevant matters were put to Ms Odgers.[224]

[120] In considering whether to dismiss Ms Odgers, Mr Brown took into account Ms Odgers' employment history, including the complaints received in September 2018 from Mr Hill and Ms Odgers' colleagues.[225] Mr Brown conceded that no formal investigation was taken in respect of these complaints but stated that he met with Ms Odgers a few days after about these complaints.[226] This was not in Mr Brown's evidence-in-chief.

[121] The Commission attempted to clarify Mr Brown's evidence on this new point. It appears that Mr Brown didn't formally investigate the issue and did have a discussion with

Ms Odgers in which he discussed Mr Hill's concerns but can't recall if he discussed the complaints of the other two employees.[227] Mr Brown thinks he would have raised with Ms Odgers that something occurred on the bus, but not the names of those that had made a complaint.[228] In this discussion, Mr Brown's evidence is that Ms Odgers accepted that she did raise the issue at the pre-start meeting but it is not clear whether Ms Odgers accepted that her conduct was aggressive or inappropriate.[229] Mr Brown decided not to issue Ms Odgers a warning in relation to her behaviour in this incident. There are no notes of this discussion.[230]

[122] At the commencement of closing submissions, Mr Spence, on behalf of Ms Odgers, conceded that Mr Brown has spoken to Ms Odgers about Mr Hill's complaint regarding the September 2018 pre-start meeting.[231]

[123] Despite efforts by the Commission to clarify what exactly Mr Brown's evidence was in this respect, it is unclear whether Mr Brown had regard to the entirety of the September 2018 incidents, just the incident at the pre-start, just the bus or both.[232]

Re-examination

[124] In relation to the "Just Culture Decision Tree", Mr Brown would generally have used Appendix 1 and 2 but not always.[233] Mr Brown believes that the process in relation to Ms Odgers was fair and just.[234] His evidence is that the document is a guideline on how to conduct investigations to ensure an outcome that is fair and just. The steps in the guideline are alternates to each other. It is possible to go straight to a particular step, without having completed the prior steps.

[125] The Commission took Mr Brown to the notation under step 5 of the policy, which states:

> "*Except for instances of serious misconduct the following four-step disciplinary process will be applied*"

[126] Mr Brown's evidence was equivocal, but it seems Mr Brown's view of the process is that the particular circumstances of any issue can be taken into account by the relevant manager is determining which step or outcome is appropriate in the circumstances.[235]

[127] In discussing Mr Brown's evidence about the disciplinary process, Mr Brown gave further evidence in relation to the inquiries he had made with airport staff in relation to the airport incident. Mr Brown interviewed the security supervisor that was present on the day of the airport incident and two security officers present at the security station.[236] While the airport didn't have footage of the incident[237] one of the airport staff informed Mr Brown that on the day he had noticed "*there were people*" filming the security point.[238] This response indicated that Mr Brown was aware that a number of people had potentially filmed the incident.

[128] Mr Brown's evidence is that he accepted Ms Odgers' statement at the time that she was the only person filming, because he had no reason to doubt this as correct, other than the statement of the airport staff. Having now learnt that Ms Odgers accepts that the statement she made to Mr Brown was untruthful, Mr Brown's evidence is that reinstatement is inappropriate.[239] While the respondent does not consider that any remedy is appropriate in

this matter, Mr Brown's view is that Ms Odgers' now undisputed untruthfulness during the investigation makes reinstatement even less appropriate.[240]

[129] I raised with Mr Brown why he had not chosen to stand Ms Odgers down from duties on 28 February 2019. Mr Brown did not consider that the airport incident alone would have led to a show cause situation, such that stand down was not appropriate.

[130] Mr Brown gave further evidence on why the respondent ultimately decided on different disciplinary outcomes for the persons involved in the photograph Incident. Mrs James was also asked to show cause why her employment should not be terminated. Mrs James' response, and employment history ultimately led to Mrs James' employment being saved. Mrs James was issued a final warning.[241] Similarly, Mr James was issued with a final warning, rather than having his employment terminated. The warning letters issued to Mr and Mrs James were provided to the Commission.

[131] I asked Mr Brown if he was concerned that at the time the photo was taken, Ms Odgers was standing on a table, and another colleague on a chair. Mr Brown stated that when he first saw the photo he was concerned that Ms Odgers had been standing on a table and one of her colleagues on a chair and during his investigation he made enquiries as to whether either of them may have breached any site policies by that conduct, but concluded that because of the height of the objects Ms Odgers and her colleague did not appear to have breached any policies by standing on those objects.[242]

[132] A written warning letter was prepared to be issued to Mr Hill in relation to his failure to investigate the airport incident.[243] It was Mr Brown's responsibility to do so, and BHP was under the impression that it was issued to Mr Hill. Through various personal circumstances that Mr Brown experienced at that time, he did not issue the warning letter. Mr McLean clarified during the hearing that the respondent did not become aware until much later that the warning letter was not issued to Mr Hill.[244]

[133] In relation to the Code, Mr Brown clarified that the list of things employees should 'never' do, he accepts Ms Odgers was not found to have committed, but he maintained that they are not the only obligations an employee has under the Code.[245] Mr Brown maintained his view that Ms Odgers' conduct was a breach of the Code.

Evidence of Mr Hill

[134] Mr Hill was called to give oral evidence by telephone to the Commission. He did not give evidence-in-chief prior to the hearing, however I decided it was necessary to hear from him as a result of Ms Odgers' allegations during the hearing that Mr Hill knew before the airport incident of Ms Odgers' plans.

[135] At the time of hearing, Mr Hill was familiar with the airport incident. Mr Hill denied that Ms Odgers had a conversation with, or otherwise told him, that she was going to place the knives and sex toy in her colleague's bag.[246]

[136] In cross-examination, Mr Hill maintained that he wasn't aware of the airport incident at the time, but did become aware of the incident in the following week. Mr Hill's evidence is that he returns home by flying to Brisbane, which departs later than the flight to Cairns which Ms Odgers and Mr Scrivon were on, and Mr Hill was not at the airport at the time of the

airport incident.[247] Mr Hill denied having spoken to Ms Odgers about her plans the week prior and suggesting that she use a spoon or fork instead of a knife.[248]

[137] Mr Hill is aware of the Fair Play Guidelines and accepted that as a supervisor, if he believed there had been misconduct he could have commenced an investigation into that alleged misconduct.[249] Mr Hill did not commence an investigation because he was not at the airport at the time of the incident and that in his view the only evidence of it was hearsay, and Mr Hill did wish to conduct a "witch hunt".[250] Upon learning of the incident, Mr Hill was not aware that knives or a sex toy had been put into someone's bag, only that there was "*something put in a…bag and that was it*".[251]

[138] Mr Hill volunteered that people are "always"[252] playing pranks, putting items into people's bags and setting the alarms off.[253] Mr Hill's evidence continued that a prank of this nature had happened previously, but not for a while.[254]

[139] I requested that Ms Odgers' text message to Mr Hill be put to him. Mr Hill accepted that he received the message, however he didn't reply because he was instructed not to have further contact with her by BHP. Mr Hill blocked Ms Odgers' telephone number after receiving that text message. Mr Hill was not contacted by Ms Odgers' representative.[255]

[140] In re-examination Mr Hill stated that his flight that evening would have been around 8:15pm, and he would have arrived at the airport around 7:30pm. He estimate that he would have gone through security at around 8:00pm. From discussions following Mr Hill's evidence, it appears that Ms Odgers was on the 7:50pm flight that evening, boarding at about 7:40pm.

Legislation

[141] Section 385 of the Act defines the meaning of "unfair dismissal" and states:

> "**385 What is an unfair dismissal**
>
> A person has been unfairly dismissed if the FWC 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."

[142] Section 387 of the Act sets out the criteria that must be taken into account when considering whether a dismissal was harsh, unjust or unreasonable, and states:

> "**387 Criteria for considering harshness etc**.

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

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

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

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

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

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

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

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

(h) any other matters that the FWC considers relevant."

[143] The type of conduct that may fall within the words 'harsh, unjust or unreasonable' was outlined by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*[256] 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."

[144] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.[257]

Submissions of Ms Odgers

[145] Ms Odgers' submissions in support of her application indicate that she relies upon a number of grounds:

"*a. There was no valid reason for the dismissal*
b. The Applicant was not notified correctly
c. The Applicant was not given an opportunity to respond
d. The Applicant had not been appropriately warned
e. The Respondent's Organisation has not followed its own procedures
f. The Respondent's Organisation is of sufficient size and has a dedicated Human Resources personnel
g. The Respondent's Organisations has applied inconsistent application of their own policies" (errors in original)

[146] The matters in dispute between the parties were said to be:

"*a. The reasons provided for the dismissal were either: capricious, frivolous or vexatious or not defensible in the circumstances*
b. The dismissal does not warrant the meaning of misconduct
c. The entire process of notification was done in a manner to harass, intimidate and belittle the Applicant
d. The Respondent has applied inconsistent applications of their own policies and procedures
e. The Respondent conduct the process of investigation in bad faith and with the intent of putting the Applicant on a conveyor belt to exit her from the organisation
f. The Respondent did not apply the principles of Briginshaw v Briginshaw in weighing up evidence
g. The Respondent did not take into account the Applicant's evidence
h. The whole process did not provide the Applicant any procedural fairness" (errors in original)

s.387(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)

[147] Ms Odgers submits that there was not a valid reason for her dismissal. The reason for dismissal, it was submitted, would not amount to "serious misconduct" within the meaning of that term in the Regulations. Further, when applying the *Briginshaw* standard the Respondent could not have reasonably satisfied itself that Ms Odgers had engaged in the alleged misconduct. In the event that "*credence*" could be given to the witness evidence, Ms Odgers submits that her length of service and the "*principles of Briginshaw*" should have resulted in a warning for misconduct rather than "summary dismissal". In oral submissions, Ms Odgers clarified that she was not contending that this dismissal was a consequence of serious misconduct.[258]

[148] Ms Odgers referred the Commission to *Meyers v 2evolve Pty Limited*[259] and the findings of Commissioner Cambridge in that matter. How precisely that matter was relevant is not entirely clear. The particular reference made by Ms Odgers in that decision is to a factual finding by the Commissioner on the basis of the evidence before the Commission in that matter. The matter is of no assistance in this application.

[149] In addition, Ms Odgers submits that the respondent has condoned her conduct in relation to the airport incident, such that it now cannot rely on that incident as forming a valid reason for dismissal.

s.387(b) - Whether the person was notified of that reason

[150] Ms Odgers submits that she was not genuinely notified of the reason for dismissal prior to the decision to dismiss being made. It was submitted that the respondent conducted the entire process in bad faith, and the respondent did not take into account Ms Odgers' evidence or apply "the principles of *Meyers v 2 evolve Pty Ltd*".

s.387(c) - Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person

[151] Ms Odgers submits that she was not given an opportunity to respond. Ms Odgers submits that the opportunity to respond is required before the decision to terminate is made and in such a way as to give the employee time to respond and with sufficient information to enable a meaningful response.

[152] Inconsistently with her own evidence, Ms Odgers submitted that the airport incident was not raised with her prior to her participation in the photograph Incident. Ms Odgers also submitted that she was asked to respond to "broad allegations" without sufficient time to prepare a response.

s.387(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

[153] Ms Odgers did not make any submissions in relation to this ground.

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[154] Ms Odgers submits that the reason for dismissal was serious misconduct so warnings are irrelevant.

s.387(f) - Whether CQS' size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[155] Ms Odgers points out that CQS is a large employer with ample access to specialised advice. In this circumstance, Ms Odgers submits that the procedural failings adopted by the respondent in dismissing her are exacerbated.

s.387(h) - Other matters

[156] Under the provision of the Act, Ms Odgers submitted that a dismissal may be hard in its consequences for the personal situation of the employee. How in particular this dismissal was harsh in the circumstances, was not a part of the submissions made.

[157] Further, Ms Odgers submitted as follows:

> "*The Applicant's diligence:*
>
> *a. The Applicant acted at all times in the best interests of the Respondent company as a hard and diligent worker with significant knowledge of the business.*

b. The Applicant had worked as an employee for the Respondent for a period of over four years with no prior issues raised.

Due to the unblemished service record of the Applicant, the Applicant had a reasonable expectation of ongoing employment for a significant period of time.

The Applicant had only just received a glowing performance review

She was invited to be part of the women in mining trajectory as part of her achievements and tenure in the mining industry

The Applicant experienced extreme stress from her summary dismissal

The Applicant submits that her summary dismissal, was especially harsh given her age and length of service with the Respondent." (errors in original)

[158] In oral submissions, and relevant to the Fair Play Guidelines, Mr Spence said the following:[260]

"MR SPENCE: Now what we also know from the evidence is that as I've said previously Mr Brown didn't at all follow the procedure outlined in the guideline for Fair Play. And the form at Appendix 2 of that particular document isn't just a tick-box exercise. What that requires the respondent's representative to do in that situation is once an investigation has occurred to consider a whole range of outcomes, including coaching, warnings, other training et cetera. It also requires that there be a conversation with the employee, prior to the sanctions being put in place What we have here, Commissioner, is a situation where the only meeting that occurred with the applicant regarding the incident that occurred on 16 October was a meeting on 28 February 2019. And the only meeting that occurred with the applicant regarding the photo incident was the meeting of 13 March 2019. Post both those meetings there was no other meetings with the applicant. In fact, the next thing she received post the 13 March meeting was show cause correspondence, dated 21 March, which then required her to respond the next day and what we say is that deprived the applicant an opportunity to respond to the allegations or have an opportunity to be engaged with that process as is her right set out in the Enterprise Agreement at clause 27.4.

COMMISSIONER: So once the show cause letter is sent that details the findings she's asked to provide a response, do you say that there is stipulated a requirement for a meeting?

MR SPENCE: Well, what we say in terms of the actual guideline - it says there's a range of actions required, including, and most of these is a record of a discussion that's happened with the employee

regarding the breach. And if you see step four at the back of the guideline it talks about that. And the fact is that this form at Appendix 2 this occurs after the investigations occurred. It's something that happens post the investigation.

COMMISSIONER: Yes, that's my experience with other BMA matters that the findings are made and then the employee is informed.

MR SPENCE: Yes. This form suggests to me, and this process suggests to me, that there's that discussion that happens with the employees. And, in fact, at step four at the most serious sanction there's an outline there of record of discussion with employer regarding the breach. So what we would say, Commissioner, in terms of that is that if the guideline had been followed, there's arguably a two-step process. The first is to have an employee attend a meeting regarding an investigation while that's occurring, to provide - or be asked questions - and provide evidence. The next step after that is that when the investigation is, in fact, complete. What you do then is go to the appendix of the Fair Play guide or the guideline for Fair Play and then you complete that and that is where the employee is put on notice about that."

[159] Curiously, in oral submissions it was said by the respondent that the photo incident alone was serious enough to be categorised as serious misconduct. I put to Mr McLean that the other participants were not summarily dismissed, nor was Ms Odgers summarily dismissed.

[160] Relevant to whether the Fair Play Guidelines needed be followed by the respondent, the following exchange occurred:[261]

"MR McLEAN: The one matter I will take you to is, obviously, the Just Culture Decision Tree, Commissioner. My submission in relation to that would be, as the Commissioner pointed out yesterday, under subheading 5, Disciplinary Procedure, on the third page of the document, it says, effectively:

> *The following four-step disciplinary process will be applied except for instances of serious misconduct.*

Our submission would be, Commissioner, that this was, as previously advanced, an instance of serious misconduct and, in those circumstances, there was no obligation to complete the Just Culture Decision Tree and the four-step process. In any event, Commissioner, we would say that the evidence of Mr Brown was clear that the real purpose for which this document is used at site is an internal reference tool. Again, Commissioner, even if you form the view there was a failure to comply with the mandatory obligations, that is, the Guidelines of Fair Play, which we obviously don't accept, we would say

that there was actually no prejudice or disadvantage visited on the applicant by the failure to do so. The respondent met with the applicant in relation to the relevant incidents, it provided the applicant with an opportunity to show cause and articulate the reasons why, in her view, her employment should not be terminated and in this Commission - - -

COMMISSIONER: What evidence is there that Mr Brown formed the view that the reason or reasons constituted serious misconduct? He's a bit haphazard, isn't he, in completing - - -

MR McLEAN: As to the application of this document?

COMMISSIONER: Yes.

MR McLEAN: None, Commissioner, but we would say that that's not relevant and the question - - -

COMMISSIONER: He was a bit confused, wasn't he, as to what I was asking?

MR McLEAN: Possibly. I think the proposition was put that there were either one or two separate propositions, namely, except for instances of serious misconduct - - -

COMMISSIONER: His evidence was that, "Oh, well, I've gone to step 4", so he didn't say, "I formed the view that it was serious misconduct, so, therefore, I knew I didn't need to fill in this form." He was very haphazard.

MR McLEAN: He was haphazard, Commissioner. I suspect the transcript will provide some clarity around that.

COMMISSIONER: But I think he is haphazard in when he does and doesn't complete the form on site for anything.

MR McLEAN: That may well be the case, Commissioner, but we would say that would be of no relevance to this proceeding. The relevant question in this proceeding was, "Was it an instance of serious misconduct?" If so, then the document is not a mandatory obligation on BHP.

COMMISSIONER: Isn't it whether Mr Brown thought it was serious misconduct?

MR McLEAN: I don't accept that, Commissioner. The Commission needs to make an assessment as to whether or not there was in fact an obligation to use this document. Whether or not Mr Brown thought there was an obligation is immaterial. If he did not have an obligation to do so, then there was no breach of proper process by the respondent in failing to complete this tree. The

views of Mr Brown can't be determinative because, as a corollary, if Mr Brown was to say, "Well, I did form the view that this was serious misconduct and it needs to be followed", that wouldn't be an absolute answer to whether or not - - -

COMMISSIONER: No, it wouldn't, but surely I must have regard to what he thought at the time because he's the one who didn't complete it, and he hasn't given that answer.

MR McLEAN: But where does that take it, Commissioner?

COMMISSIONER: Because he's not completing it. It seems he's on and off whether he completes these on site or not, he sits down - - -

MR McLEAN: To be fair, Commissioner, I think the only instance that should be taken into account is this particular matter. I don't think Mr Brown's failure to complete this document in other circumstances where he may have had an obligation should bear on the fairness of this particular process.

COMMISSIONER: Well, he has said that the airport incident didn't warrant dismissal and he didn't complete the tree for that incident.

MR McLEAN: I take that, Commissioner. The position then would be, Commissioner, that if there was an obligation to complete a Just Culture Decision Tree, the failure to do so again occasioned no prejudice or disadvantage to the applicant because the applicant had an opportunity to engage in a fair and reasonable process throughout the investigation of the show cause procedure and, indeed, in this Commission, the applicant has had a full opportunity, with all matters properly ventilated, to identify other information or other considerations which she says means that her dismissal was unfair and she has failed to identify any such information, and the obvious consequence of that failure, Commissioner, is that no process that would have been followed by BHP could have ended up with a different outcome if the applicant wasn't able to introduce any additional information.

COMMISSIONER: What about the obligation to do it as per the EBA?

MR McLEAN: Again we would say that serious misconduct creates an exception to that obligation.

COMMISSIONER: What about the first incident?

MR McLEAN: The first incident, Commissioner, the EBA, to my recollection, says, "We will follow the guideline, it's a fair play."

COMMISSIONER: You just can't have BHP turning up to defend unfair dismissal cases and using this guideline when it wishes and when it doesn't. In my experience, it adopts this policy and this is the first time I am hearing that it's sort of a little bit haphazard. Am I wrong?

MR McLEAN: My understanding is the purpose for which it is used is very much an internal reference guide. It is used by managers to guide their internal decision-making process. I appreciate that the evidence is what Mr Brown spoke to and not what I can tell the Commission but - - -

COMMISSIONER: Is that what you tell people when they vote for an EBA, that, "We will use it when we feel like it"?

MR McLEAN: I am not sure of that position, Commissioner. All EBA negotiations predate my time so I can't speak to that.

COMMISSIONER: I just don't understand how it's, you know, shown around in other matters that I have been involved in as a very important document and here it's really been watered down and it's an obligation under the EBA.

MR McLEAN: The obligation under the EBA is to, I think, follow, if that's the correct language, the Guidelines of Fair Play.

COMMISSIONER: Let's have a look at the EBA.

MR McLEAN: To follow the process outlined in the Caval Ridge.

COMMISSIONER: That means "meet", doesn't it?

MR McLEAN: Well, to me, Commissioner, that doesn't impart an obligation to complete any document.

COMMISSIONER: Why? Why would it say that?

> *The parties agree to follow the process outlined in the Caval Ridge Guideline to Fair Play.*

If you are going to tell employees voting for an agreement that you are not going to do it, well then that's what you should tell people, but you don't.

MR McLEAN: I take that, Commissioner. I am not in a position to provide any clarity around what was or wasn't said to employees at the time that the EA was voted on, so I can't take that any further.

COMMISSIONER: Is it a submission that is being put because Mr Brown didn't do what he should have done?

MR McLEAN: Commissioner, my understanding is across a number of sites, the approach or the understanding of the Just Culture Decision Tree is that it is an internal reference tool for managers to help guide their decision-making process, but it is not something, to my knowledge, which is conceived as having to be completed in every case.

COMMISSIONER: Well, you had better fix that up, I suggest. I know that in Macklin it was used and that was with the CFMEU. I imagine they wouldn't share your views that this is a discretionary document.

MR McLEAN: I take the point, Commissioner. That is all I have to say on process or the procedural requirements under the statutory test, but, again, the point I make, Commissioner, or emphasise, is that whether or not the Commission forms a view that there has been a procedural failure, there has been no demonstrated evidence of prejudice or disadvantage that the applicant has suffered as a result of that failure.

COMMISSIONER: Well, if she had been sat down and walked through the steps, mightn't she have been able to say, "I'm apologetic, this is very serious, instead of dismissal, I think you should offer me a step 3, which includes a stand-down without pay"? That could have invited that conversation, couldn't it?

MR McLEAN: Commissioner, she had that opportunity in substance, albeit not in form, but in substance in the show cause process. That is exactly what the show cause process is. It is, "Tell us any matters you want us to have regard to" and I fail to see how that is any different from the scenario you have just proposed where she could have adduced more information about alternative outcomes, she could have adduced information about her remorse. She did that in the show cause process. So, whilst it might not be the same in form, it's the same in substance. It provides the same opportunity. The show cause process is so broad and, in some respects, it provides the applicant with a greater opportunity to defend her employment in some prescriptive document.

COMMISSIONER: So, at step 4 of the document - it is unfortunate that the parts are also - it should perhaps be part 4 and not step 4 - just over the page of the tree itself, I think that should read "Part 4".

MR McLEAN: In the annexures, Commissioner, or - - -

COMMISSIONER: It should absolutely because everything else is part 1, part 2, part 3, part 5, but in the middle is step 4. Perhaps you can get

an updated document that is not from 2013.

MR McLEAN: I will take that on board, Commissioner. I am just trying to follow roughly where you are.

COMMISSIONER: So you have got part 1, part 2, part 3 is the tree.

MR McLEAN: This is in the appendix, appendix 2?

COMMISSIONER: Yes.

MR McLEAN: Step 4.

COMMISSIONER: It should be part 4.

MR McLEAN: It should be part 4.

COMMISSIONER: Yes:

> *Discussion with an employee. This is a record of discussion. Please ensure completion.*

So when does this happen? Is this after the findings? This is not the 13 March discussion, is it, that Mr Brown is entitled to complete? This is after findings are made, isn't it, so this would be after 21 March?

MR McLEAN: Again, Commissioner, in circumstances where the applicant admitted to the conduct - - -

COMMISSIONER: I am asking you when should this form be completed, when should that part be completed?

MR McLEAN: I think - - -

COMMISSIONER: Because the evidence I understood in Macklin was that this form is completed after the managers have made their findings.

MR McLEAN: I think that's right. I think I saw that somewhere in this document, Commissioner. I take the point that the meeting or the meetings held with the applicant occurred before the findings that were put in the show cause letter, but the point that I would make is that the findings are really - the findings that were articulated in the show cause letter are really no broader in concept than the matters put to Ms Odgers during those meeting and to which she admitted, at which point, in circumstances where she has admitted to those matters, they were, for all intents and purposes, findings. If the employer has a view of what happened and the applicant admits to that conduct, that is invariably going to be the finding. Subsequent

to the applicant's admission, there is then a discussion about the severity of the matter and the applicant is afforded an opportunity to discuss the matter.

COMMISSIONER: What do you say about the expectations of employees?

MR McLEAN: As to what should occur?

COMMISSIONER: Yes.

MR McLEAN: Again, Commissioner, I am not sure how the expectations of employees relates to BHP's procedural obligations. BHP's procedural obligations are what they are. The evidence or the views of Mr Brown and/or employees cannot be determinative of what those obligations are and if they have been complied with. That is a matter for the Commission to determine based on the evidence before the Commission, including the relevant documents. I take the point that the Commission may make an adverse finding against us as to whether or not the procedural requirements have been complied with, but, again, my submission would be that there has been no demonstrated prejudice and indeed there was no disadvantage suffered by the applicant given that the process was, in substance, the same as what any procedural process the Commission might find applied would have been.

COMMISSIONER: Except that Mr Spence is critical of the fact that there was no follow-up discussion once the findings were made, it was simply respond to a show cause letter.

MR McLEAN: Again, Commissioner, I think the opportunity to respond in writing with considered time is just as valuable an opportunity as a meeting, but also, again in circumstances where the allegations were admitted to at the start of each meeting, there is then subsequently a discussion that takes place when both parties have in their knowledge that the applicant has engaged in the conduct. The applicant knew she had engaged in the conduct, she knew the respondent thought she had engaged in the conduct, she knew the respondent would find that she had engaged in the conduct, so really that's the same as a finding, for all material purposes, and there is then a discussion between the respondent and employee. In my submission, that serves the same purpose, particularly when considered in concert with the show cause response opportunity, as would be required by this document. Indeed, in some respects, Commissioner, I can't see an obligation in this document to provide a show cause letter or provide a show cause response opportunity beyond this discussion.

COMMISSIONER: But this discussion hasn't occurred.

MR McLEAN: What I mean is, even if we take it as an obligation to have this discussion per step 4 of the policy, which you have taken us to, there is no requirement in this document, if this process has been followed, to allow the employee to respond in writing.

COMMISSIONER: Well, it requires you, doesn't it, to - no, not to respond in writing but to have a discussion once finding - - -

MR McLEAN: Have a discussion, agreed.

COMMISSIONER: Am I right that this - - -

MR McLEAN: You are. This document, if this document applied, would require us to have a discussion with the employee post the findings.

COMMISSIONER: If the document applies?

MR McLEAN: If the document applies, but, again, my submission, Commissioner, is if we were following this process, if we had an obligation to follow this process and we did follow this process, there would have been no opportunity for the applicant to respond in writing because the process only provides an opportunity to respond verbally. So, again, the applicant was not deprived of an opportunity to respond and, in some respects, it is not unreasonable to think that the applicant had a better opportunity to respond by being allowed to step away from a face to face conversation, give consideration to the matters and draft a letter and review that letter.

COMMISSIONER: If the policy was followed properly, then it doesn't prohibit you from issuing a show cause letter.

MR McLEAN: It doesn't prohibit, but if the way the process was being managed was, as I think has been suggested, in direct alignment with this document, then there would have been no show cause process issued, and I can foresee a scenario where - - -

COMMISSIONER: But there is no reason why it could not have been issued once the discussion occurred.

MR McLEAN: No, there's not, Commissioner, but I can foresee a scenario where the company decides to provide a further opportunity to respond in writing and is then criticised by an applicant for taking into account matters that were sent out in the letter when the process didn't apply, because the submission then put against us would be, "Well, you didn't follow your document,

> you actually forced or even induced the applicant into providing additional information and, in doing so, went beyond what the prescribed process was." I think, as an organisation, if this was the process that needed to be followed, there would be reservations about departing from it for fear of an accusation that we haven't followed it as we are currently required to do to every word. Again, the submission is, Commissioner, that the opportunity that was provided was adequate for the statutory purposes and, even if it doesn't align with this document, assuming this document applies, well then there was no disadvantage suffered because the substantive opportunities were the same, if not greater, than what would be required under this process."

Remedy

[161] Ms Odgers is seeking the primary remedy of reinstatement with consequential orders in relation to service and back-pay. Mr Spence submitted that given that Ms Odgers is working on the same site, and using the same meal facilities as the Respondent's employees, there is nothing inappropriate about her being reinstated to the Respondent.[262]

Submissions of CQS

s.387(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)

[162] The respondent submits that the evidence does establish that Ms Odgers engaged in misconduct in relation to the airport incident and the photograph incident. The two incidents, collectively or individually, constitute a valid reason for dismissal. The conduct was inconsistent with the Value and Code, and demonstrated a lack of respect for her co-workers, and BHP's brand. In addition, the conduct threatened to bring BHP into disrepute.

[163] CQS submits that while it would amount to serious misconduct within the meaning of the Regulations, it is not bound to prove that Ms Odgers' conduct did amount to serious misconduct, rather the question is whether there was a valid reason.

[164] In so far as Ms Odgers relies upon *Briginshaw,* CQS submits that the submission is misguided in circumstances where Ms Odgers has admitted the conduct. CQS submits that the *Briginshaw* principle is of no relevance in this matter.

[165] The respondent denies that it has 'condoned' the conduct in relation to the airport incident. The doctrine of condonation has limited operation and only operates in instances where the employer has full knowledge of the conduct. It is disputed whether the respondent did have full knowledge. On Mr Brown becoming aware of the allegation it was promptly actioned. Even if the doctrine applied, CQS submits that it does not limit the Respondent from taking the misconduct into account when considering further disciplinary action.

[166] As a result of Ms Odgers' admission during the hearing that she stole the butterknives from the BHP onsite canteen, Mr McLean stated that this was not within the respondent's knowledge at the time of the dismissal, but subsequently discovered in Ms Odgers' oral

evidence. Whilst it is conceded that the knives are likely to be of a nominal amount, it was a deliberate act, and Ms Odgers would have known that the knives would, in all likelihood, been confiscated by airport security.

s.387(b) - Whether the person was notified of that reason

[167] CQS submits that Ms Odgers was notified of the reason for dismissal. Meetings occurred on 28 February and 14 March 2019 in relation to the two incidents, and Ms Odgers was notified of the "precise reasons" why the respondent was contemplating dismissal in the show case letter of 21 March 2019.

s.387(c) - Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person

[168] Ms Odgers was given an opportunity to respond in the two meetings referred to above and by way of response to the show case letter. The respondent had regard to all matters that Ms Odgers raised.

s.387(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

[169] CQS submits that it offered Ms Odgers an opportunity to have a support person, but Ms Odgers expressly declined such an opportunity in relation to the 28 February 2019 meeting. Ms Odgers did have a support person at the 13 March 2019 meeting.

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[170] Ms Odgers was dismissed for reasons relating to her conduct, as such warnings are not relevant.

s.387(f) - Whether CQS' size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated resource management specialist impacted on the procedures followed

[171] CQS accepts that it has access to specialist advice and is a large business. In so far as there is any delay in taking action in respect of the airport incident, CQS submits this is a relevant mitigating factor.

s.387(h) - Other matters

[172] The respondent submits that the Commission cannot be satisfied that Ms Odgers has been the subject of differential treatment with her colleagues. In particular, they are not an "apples with apples" comparison. The primary reason for this is that the other employees involved in the photograph incident were not also involved in the airport incident.

[173] The respondent disputes that Ms Odgers' length of service is a relevant consideration or that the effect of the dismissal has had more than an ordinary effect on Ms Odgers. The respondent does not accept that Ms Odgers has at all times acted in the best interests of the company and submits that there is no evidentiary basis for the submission that the investigation was conducted in bad faith.

Remedy

[174] The respondent submits that reinstatement would be an inappropriate remedy, because it has lost trust and confidence in Ms Odgers' ability to appropriately conduct herself. Should the Commission order reinstatement, the respondent submits that consequential orders in relation to back-pay and continuity of service should be refused as depriving Ms Odgers' misconduct of any consequence.

[175] Alternatively, if the Commission considered that an award of compensation was appropriate, the award should be limited, and take into account that Ms Odgers was paid 5 weeks' notice on termination, which the Respondent submits Ms Odgers was not entitled to receive as she was dismissed for serious misconduct, yet was paid to Ms Odgers gratuitously.[263]

Consideration

s.387(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)

[176] Ms Odgers was aged 49 at the time of the hearing. She held a well-paying and rewarding job. Given her age, there is no rational explanation for her immaturity relevant to the two incidents.

[177] It was Ms Odgers' evidence that she purchased the sex toy near her residence, having concocted the idea some weeks or months earlier. After purchasing it, she travelled with it from home to the work site, worked a swing, and then carried out the airport incident on her colleague and housemate, Mr Scrivon.

[178] I do not accept Ms Odgers' evidence that she told Mr Hill some time earlier about the proposal to put a sex toy in Mr Scrivon's luggage as he went through the airport security, and he suggested forks or spoons as opposed to knives. If this had occurred, there is no explanation offered by Ms Odgers as to why she did not state this in her written show cause response or orally to Mr Brown. It is an extraordinary allegation, and one would think that if it had occurred, it might have presented to Mr Brown a strong case for mitigation when he was considering termination of her employment.

[179] Such assertion was not included in Ms Odgers' written statements to the Commission. Instead, Ms Odgers asserted it in oral evidence during the hearing, and then suggested that she had informed her legal representative, Mr Calderon, as to it being a fact. Further, she submitted that the text message sent to Mr Hill following the dismissal demonstrates that Mr Hill knew about her intention before the event.

[180] I do not accept that the written communication to Mr Calderon could have led him to understand Ms Odgers' post-dismissal assertion. She communicated to Mr Calderon that Mr Hill and Mr Tim Brady were at the airport and "were aware of what was about to unfold." How Mr Calderon could have understood that to mean that Ms Odgers had purportedly held a conversation with at least Mr Hill some time prior to the airport incident is incredulous.

[181] Further, simply because post-dismissal Ms Odgers sent to Mr Hill a text message informing him that he would be called as a witness and because "[he] knew about it and were

also there" does not demonstrate, as she submitted, that Mr Hill had held a conversation with her some time prior to the airport incident.

[182] I have given most weight to Ms Odgers' failure to mention this purported conversation that she claims to have had with Mr Hill, with Mr Brown during the investigation and show cause period. I conclude that Ms Odgers invented the evidence she gave at the hearing before me, and I accept Mr Hill's evidence that this event did not occur.

[183] Accordingly, I find that Ms Odgers acted alone in ensuring the airport incident occurred. Ms Odgers stated so when interviewed by Mr Brown on 28 February 2019 when she declared, *"I take full responsibility, no one else was involved."*

[184] Relevant to the airport incident, Mr Brown was conducting an investigation, and had informed Ms Odgers of that fact during the interview of 28 February 2019. It is extraordinary that the airport incident came to Mr Brown's attention so many months after the event. Where I am critical of such a delay where the respondent was aware of the incident many months earlier, and Mr Louw informed Mr Brown on 13 February 2019, this is counteracted by Ms Odgers' statement during the 28 February 2019 investigation meeting that she would keep to herself [in her employment], and only two days later was involved in the photo incident.

[185] The airport incident is a serious matter. Ms Odgers took some time to plan the event. She not only took from BHP the butter knives without the respondent's permission, she potentially put Mr Scrivon in breach of Australian aviation and security laws by having the knives go through the security screening without his knowledge. Further, she was trusted with being responsible for the bags of her fellow workers at the airport while they went outside for a cigarette.

[186] Ms Odgers hoped that Mr Scrivon would treat the incident as a joke. She is lucky he did so. Other employee might not have been so forgiving. She did not, however, have any regard for the airport security attendants, and the distraction that her stunt would cause to them. In cross-examination when it was put to her that a sex toy might be considered by some as an offensive object, Ms Odgers declared, *"Well, most people have one."*

[187] Mr Brown undertook inquiries with the airport security attendants throughout February 2019, where he learned that Ms Odgers and others had filmed the incident. The following was put and answered during the meeting of 28 February 2019:

> *Brown:* *While the bag was being searched by the airport security office a number of people were observed by another airport security officer filming the event with mobiles, were you part of the group filming while the bag was being searched?*
>
> *Odgers:* *From my recollection I was the only person filming, I was asked to delete the footage and then did so.*

[188] Ms Odgers knew this statement to Mr Brown to be false. She stated so during the hearing. Demonstrating Mr Brown's character, he accepted her statement during the 28 February 2019 meeting and said, to the effect, that he did not doubt it. It was only at the

hearing that the respondent discovered Ms Odgers had not told the truth during the investigation meeting.

[189] I do not accept that Mr Hill was aware of the airport incident at the time that it occurred. I accept his account that his flight left the airport at a later time, and I do not accept Ms Odgers' evidence that he was seated where she claims.

[190] Certainly Mr Hill became aware about one week after the airport incident that some incident had occurred. There is no reasonable explanation as to why Mr Hill did not undertake further investigation of the rumours. Mr Brown was later tasked with investigating Mr Hill's inaction and was directed by the respondent to issue to Hill a written warning, which he then did not do. Mr Hill failed in his obligations to make inquiries when he learned there had been some incident.

[191] Mr Brown gave evidence that he would not have dismissed Ms Odgers for the airport incident alone with the information that he had before him.[264] I note that the information Mr Brown had before him at the time did not include the fact that Ms Odgers used the respondent's knives to carry out the prank, and that Ms Odgers told Mr Brown an untruth during the investigation about others filming the incident.

[192] Relevant to the photograph incident, I note that Ms Odgers:

(a) Stood on a table in the meal room;
(b) Unbuttoned her top down to the last two or so buttons;
(c) Provocatively bared the top of her breasts while bending forward

all the while posing for a 'selfie' taken by Mr Dennis James.

[193] Ms Odgers was not alone in this action, as Ms Fenech and Ms West did the same, although Ms West remained on the ground, and Ms Fenech was standing on a chair.

[194] How any of the women in the photo thought it would be a good idea to pose for such a selfie in the workplace defies belief. Ms Odgers understood it was Mrs James' phone, used by her husband to take the selfie. She ought to have known that once the photo was taken it could have been used for any purpose.

[195] It is true that the photo depicts less skin than one would typically see at the beach or at a public swimming pool. It is the provocative pose of each of the women, and act of each of them having unbuttoned their shirts down to below the bottom of their bra, each leaning forward that causes discomfort that employees have elected to behave this way in the workplace. During the hearing Ms Odgers initially said that she didn't think the Facebook post of the photo could be considered offensive, as only cleavage was showing, and she did not think it was a highly inappropriate photo. It was pointed out that she had been remorseful in her show cause response. Ms Odgers stated in her evidence that if she had been warned about the airport incident she would have been on 'behaviour', which I understand to mean on her best behaviour. She contended that usually if you're in trouble you're stood down and don't return to work.

[196] I find that a person unfamiliar with the BMA logo would find it difficult to identify it on any of the women's shirts. However, a person familiar with the BMA logo would, in my

view, have little difficulty identifying it on Ms Odgers and Ms Fenech's shirt. The logo is not readily visible on Ms West's shirt.

[197] The increased numbers of women in mining is to be applauded, and there is a great deal of work being done by relevant parties to promote this. I accept that being able to identify women who work in mining who, while at their workplace, unbuttoned their shirts, provocatively exposing their breasts (within their bra) can cause damage to the reputation of the respondent.

[198] Ms Odgers did not act alone, but she did inform Mr Brown only two days earlier when he informed her that she was being investigated over the airport incident that she would keep to herself.

[199] Noting that Mr Brown did not hold any concern that Ms Odgers was on the table during the photo, and Ms Fenech was on the chair, Ms Odgers' misconduct on 2 March 2019 was no more serious than Ms Fenech and Ms West.

[200] None of the other participants, including Mr and Mrs James were dismissed over this incident, however Mrs James came very close to losing her job, having been issued with a show cause letter. Mr Brown ultimately decided against dismissing Mrs James.

[201] Noting that the women did keep their bras on while posing for the photo, I accept that the appropriate disciplinary action for each of Ms Fenech, Ms West and Mr and Mrs James was a first and final written warning. Relevant to Ms Odgers' assertion that Ms West was subject to an earlier disciplinary action over her media comments that the mine is a 'sausage fest', I note that the article had been published in January 2015. While the media article was not authorised, Ms West largely promoted women in mining, but then referred to it being a 'sausage fest'. Ms Odgers' characterisation of that term meaning that men are largely promiscuous on-site is far off track. A 'sausage fest' means that there is a preponderance of men compared to women. The reference to 'sausage' is a colloquialism because men have a penis and hence the correlation to a sausage.

[202] I do not accept that any policy that Ms West may have been found to have been in breach of January 2015 would carry anywhere near as much weight as Ms Odgers' action in October 2018 relevant to the airport incident. In any event, any disciplinary action against Ms West pursuant to the 2015 article had become stale in accordance with the Fair Play Guidelines. Accordingly, I do not consider that Ms West is an appropriate comparator to Ms Odgers relevant to her disciplinary history.

[203] Mr Brown's evidence was unclear as to whether he took into consideration, when deciding to terminate, the incidents in September 2018 regarding Mr Hill, and then Mr Carrick and Mr Furness' complaints about conduct on a bus. I conclude that his evidence is that he took into account Ms Odgers' remonstrations with Mr Hill, and this was accepted in submissions on day two of the hearing. It appears to me, however, that Mr Brown did not directly address with Ms Odgers the allegations that she had been disruptive and aggressive whilst on the bus, referring to another employee as a "dog" for dobbing.[265] I have determined that Mr Brown used this information, without having put it before Ms Odgers to assist with his determination that Ms Odgers should be dismissed.

[204] Having considered the BHP Charter Values of respect and integrity, together with the BHP Code of Conduct, specifically:

a. We expect that everyone who works at BHP will be treated with respect;
b. Never behave in a way that is or may be perceived as offensive, insulting, intimidating, malicious or humiliating to others;
c. Never engage in physically or socially intimidating behaviours

I conclude that the reasons provided in the termination letter dated 26 March 2018 a valid reason for the dismissal. I consider the Charter Values and the Code of Conduct to be reasonable workplace standards which Ms Odgers breached, and for which she had not many months earlier received refresher training.

[205] Ms Odgers is fortunate that Mr Scrivon did not take offence over the airport incident, however she had no regard for anybody else in the airport, including the airport security attendants. She did not treat Mr Scrivon with respect, even if he had been involved in earlier putting pizza on the roof of her camp room (this proposition has not been tested or confirmed, but I shall assume it occurred).

[206] I determine that Ms Odgers did breach the Charter Values of respect and integrity. She did not do what is "right", nor did she embrace openness, trust, teamwork, diversity and relationships that are mutually beneficial.

[207] I find that there was a valid reason for the dismissal.

s.387(b) - Whether the person was notified of that reason

[208] The show cause letter issued to Ms Odgers on 21 March 2019 notified her that the findings are serious and constitute misconduct, relevant to the two incidents. She was informed that her conduct and behaviour breached the Charter Values, specifically respect, and that it breached the Code of Conduct. The letter states, "*BHP Code of Conduct – Protecting our Company, in particular*". The sentence is clearly unfinished.

[209] The sentence being incomplete, and without any further guidance as to it being the respondent's asset of its reputation that she was purported to have damaged, it is a vague finding that was communicated. It would have been necessary for Ms Odgers to obtain the Code of Conduct, find the page titled, "*Protecting our Company*", and then try and determine what she had breached.

[210] It is disappointing that the show cause letter informed her that she has breached the Charter Values of respect, yet the termination letter informed her that she has breached both integrity and respect.

[211] Ultimately Ms Odgers did breach the Code of Conduct of *"Protecting our Company"*. She did breach the *"Protecting our assets"* page by taking physical property (the knives) for personal use. The ownership of the knives was not known to the respondent at the time of the dismissal, but pursuant to the High Court decision in *Shepherd v Felt & Textiles Australia Ltd*:[266]

"the dismissal of an employee may be justified upon grounds on which the employer did not act and of which the employer was unaware when the employee was discharged."

[212] In the show cause response, Ms Odgers stated that relevant to the airport incident, she was very remorseful. She went on further to say,

"*I am still unclear on what company policy or procedure I breached here as there is no reference to this incident in the "breaches" section of the correspondence.*"

[213] Relevant to the photo incident, Ms Odgers stated,

"*I would never intentionally compromise the brand of a company that I am very proud to be working for.*

....

There was no intention on my part to cause harm to my fellow workers or the BMA brand.
…….."

[214] Ms Odgers did not know specifically the grounds on which the respondent was going to dismiss her, being the risk of reputational damage to the company, however Ms Odgers addressed it in her show cause response. Ms Odgers was told that her conduct breached the charter value of respect, but was not told in the show cause letter that it breached the value of integrity.

[215] During closing submissions, Mr McLean and I had the following exchange relevant to the differences between the show cause letter and the termination letter issued by the respondent:[267]

COMMISSIONER: Right. So it's not an incomplete sentence?

MR McLEAN: My submission would be that the more proper reading of that is it's supposed to communicate that those are examples, but are not an exhaustive list of the policies that the applicant has contravened. Commissioner, in my submission the reason for the dismissal was that the applicant engaged in this conduct at the airport and engaged in the conduct in the photograph incident. It was the engagement in that conduct that ultimately motivated the decision to dismiss. The fact that the conduct may have been in contravention of particular policies was not the reason. The fact that it contravened particular policies may make that conduct more egregious, it may factor into a Commission's assessment as to whether or not there was valid reason and whether or not termination was harsh, but what the respondent was really concerned with here is the conduct itself. The submission I make there, Commissioner, is you raised earlier that there was a particular part of the code of conduct that was not included in one of the pieces of correspondence,

which I made a submission had been contravened. The situation I am faced with there, Commissioner, is as a matter of we would say objective facts the conduct was in breach of various parts of the code of conduct. Whether or not we put that to her doesn't change whether or not it's in breach of those parts of the code of conduct. The reasons for the dismissal were the conduct itself, the fact that it may be in contravention of various different policies only as to the seriousness of it. The fact that those policies weren't identified doesn't mean that the reasons for the dismissal weren't communicated.

COMMISSIONER: At 387(c) whether the person was given an opportunity to respond to any reason related to the capacity of conduct of the person.

MR McLEAN: And we would say in this case the applicant was, Commissioner. The applicant was very aware of the issue or the conduct with which the respondent took issue, because the corollary, Commissioner, would be that if we cited three or four sections of the code of conduct in this document in a show cause letter and then I was to stand here and say, well just for the Commission's completeness it's also in contravention of these different pieces of the code of conduct and that's relevant to your assessment as to fairness that would mean that I'm effectively causing the respondent to contravene subsection (c), which can't be the case. Whether or not particular conduct is a contravention of a policy is ultimately a matter to be determined by the Commission. So at best identifying for an applicant particular policies that have been breached allows an applicant to try and excuse their conduct by way of a technicality.

COMMISSIONER: The thing is you've got Mr Brown who tells her "These are my findings and I want you to respond to me as to why your employment should continue", and she does so, and then he says, "Thank you, I've received that, but I'm dismissing you because you've breached not just (a) you've breached (b) as well." So she never had that opportunity to address that.

MR McLEAN: Where would that have taken an applicant though, Commissioner, save to say, well, I didn't breach that policy, because ultimately the respondent is going to have a view of that. If the respondent is wrong on that view then the Commission will appropriate chastise the respondent. The Commission is the ultimate determiner of whether or not particular conduct is in breach of a policy. So the idea that failure to identify particular policies somehow prejudices an applicant - - -

COMMISSIONER: It is a matter that the Commission must take into consideration.

MR McLEAN: It can take it into consideration, obviously the Commission can take into account any matter that it wishes, but the point I was making before, Commissioner, is this conduct is or isn't as a matter of fact in breach of particular sections of the policy.

COMMISSIONER: But there's the denial of procedural fairness, isn't there, by not putting to her that this is what Mr Brown had in mind or ultimately concluded?

MR McLEAN: I wouldn't accept that, Commissioner, for the reason that merely notifying the applicant of policies, as I said before, provides the applicant only with an opportunity to try and excuse her conduct by reference to a technicality.

COMMISSIONER: Shouldn't she be allowed to?

MR McLEAN: But this isn't a situation where the applicant has been dismissed for a breach of policy. This is a situation where the applicant has been dismissed for her misconduct and the fact that that misconduct may fall foul of certain policies might exacerbate the seriousness of that, but the conduct in itself was what motivated the dismissal.

COMMISSIONER: Yes, but you told me how much reliance the respondent has on its charter values. It's like a Bible, isn't it?

MR McLEAN: I think it's well established, Commissioner, that those are well displayed around site and that the respondent places great emphasis on it. The charter values is not a comprehensive document, Commissioner, and the submission that we - I think at one point refer to the charter value of respect - the submission that we failed to explain how the applicant's conduct contravened a seven or eight word proposition I think is a nonsense. I think there's only so much we can do. We can say here's the eight word proposition. If you can't figure out why your conduct, which we have put you on notice, for BHP's reputation into disrepute and which demonstrated disrespect for an employee, if you can't figure out how that violates an eight word proposition contained in the charter value what more can we do. I don't think it's reasonable to interpret subsection (b) as requiring a respondent to articulate why an applicant's misconduct contravenes every single relevant part of the respondent's policy in that way.

COMMISSIONER: If a large employer like BHP can't marry up its show cause letters to its termination letters what hope do other employers have?

MR McLEAN: And that goes to my point, Commissioner. To be able to - - -

COMMISSIONER: It's not that hard, is it?

MR McLEAN: It's easier said than done, Commissioner, because there's so many policy documents here and - - -

COMMISSIONER: To marry up a show cause letter to make sure that in your termination letter you've covered everything that you've put to the employee without springing something else on them, which they never had a chance to respond to.

MR McLEAN: I don't accept the characterisation about springing on. I appreciate it's not a matter that was expressly put in writing, but I think it's - - -

COMMISSIONER: It's what Mr Brown said. He said in the termination letter you've breached this part.

MR McLEAN: But that's again a matter of characterising the misconduct that the employee has engaged in. So the respondent in the show cause letter said we take issue with your conduct at the airport and we take issue with your conduct in the photograph incident, and in light of your misconduct, which is on page 2, it's the extract I took the Commissioner to before, in light of the misconduct, that is all the circumstances, we're considering terminating your employment. Please provide - - -

COMMISSIONER: And you also have in our view breached these two provisions, and then when you tell her that she's dismissed you tell her that her behaviour and conduct was inconsistent with certain parts of the code of conduct and the charter values, and that's new news to her.

MR McLEAN: The applicant admits she should have been aware of the charter values and the code of conduct. It's not news to her what those obligations are, and again this is my point about having to detail every single breach of policy, because - - -

COMMISSIONER: It's just not that hard to marry them up.

MR McLEAN: I take the point."

[216] I determine that Ms Odgers was notified that the reason for her dismissal was her misconduct in the airport incident and the photo incident. Where the respondent tied her misconduct to breaches of its Charter Values and to its Code of Conduct, I determine that Ms Odgers was notified prior to the dismissal that her misconduct resulted in a finding by the respondent that she breached the Charter Value of respect, and the Code of Conduct, but without any appropriate specificity.

[217] I determine that Ms Odgers was not notified that the reason for her dismissal included a finding that she had breached the Charter Value of Integrity until she received the termination letter.

s.387(c) - Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person

[218] Ms Odgers was provided an opportunity to respond to the matters stated in her show cause letter. She did so in her show cause response noting the above criticisms that I have made that she was not aware that the respondent would make other findings relevant to the breaches it determined when it dismissed her.

[219] I have determined that Mr Brown used the September 2018 bus incident as a persuasion to dismiss Ms Odgers relevant to the airport incident and the photo incident. He did not address these matters with her, yet he did address her aggression towards Mr Hill in September 2018. I consider it inappropriate for Mr Brown to have taken into consideration the bus incident in September 2018 when weighing up his decision whether or not to terminate Ms Odgers.

[220] Of incredible concern to me is the abject failure of the respondent, through Mr Brown, to adhere to its obligations to follow the BMA Guideline to Fair Play policy (Fair Play Guidelines). As I explained to the parties during the hearing, in other BMA or other associated entity matters that have been before me, it has often been presented that the Fair Play Guidelines are a "bible". Most concerning was during the first day of hearing when it was suggested by Mr McLean that the respondent is not obligated to follow the Fair Play Guidelines.

[221] It was established during the hearing that the relevant enterprise agreement, the *BMA Caval Ridge Mine Enterprise Agreement 2015* [2015] FWCA 3376 contains the following provision:

> "27.4 In matters where disciplinary action is a possible consequence, the parties agree to follow the process outlined in the Caval Ridge "Guideline to Fair Play". A more detailed disciplinary policy will be developed by the Company prior to the commencement of operations."

[222] In the *BMA Caval Ridge Mine Enterprise Agreement 2018* [2019] FWCA 1586, approved by the Commission on 12 March 2019 and in effect from 19 March 2019, just weeks before the dismissal, the same clause exists.

[223] The disciplinary procedure outlined in the Fair Play Guidelines is as follows:

> "5 Disciplinary Procedure
>
> Except for instances of serious misconduct, the following four step disciplinary process will be applied.
>
> The application of the Just Culture Decision Tree together with the particular circumstances and severity will determine the appropriate disciplinary action Step to be taken with respect of an Employee. The relevant Septs are as follows:

Step 1 An Employee will be verbally counselled by their Supervisor. Where requested by the Employee, a Supervisor will conduct the counselling in the presence of an Employee Representative. Written notice of the verbal counselling will be provided to the Employee and a copy placed on the Employee's file; or

Step 2 An Employee will be counselled by their Supervisor in the form of a formal warning. Where requested by the Employee, a Supervisor will conduct the counselling in the presence of an Employee Representative and have the warning confirmed in writing. A copy of the formal warning will be provided to the Employee and also placed on the Employee's file; or

Step 3 An Employee will be issued a final warning by their Supervisor or Department Manager or Superintendent. Where requested by the Employee, the Company representatives will conduct the counselling in the presence of an Employee Representative, and have the final warning confirmed in writing and the Employee will be advised that dismissal may result from any further act of misconduct. In addition, the Company can stand down the Employee without pay for up to 21 calendar days. A copy of the formal warning will be provided to the Employee and placed on the Employee's file; or

Step 4 Disciplinary action, which is commensurate with the severity and/or frequency of the act(s) of misconduct, will be taken.

As a general guide the disciplinary procedure will work on a sequential basis e.g. first breach results in Step 1, an additional breach within a 12 month period results in Step 2, etc. However, where a Supervisor and Department Manager/Superintendent deem that the circumstances warrant the action, an Employee may be placed on a Step that is not sequential.

Where an Employee who is in receipt of a warning under Steps 1, 2 or 3 above, receives no further warnings under Steps 1, 2 or 3 in the proceeding 12 month period, the current warning will revert to the previous Step (if any) e.g. Step 3 reverts to Step 2, Step 2 reverts to Step 1, etc.

For the avoidance of any doubt, a stand down period at Step 3 does not limit the Company's ability to suspend an Employee without loss of pay during a disciplinary investigation."

[224] The Fair Play Guidelines state the following:

"9 Investigations

…….

9.2 Investigations of non-safety related breaches

Prior to commencement of the Just Culture process, an objective investigation should be conducted to gather the facts necessary to complete the Just Culture Decision Tree."

[225] The Just Culture Decision Tree depicts two limbs of the tree – unintentional and intentional. The flow down from intentional is violation, and then the manager is tasked with choosing if the violation is cultural or deviant. A cultural deviation is described as an intentional error by a person because it is perceived by that person that it is the expectation action in their work group. A deviant violation is described as an intentional error by a person even though they know it is not the approved/tolerated action.

[226] Appendix 2 requires the appropriate manager to complete a form. It states:

> "Where an investigation reveals a breach/infringement of a policy, procedure, process or contractual arrangement (safety or non-safety related), the application of the Just Culture Decision Tree together with the particular circumstances and severity of the behaviour of each case will determine the appropriate step(s) to be taken with respect to an Employee.
>
> Has an Investigation been completed in regards to this event/incident YES/NO
>
> If Yes, please complete all 7 parts of this form. If No, please ensure you complete an investigation prior to proceeding with this form."

[227] Step 4 of the form state:

> "Step 4 – Discussion with Employee (this is a record of discussion, please ensure completion)
>
> Does the Employee agree with the alleged breach? YES/NO
>
> If the Employee does not agree, why not?
>
> Record of discussion with Employee regarding breach."

[228] The form then requires the appropriate manager to record the actions to be taken. The actions are headed:

- No action
- Training
- Coaching
- Possible Discipline
- Possible Termination

[229] Mr Brown did not implement the Fair Play Guidelines for Ms Odgers at all. In cross-examination he said the following:[268]

MR SPENCE:	"…And that then requires you to fill in the forms at appendix 2, doesn't it, of that document? If you go to the back?
Mr BROWN:	Not necessarily.
MR SPENCE:	But this document says that that's what you do, doesn't it?

MR BROWN: But this document is just a guideline. Not - - -

MR SPENCE: But it's part of the enterprise agreement that you comply with it, isn't it?

MR BROWN: An EA - the parties agree to follow the process outlined in the Caval Ridge guidelines.

MR SPENCE: Yes?

MR BROWN: Yes.

MR SPENCE: So it's agreed that that's what will be followed?

MR BROWN: The process, yes.

MR SPENCE: Yes?

MR BROWN: Not necessarily the document line for line. As in, like, in a - the document as I read it here, whilst there is an appendix there where you can, I guess, basically put information in, that is just - I guess that is - assist people at times to ensure that they follow - gather all the information, and follow the steps involved to have a thorough investigation, fair and just.

MR SPENCE: So can you show me in here where it says that that's optional?

MR BROWN: It doesn't state there that it's optional."

[230] In re-examination the following exchange occurred:[269]

MR McLEAN: "In your experience is there always an Appendix 1 completed in relation to a Just Culture Decision Tree?

MR BROWN: In all - in most of the - in all the ones - anything that I was involved in I generally would have used that document.

MR McLEAN: Okay. Would you always complete - so we're looking at Appendix 2 - Just Culture Decision Tree. Would you always given in this document?

MR BROWN: Generally, yes.

MR McLEAN: Generally, yes but not always?

MR BROWN: Not always.

MR McLEAN: And can you just clarify again, for the Commission, your understanding of the purpose which this document serves?

MR BROWN: The guideline to how we conduct and I conduct investigations. I make sure that we follow steps that are fair and just and ensure the outcome is just that - fair and just.

MR McLEAN: And in this case do you believe that your process was fair and just?

MR BROWN: I do.

MR McLEAN: Steps one through to four - my friend took you to this under point five of the decision tree. Took you to steps one through to four?

MR BROWN: Mm'hm.

MR McLEAN: Are they all step - or alternative disciplinary outcomes?

MR BROWN: Alternate - yes.

MR McLEAN: Okay. So if you were to form the view that a particular course of action warranted a step four would you, prior to issuing the step four, have to issue a step one?

MR BROWN: No.

MR McLEAN: Would you have to issue a step two?

MR BROWN: No.

MR McLEAN: Would you have to issue a step three?

MR BROWN: No.

MR McLEAN: So your understanding of the policy is you can go straight to step four?

MR BROWN: Yes.

MR McLEAN: And if you were to go straight to step four would there still be verbal counselling of an employee by their supervisor as per step one?

MR BROWN: No.

COMMISSIONER: Sorry? Your question was when can you go to step - when can you jump them?

MR McLEAN: Effectively, Commissioner, if you form the view that step four was an appropriate disciplinary outcome if you need to

complete a step one or complete a step two or complete a step three?

COMMISSIONER: But what step four says "Disciplinary action which is commensurate with the severity and/or frequency of the acts of misconduct will be taken." What does that mean?

MR BROWN: You're asking me Commissioner?

COMMISSIONER: Yes.

MR BROWN: Yes. So in relation to the severity we were dealing with a very serious safety breach where health and safety of coal miner workers have been compromised. We would - that potentially goes straight to a step four to a show cause.

MR McLEAN: So your evidence is there are alternative outcomes that you can land on?

MR BROWN: Yes.

COMMISSIONER: Well, how does that work with the first line, under five?

MR McLEAN: Under five?

COMMISSIONER: Except for instances of serious misconduct the following four step is a process that would be applied.

MR McLEAN: Well, I think that means - - -

COMMISSIONER: It's a question for the witness.

MR BROWN: Sorry. Which? Sorry, Commissioner which?

COMMISSIONER: So under five of the policy. So you go to the first standing page? Yes?

MR BROWN: Yes. This one procedural step - yes.

COMMISSIONER: It says, "Except for instances of serious misconduct the following four-step disciplinary process will be applied."

MR BROWN: Excuse me - you're looking at that page of the tree wasn't it?

COMMISSIONER: No. No, the beginning.

MR BROWN: The beginning.

COMMISSIONER: So you've got (1) Purpose and Scope, (2) Scope - - -?

MR BROWN: Oh, right. Sorry. Disciplinary procedure five? That's the one you're talking about?

COMMISSIONER: Yes.

MR BROWN: Except for instances of serious misconduct the following four-step process will be applied. Yes. And you're asking me - sorry?

COMMISSIONER: Well, read that in conjunction with step four?

MR BROWN: Yes.

COMMISSIONER: Is it your view that normally, excluding serious misconduct, employees would typically go - one, two, three, four - but you can jump ahead?

MR BROWN: You - it's case by case, Commissioner. Depending on it say - if we have a serious safety breach it may go straight to - for example - it might go to a final warning or it might go to a show cause, depending on the severity of it.

COMMISSIONER: Well, if it was a serious safety breach?

MR BROWN: Yes.

COMMISSIONER: And you decided to land on a final warning is that you would make a determination that it was not an instance of serious misconduct because you've got the first line there of this clause that says, "If it's serious misconduct you don't have to go to steps one to four."?

MR BROWN: No. And misconduct can be - so it can be behaviour or it can be safety related.

COMMISSIONER: Well, it reads "Serious Misconduct."?

MR BROWN: It does read "Serious Misconduct". So if we're talking - and the section 39 of the Act states that "All coal miner workers with example must abide by the health and safety system of the coal mine they work at." And misconduct may be breaching the policies and which is underpinned by the Health and Safety Management System. So misconduct, for example, could be operating a piece of equipment unsafely or outside of its parameters there to be misconduct or viewed as misconduct.

COMMISSIONER: So step four allows you to do whatever you need to do?

MR BROWN: Step four if you think that - step four allows you to go straight

to - allows you to go to a show cause as an example and if you feel that the breach or the misconduct is serious enough to end up there to be there with, I guess, the person involved as having to explain why their employment should not be terminated.

COMMISSIONER: So you can go to step four straight away, can you?

MR BROWN: You can - yes - depending on the severity - yes, you can. You can. If you deem that the - what the - we'll call it the event. An event has happened and you deem that they're serious enough that's when a person needs to show cause why he should be remained employed on that mine site, yes you can go to step four.

COMMISSIONER: All right. But the first line of that five then says that, except for instance in the serious misconduct.

MR McLEAN: Commissioner, I think in fairness the witness should be taken to the paragraph after step four.

COMMISSIONER: Yes. So you move from - you typically move from step one to two. However, where a manager deems that the circumstances warrant the action an employee may be placed on a step that is not sequential. Right?

MR BROWN: Yes.

COMMISSIONER: But four is the - four is the doing, isn't it? It's giving you a license. Four allows you to do whatever you think is commensurate with the severity of the - or frequency of the misconduct?

MR BROWN: Four allows you to make - I guess - make a decision to ask the employee to show cause or be terminated immediately. So depending on the severity of the event or the behaviour at the time or if you think that that is not allowing everybody else in that - say that mine site to work safely.

COMMISSIONER: So my question is taking into account the first sentence of five and the step four process?

MR BROWN: Yes.

COMMISSIONER: Are they to be read - can they be read together at all or are they exclusive of each other?

MR BROWN: I think they can be read individually because it's - - -

COMMISSIONER: Well, are they exclusive? Because the word "except" is used in the first line.

MR McLEAN: Commissioner, I'm struggling to follow. Perhaps if you can rephrase for the witness?

COMMISSIONER: You've got a lot of considerations here. Is it misconduct? Is it serious misconduct? The company has paid five weeks' notice under the EBA it doesn't have to pay notice if it's wilful and serious misconduct. So why did you dismiss her?

MR BROWN: Why did I dismiss her?

COMMISSIONER: Yes.

MR BROWN: Because I didn't believe that - I believed at the time that that was an appropriate outcome because I thought her conduct in relation to the photo and also the - at the time - I was just finishing the investigation in relation to the airport event.

COMMISSIONER: You'd finished the investigation had you?

MR BROWN: I'd done all the interviews in relation to the airport investigation and I had all the evidence before me and - - -

COMMISSIONER: So you interviewed other people in relation to the airport incident, did you?

MR BROWN: I interviewed people that worked at the airport. Worked on the security area of the airport that were on duty that night when the - when the bag went through the - - -

COMMISSIONER: You interviewed the security staff at the airport?

MR BROWN: I went and interviewed the supervisor that was on that night and also two of her co-workers that were at that station at the security point, yes."

[231] I questioned Mr Brown as to whether he has utilised what I understand to be the stand-down without pay provisions within the enterprise agreement. Clause 6.4 of the 2015 agreement allows the respondent to stand an employee down for misconduct (clause 6.4(a)), and without pay (clause 6.4(d)). I am aware of other BMA agreements which provide a cap of 21 days of stand down without pay. The following was discussed with Mr Brown relevant to the airport incident:[270]

COMMISSIONER: "You wouldn't have dismissed her for that incident alone?

MR BROWN: Not with the evidence I had at the time, no.

COMMISSIONER: And you didn't stand her down. You let her continue working and two days later we've got the photo incident?

MR BROWN: Yes.

COMMISSIONER: Have you ever suspended somebody?

MR BROWN: Yes.

COMMISSIONER: Without pay?

MR BROWN: Without pay.

COMMISSIONER: I mean you've got a very unique provision in your enterprise agreement that allows you to do that. Most people don't have that.

MR BROWN: To stand people down without pay, Commissioner, you mean?

COMMISSIONER: Yes. There's a sanction.

MR BROWN: Yes.

COMMISSIONER: Have you ever done that?

Not at the time I've been employed with BHP - no. Not for my best recollection.

COMMISSIONER: It's quite a unique and effective penalty, isn't it?

MR BROWN: To stand people down without pay?

COMMISSIONER: Yes.

MR BROWN: Some people may view that, yes."

[232] Mr McLean volunteered that Mrs James, as a consequence of her actions was issued a final written warning and a 21-day unpaid suspension. I questioned Mr Brown if that was the first time he had suspended an employee without pay. He answered, *"It is. To the best of my recollection that would be the first time."*[271] Mr McLean stated that Mrs James received the maximum penalty.

[233] Curiously, the first and final written warning for Mrs James provided to the Commission and dated 28 March 2019 states:

> "I refer to discussions with you on 12 March 2019 regarding the investigation into your conduct on 2 March 2019 (Investigation). I note that you elected to have a support person present. You were stood aside on full pay effective 13 March 2019 pending the investigation.
>
> ……

Outcome – Final Written Warning

I have taken all relevant matters into account and have elected to issue you with a Final Written Warning.

……"

[234] There is no mention of Mrs James receiving a sanction of a 21-day unpaid suspension. If the letter to Mrs James is correct, she was suspended during the investigation and show cause process with pay.

[235] In consideration of s.387(c) of the Act, I find that Ms Odgers was provided an opportunity to respond to some reasons put by the respondent to her relevant to her conduct. I determine that Ms Odgers was not afforded the opportunity to respond to the bus incident of September 2018, and this incident factored in part of Mr Brown's decision making to terminate her.

[236] I determine that where Ms Odgers had an expectation that the respondent would meet its enterprise agreement obligations to apply the Fair Play Guidelines, it failed to do so without any adequate explanation. Mr Brown simply did not utilise them. His evidence is that he usually does, but he also gave evidence that he considers them to be a guideline only, and not a requirement. Whilst Mr Brown did, in the show cause letter cite that he considered her conduct to be intentional, he didn't explain the context of such finding.

[237] Ms Odgers, and any employee employed by the respondent and covered by the agreement is owed an opportunity to influence the decision maker. It is a strict obligation, agreed to by the respondent and in place for many years. In fact the Fair Play Guidelines are dated November 2013. There is no adequate explanation as to why the Superintendent, as Mr Brown was, chose to follow them or not. There is an obligation to follow them.

[238] Given that Mr Brown was of the view that the airport incident did not warrant dismissal with the information that he had before him at the time, it was appropriate in all of the circumstances for Mr Brown to discuss with Ms Odgers following the investigation, (by telephone, if necessary), and determine which step within the Guidelines he would determine was the appropriate step. He did not assert that pursuant to clause 5 of the Fair Play Guidelines that it was "serious misconduct", even if it was later asserted that it could amount to serious misconduct. It was certainly misconduct, but Mr Brown never determined that it was serious misconduct to warrant an excuse not to follow the disciplinary procedure within the Fair Play Guidelines. He just did not do it.

[239] Where it was submitted that the photo incident could amount to serious misconduct, the Fair Play Guidelines were not carried out for any of the employees involved. Mr Brown never asserted that the reason why he didn't complete the Fair Play Guidelines for all five employees was because he considered for each of them the misconduct amounted to serious misconduct. He just did not do it.

[240] In consideration of s.387(c) of the Act, I determine that Ms Odgers was not provided with an opportunity to effectively influence or encourage Mr Brown in his decision making relevant to the reasons for the dismissal. She did not, as is required, have the opportunity to discuss the various steps within the Fair Play Guidelines, or to address Mr Brown on the

potential of a final written warning and/or being suspended for a period of time without pay. It is true that she had an opportunity within the written show cause response to advance mitigation, but Mr Brown, it seems, did not ever turn his mind to the potential of an unpaid stand down.

s.387(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

[241] Ms Odgers did not submit that there was an unreasonable refusal by the respondent to allow her a support person, and I find accordingly.

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[242] Ms Odgers was dismissed for misconduct, and accordingly, this consideration is not entirely relevant. I do take into account the earlier verbal conversation that Mr Brown had with Ms Odgers in September 2018 relevant to her inappropriate addressing of Mr Hill. I have not had regard to the earlier incident of drinking while on the plane given it was issued in 2015, and according to the Fair Play Guidelines, it would have been extinguished after a period of 12 months.

s.387(f) - Whether the respondent's size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[243] This is a neutral consideration given the size of the respondent.

s.387(h) Other matters

[244] As noted by Vice President Lawler in *Sexton v Pacific National (ACT) Pty Ltd:*[272]

> "Relevantly advanced age and long service can render harsh a termination that would not be harsh in the case of identical conduct by a younger person with relatively short service. Nevertheless, age and length of service simply remain a factor to be taken to account in considering whether the termination was harsh, unjust or unreasonable and in applying the principle of a "fair go all round."

[245] Ms Odgers was employed for a period of approximately five years. This is not a long period of time, nor is it an insignificant period of time. As stated above, Ms Odgers was aged 49 at the time of the dismissal.

[246] It was submitted that Ms Odgers had received an invitation to be part of the women in mining trajectory as part of her achievements and tenure in the mining industry. Yet no evidence was led in relation to this. I do not consider it appropriate to take into consideration this submission, given that I do not think anybody would find it appropriate for a candidate promoting women in mining to be involved in the unsavoury incidents Ms Odgers was involved in, and for which I have determined there was a valid reason for the dismissal.

[247] I have also taken into consideration the information that became available to the Commission during the hearing relevant to Ms Odgers' false statement to Mr Brown on 28

February 2019 that she was the only person involved in recording the airport incident, and her theft of the butter knives from the respondent.

[248] I confirm that for the purposes of s.387 of the Act, I have not taken into account what I consider to be her falsified statement to the Commission that she held a discussion with Mr Hill prior to the airport incident occurring.

Conclusion

[249] In no uncertain terms, Ms Odgers' misconduct was unacceptable. On being alerted that Mr Brown was investigating her and the investigation was still on foot, Ms Odgers decided to partly undress in the workplace just two days later and allow a photograph to be taken of her and others. If she did not think the respondent was serious about the first incident because it had occurred so many months before, she should have done what she said she would do, and "keep to herself".

[250] Without any regard for how precarious her employment might be, she stood on a table and participated in the photo incident. Her foolishness in being involved in both incidents is demonstrated by her evidence before the Commission that she did not regard the photo as inappropriate. She agreed during the show cause process that she was remorseful and she should not be dismissed over the incident, but during the hearing attributed the posing for the photo as nothing more than cleavage. Her suggestion that sometimes women walk from the camp gym to their camp rooms in gym gear is not comparable at all to the behaviour she engaged in during the photo incident.

[251] As stated earlier, however, I am deeply troubled by the respondent's failure to meet its lawful obligations to comply with the enterprise agreement it has entered into. The Fair Play Guidelines are a requirement to follow; they are not just something that can be completed whenever a manager decides he or she will do so.

[252] The size of the respondent and its obligation to its employees warrants a firm position on this matter by the Commission as currently constituted. The respondent was obliged to consult with Ms Odgers and inform her of its decision relevant to the Just Culture Decision Making Tree. She was entitled to be informed that following the investigation, the respondent considered her conduct to be intentionally deviant. I agree that for both incidents it was intentionally deviant and in breach of the reasonable Charter Values and the Code of Conduct.

[253] If Mr Brown had met his obligations, Ms Odgers may have discovered that Mr Brown was, in part, also relying on her purported conduct in September 2018 relevant to the bus incident. She might have had the opportunity to convince him of a lesser step, or an unpaid suspension. She might have convinced Mr Brown to issue to her a first and final warning as he did for Mrs James.

[254] I accept that a respondent, any respondent, may not always procedurally ensure it meets its obligations to ensure that a dismissal is valid and procedural fairness has been appropriately afforded to a dismissed employee. In considering whether a dismissal is unfair, a respondent won't be required to meet *every* obligation; it is a balancing act, hence the fair go all 'round. It is important in this case to note that while the substance of the incidents was put to Ms Odgers consistently in the investigation and show cause letters, and the conduct was accepted by Ms Odgers, the respondent ultimately dismissed Ms Odgers for additional

breaches of the Charter Values and Code of Conduct. As stated by me during the hearing, if a respondent the size of this respondent can't appropriately marry its investigation findings with its termination letter, what hope do smaller employers have?

[255] Commissioner Cirkovic recently held in *Michael Scott v Latrobe Regional Hospital* 2019 [FWC] 5680:

> "Failure to follow Enterprise Agreement disciplinary procedure
>
> **[83]** The Applicant submitted that I should have regard to an alleged failure of the Respondent to follow the investigation and disciplinary procedures in the Enterprise Agreement. The Respondent submitted that it had complied with the relevant procedures. Clause 8.4 of the Enterprise Agreement is set out below.
>
> ……
> ……
>
> **[84]** Based on the material before me, I am satisfied that the letter to the Applicant dated 18 July 2019 is unequivocally part of an investigation process; not a written record of the outcome of the investigation. The written outcome of the investigation, including findings and the bases of the Respondent's conclusions, was provided to the Applicant in the letter of termination dated 6 August 2019. Pursuant to clause 8.4, the Respondent was required to "meet with the employee" before taking the disciplinary action that it did. Based on the above, I am satisfied that the Respondent failed to follow the disciplinary process set out in the Enterprise Agreement, and in the circumstances, this contributes to the unreasonableness of the dismissal."

[256] I wish to reiterate that each time this respondent has a matter before me I will not hold it to the highest standard of ensuring every inch of procedural fairness has been afforded to a dismissed employee. In every matter the circumstances of each dismissal will be given appropriate consideration.

[257] However, for the respondent to have no regard at all to its obligations in this matter of applying the Fair Play Guidelines pursuant to the relevant enterprise agreement, means that despite there being a valid reason for the dismissal, and despite Ms Odgers knowing the context of the respondent's findings in relation to each of the incidents, I conclude that for the reasons above, the dismissal was unjust and unreasonable.

[258] Accordingly I determine that Ms Odgers' dismissal was unfair.

Remedy

[259] Section 390 of the Act reads as follows:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies."

[260] Ms Odgers is a person from unfair dismissal for the Act's purposes, and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether she can be reinstated. Ms Odgers seeks reinstatement.

[261] Section 391 of the Act provides as follows:

"**391 Remedy—reinstatement etc.**

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;
the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

Is reinstatement inappropriate?

[262] I have found Ms Odgers was unfairly dismissed; however it is not axiomatic that reinstatement or reappointment follows such a finding. In a Full Bench decision in *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 (*Nguyen*) it was held:

"[35] The appellant's submissions appear to proceed on the basis that reinstatement automatically follows from a finding of unfair dismissal. This is not correct. There is no right to reinstatement consequent upon a finding that an applicant has been unfairly dismissed. The commission has a discretion as to whether a remedy will be awarded in a case where a dismissal has been found to be unfair. Reinstatement will only be awarded if the commission is satisfied that is appropriate to do so."

[263] It is common for respondents in unfair dismissal matters to argue that it is inappropriate to reinstate an employee who has been found to be unfairly dismissed because of a loss of trust and confidence. In *Nguyen*, the Full Bench examined the relevant principles

concerning an alleged loss of trust of confidence in the context of an application for reinstatement. It held:

> "[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:
>
> (a) Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
>
> (b) Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
>
> (c) An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
>
> (d) The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
>
> (e) The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.
>
> [28] Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."

[264] In *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186at 191-192, the Full Court of the Industrial Relations Court said:

> "... We accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.
>
> At the same time it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee's employment, the accuser will often be reluctant to shift from the

view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Division 3 of Part VIA of the Act.

If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of loss of confidence in the employee.

Each case must be decided on its own merits."

[265] I have had regard to the period of time that Ms Odgers had off work before she commenced with another employer at the same mine site. Ms Odgers is currently permitted to work at the same workplace, albeit employed by another employer, but working alongside her earlier colleagues. I confirmed during the hearing that she also might share meals with such employees.

[266] I have also taken into consideration the considerable expense in money and time Ms Odgers experiences working at the site and paying for her own airfares and off-site accommodation, and the delay in commercial flights as opposed to charter flights.

[267] Where Ms Odgers has asserted some things detrimental or disparaging to some respondent employees, this does not appear to be a concern given she is working at the site without apparent incident.

[268] I also have taken very seriously the discussion during the hearing that the respondent may consider, in light of evidence during the hearing whether it would allow Ms Odgers to continue to be allowed to work on site with the other employer. An adjournment occurred to encourage the parties to discuss such a scenario.

[269] I instructed the respondent to inform my Chambers, during the period the decision was reserved, whether it did take any action to remove Ms Odgers from the site. To-date, no communication has been received from either party informing the Commission that Ms Odgers has been removed from the site at the initiative of the respondent.

[270] I have also taken into consideration the additional evidence given during the hearing. It has become clear that Ms Odgers told Mr Brown an untruth during the investigation meeting of 28 February 2019. She said she did so because she did not want to get other employees into trouble.

[271] Further, it was discovered that Ms Odgers had taken the butter knives belonging to the respondent without authorisation. I accept that they are of nominal value, but she still decided to misappropriate them.

[272] Most alarming is my finding that Ms Odgers fabricated evidence to point the finger at Mr Hill and allege that Mr Hill knew about the airport incident some time before it occurred, and encouraged her to use spoons or knives.

[273] I do not consider it appropriate to reinstate Ms Odgers to her former position. I accept that the respondent has lost trust and confidence in Ms Odgers to be an honest employee employed by it.

[274] I now turn to consideration of compensation.

Compensation

[275] Section 392 of the Act provides:

> "**392 Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
>
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
>
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
>
> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
>
> (g) any other matter that the FWC considers relevant.
>
> *Misconduct reduces amount*
>
> (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

Authorities

[276] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.[273] That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram* and *District Retirement Villages inc T/A Ottrey*;[274] *Jetstar Airways Pty Ltd v Neeteson-Lemkes*[275] and McCulloch v Calvary Health Care (McCulloch).[276]

[277] I have had regard to the above authorities, and I have considered the submission of each party.

The effect of the order on the viability of the respondent

[278] Given the size of the respondent this is a neutral consideration.

The length of Ms Odgers' service

[279] Ms Odgers had approximately five years' service. I have had regard to the decision of SDP Richards in *Davidson v Griffiths Muir's Pty Ltd* [2010] FWA 4342. His Honour determined at [140]:

> "As an employee for a short period of time, the length of Applicant's service with the Respondent on its own is not a powerful force making for a compensation remedy (or a compensation order of significant quantum)"

[280] I consider that Ms Odgers' service of five years is a reasonable period of time.

The remuneration that Ms Odgers would have received, or would have been likely to receive, if she had not been dismissed

[281] I have determined that given Ms Odgers' track record, and her promises to not engage in misconduct even in light of a serious investigation, Ms Odgers' employment would have ended after a further ten weeks. It took a great deal of cross-examination for Ms Odgers to agree that the airport incident could have been an offensive incident, and she was not really remorseful over the photo incident, concluding that it was "just cleavage".

[282] The 2018 Agreement came into effect at around the time of Ms Odgers' dismissal. I understand that the annualised salary for Ms Odgers would have been $136, 241.01, being an amount of $2,620.02 per week. Ms Odgers was paid five weeks' notice on termination being an amount that should equal $13,100.10.

The efforts of Ms Odgers (if any) to mitigate the loss suffered because of the dismissal

[283] I am satisfied that Ms Odgers took appropriate measures to mitigate the loss suffered because of the dismissal.

The amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[284] Ms Odgers gave evidence that she did some painting for a friend, but then said that she was paid in kind.

The amount of any income reasonably likely to be so earned by Ms Odgers during the period between the making of the order for compensation and the actual compensation

[285] This factor is not relevant in the circumstances of this matter.

Other relevant matters

[286] I do not consider that there are any other relevant matters to consider that I have not already addressed above.

Misconduct reduces amount

[287] Section 392(3) requires that if the Commission is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person then the Commission must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[288] The section requires that consideration be given by the Commission, amongst other things, as to whether a person's misconduct contributed to the decision to dismiss an employee even if the Commission has found that there was no valid reason for the person's dismissal. However, if there was no valid reason for the dismissal that may be relevant to the Commission's decision as to the appropriate amount by which the amount of compensation should be reduced.[277]

[289] Ms Odgers most certainly engaged in misconduct. Having regard to the material before me, I consider it appropriate to make a reduction of 50% to the amount of compensation I would otherwise order on account of Ms Odgers' misconduct.

Shock, distress etc. disregarded

[290] I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Ms Odgers by the manner of the dismissal.

Compensation Cap

[291] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the applicant, or to which the applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[292] The high income threshold immediately prior to the dismissal was $145,400, and the amount for 26 weeks was $72,700. The amount of compensation the Commission will order does not exceed the compensation cap.

Payment by instalments

[293] This is not an appropriate consideration given the size of the respondent.

Order of compensation

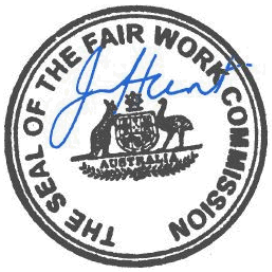
[294] I have determined that the respondent is to pay to Ms Odgers the following amount of compensation less tax as required by law within 14 days of the date of this decision:

10 weeks' compensation:	$26,200.19
Less five weeks in lieu of notice:	$13,100.10
Amount:	$13,100.19
Deduction of 50% for misconduct:	-$6,550.09

Total amount: **$6,550.10**

[295] In addition, the respondent is to pay superannuation on the amount of $6,550.10 at the rate of 9.5% into Ms Odgers' superannuation fund within 14 days of the date of this decision.

[296] An Order [PR713396] to that effect will be issued with this decision.



COMMISSIONER

Appearances:

T Spence, counsel, with *C Van Oeveren*, solicitor, for the applicant.
J McLean, solicitor, for the respondent.

Hearing details:

Brisbane
2019
July 16, 17.

Final written submissions:

Submission in reply of the applicant, 12 July 2019.
Respondent's outline of submissions, 9 July 2019.

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<PR713397>

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[1] PN32 to PN33; PN53 to PN63.

[2] PN11 to PN25.

[3] PN28 to PN34.

[4] PN1680.

[5] Exhibit A1 at paragraph 6.

[6] Ibid at paragraph 7.

[7] Ibid at paragraph 8.

[8] Exhibit A1 at paragraphs 9 to 14.

[9] Ibid at paragraphs 16 to 29.

[10] Ibid at paragraph 33.

[11] Ibid at paragraphs 35 to 41.

[12] Ibid at paragraphs 42 to 54.

[13] Exhibit A2 at paragraphs 5 to 9.
[14] Ibid at paragraphs 13 to 18.
[15] Exhibit A2 at 27.
[16] PN193; PN196.
[17] PN194 to PN195.
[18] PN197.
[19] PN198 to PN199; PN204.
[20] PN200 to PN201.
[21] PN202 to PN203.
[22] PN251.
[23] PN214 to PN215.
[24] PN226 to PN233.
[25] PN218 to PN219; PN234 to PN239.
[26] PN265 to PN266; PN268.
[27] PN240; PN267 to PN268.
[28] PN264.
[29] PN265.
[30] PN270 to PN271.
[31] PN272.
[32] PN274.
[33] PN275 to PN277.
[34] PN278 to PN280.
[35] PN281.
[36] PN224.
[37] PN245 to PN250.
[38] PN261 to PN263
[39] PN176.
[40] PN180.
[41] PN181 to PN182.
[42] PN183.
[43] PN184 to PN188.
[44] PN485.
[45] PN486.
[46] PN491.
[47] PN498 to PN500.
[48] PN502.
[49] PN501.
[50] PN503 to PN504.
[51] PN505 to PN506.
[52] PN311 to PN330.
[53] PN331 to PN342.
[54] PN345 to PN350.
[55] PN366 to PN378.
[56] PN1042 – PN1044.
[57] PN389.
[58] PN390 to PN392.
[59] PN393 to PN399.

[60] PN400 to PN403.
[61] PN415 to PN416.
[62] PN417 to PN420.
[63] PN510.
[64] PN422 to PN425.
[65] PN426 to PN430.
[66] PN431; PN526 to PN543.
[67] PN523 to PN525.
[68] PN432.
[69] PN544 to PN545.
[70] PN545.
[71] PN525.
[72] PN435 to PN436.
[73] PN437 to PN440.
[74] PN441 to PN442.
[75] PN443 to PN446.
[76] PN453.
[77] PN454 to PN455.
[78] PN459.
[79] PN460 to PN461.
[80] PN466 to PN468.
[81] PN467.
[82] PN467 to PN470.
[83] PN472.
[84] PN476 to PN478.
[85] PN480 to PN483.
[86] PN1148 to PN1149.
[87] PN553.
[88] PN655.
[89] PN656 to PN659.
[90] PN661.
[91] PN737.
[92] PN741.
[93] PN762.
[94] PN688 to PN670.
[95] PN669 to PN671; PN686.
[96] PN686 to PN693.
[97] Exhibit R2 at annexure LB14.
[98] Ibid.
[99] PN699.
[100] PN706.
[101] PN1006 to PN1021.
[102] PN789.
[103] PN790 to PN791.
[104] PN795.
[105] Exhibit R1.
[106] PN871 to PN876.

[107] PN882.
[108] Exhibit A2 at paragraph 14.
[109] PN673 to PN685.
[110] PN716; PN721 to PN724.
[111] PN717 to PN720.
[112] Exhibit R2 at annexure LB10.
[113] PN351 to PN360.
[114] PN363 to PN365; PN354; PN644 to PN653.
[115] PN833 to PN847.
[116] PN847 to PN870.
[117] PN562 to PN571.
[118] PN562 – PN565.
[119] PN595 to PN596
[120] PN582 to PN589.
[121] PN599 to PN600.
[122] PN604.
[123] PN605.
[124] PN622 to PN624; PN627 to PN40.
[125] PN638 to PN640.
[126] PN635.
[127] PN887 to PN890.
[128] See discussion at PN891 to PN988.
[129] PN1030 to PN1039.
[130] PN1161 to PN1162.
[131] PN1060.
[132] PN1065.
[133] PN1066 to PN1068.
[134] PN1069.
[135] PN1085.
[136] PN1091.
[137] PN1171 to PN1175.
[138] PN154.
[139] PN155.
[140] PN156.
[141] PN79.
[142] PN80.
[143] PN81.
[144] Exhibit A3.
[145] PN135.
[146] PN140.
[147] PN163 to PN164.
[148] PN165 to PN166.
[149] PN165 to PN169.
[150] Exhibit R2 at paragraph 4.
[151] Ibid.
[152] Ibid at paragraph 6 and annexure LB-1.
[153] Ibid at paragraph 11.

[154] Ibid at paragraph 12; Annexure LB-2.

[155] Ibid.

[156] Ibid at paragraph 13; Annexure LB-3 at page 14.

[157] Ibid at paragraph 14; Annexure LB-3 at page 15.

[158] Ibid at paragraph 18; annexure LB-6.

[159] Ibid at paragraph 16.

[160] Ibid.

[161] Ibid at annexure LB-4.

[162] Ibid.

[163] Ibid at paragraph 17.

[164] Ibid at annexure LB-8.

[165] Ibid at paragraph 27.

[166] Ibid at paragraph 25.

[167] Ibid at paragraph 26.

[168] Ibid at paragraph 26; Annexure LB-10.

[169] Ibid at Annexure LB-10.

[170] Ibid at paragraph 27.

[171] Ibid at paragraph 28; Annexure LB-11.

[172] Ibid at paragraph 29.

[173] Ibid at paragraph 33; Annexure LB-12.

[174] Ibid at paragraph 35(a).

[175] Ibid at paragraph 43.

[176] Ibid at paragraph 42.

[177] Ibid at Annexure LB-13.

[178] Ibid at Annexure LB-14.

[179] Ibid at paragraph 38.

[180] Ibid at paragraph 38.

[181] Ibid at paragraph 40.

[182] Ibid at paragraph 41.

[183] PN1280 to PN1283.

[184] PN1284 to PN1288.

[185] PN1289 to PN1297.

[186] PN1298 to PN1314.

[187] PN1337 to PN1343.

[188] PN1356 to PN1358.

[189] PN1322 to PN1330; PN1359 to PN1360.

[190] PN1365 to PN1369.

[191] PN1376 to PN1378; PN1582.

[192] PN1379 to PN1381.

[193] PN1397 to PN1398.

[194] PN1382 to PN1383.

[195] PN1386 to PN1394.

[196] PN1395.

[197] PN1403 to PN1404.

[198] Exhibit R2 at Annexure LB-4 at page 9.

[199] PN1423.

[200] PN1425.

[201] PN1428 to PN1431.
[202] PN1485 to PN1489.
[203] PN1441.
[204] PN1444 to PN1445.
[205] PN1446.
[206] PN1447 to PN1449.
[207] PN1452.
[208] PN1456.
[209] PN1457.
[210] PN1458 to PN1459.
[211] PN1462.
[212] PN1463 to PN1464.
[213] PN1490 to PN1491; PN1543 to PN1550.
[214] PN1470 to PN1471.
[215] PN1465.
[216] PN1466; PN1472 to PN1477; PN1482.
[217] PN1497 to PN1505.
[218] Exhibit R3.
[219] PN1508 to PN1513.
[220] PN1518 to PN1519.
[221] PN1558.
[222] PN1556.
[223] PN1560 to PN1562.
[224] PN1563.
[225] PN1567.
[226] PN1568 to PN1578.
[227] PN1590 to PN1602; PN1615.
[228] PN1618 to PN1619.
[229] PN1599.
[230] PN1608.
[231] PN2031 to PN2045; PN2059 to PN2065.
[232] PN1604 to PN1625.
[233] PN1629 to PN1635.
[234] PN1637.
[235] PN1669 to PN1673.
[236] PN1679.
[237] PN1684.
[238] PN1685 to PN1687.
[239] PN1707 to PN1708.
[240] PN1770.
[241] PN1752; PN1817 to PN1829.
[242] PN1732 – PN1748.
[243] PN1780.
[244] PN1784 – PN1797.
[245] PN1799 to PN1802.
[246] PN1876 to PN1877.
[247] PN1887 to PN1889.

[248] PN1885 to PN1886; PN1909; PN1937 to PN1938.

[249] PN1893.

[250] PN1895 to PN1898.

[251] PN1900.

[252] PN1901.

[253] PN1901 to PN1905.

[254] PN1905.

[255] PN1965.

[256] (1995) 185 CLR 410, [465].

[257] *Sayer v Melsteel* [2011] FWAFB 7498 at [20].

[258] PN2098.

[259] [2016] FWC 2921.

[260] PN2106 to PN2114.

[261] PN2660 to PN2744.

[262] PN2269.

[263] PN2884; PN2931.

[264] PN1711.

[265] PN1615.

[266] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

[267] PN2615 – PN2643.

[268] PN1337 – PN1343.

[269] PN1633 – PN1679.

[270] PN1711 – PN1719.

[271] PN1757.

[272] (2003) unreported, PR931440 at [30].

[273] (1998) 88 IR 21.

[274] [2013] FWCFB 431.

[275] [2014] FWCFB 8683.

[276] [2015] FWCFB 2267.

[277] *Crawford v BHP Coal Pty Ltd* [2017] FWC 154, [345] – [346]; *Read v Gordon Square Child Care Centre Inc.* [2013] FWCFB 762, [83].