



DECISION

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

Mr Nigel Sclater

v

**Transdev Harbour City Ferries Pty Ltd T/A Transdev Harbour City
Ferries**
(U2019/5233)

DEPUTY PRESIDENT BULL

SYDNEY, 22 NOVEMBER 2019

Application for relief from unfair dismissal – Ferry Master found asleep on duty – use of non-prescription cough mixture – valid reason found – dismissal not unfair – application dismissed.

[1] Mr Nigel Sclater has made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (the Act), alleging that he has been unfairly dismissed from his employment with Transdev Harbour City Ferries Pty Ltd (the respondent/Transdev). Mr Sclater seeks an order that he be reinstated to the position in which he was employed immediately before his dismissal.

[2] There was no dispute that at the time of dismissal, Mr Sclater was a person protected from unfair dismissal¹ under the Act.

[3] Both parties sought to be represented by legal counsel. Section 596(1) of the Act provides that a party may be represented in a matter by a lawyer or paid agent only with the permission of the Commission. Permission was granted to both parties pursuant to s.596(2)(a) of the Act, as the Commission was satisfied that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter. The matter proceeded with counsel for both parties, contributing to the efficiency of the proceedings.

Background

[4] Mr Sclater was employed as a Ferry Master by the respondent until his dismissal on 23 April 2019. The dismissal resulted from an incident on 11 April 2019, when Mr Sclater was on duty as the Master on the ferry ‘May Gibbs’, travelling between Pyrmont Bay Wharf and McMahon’s Point Wharf.

[5] When the ferry arrived at the Balmain East wharf, Mr Nicholas Dinham, an *Operations Manager* for the respondent, boarded the ferry. Mr Dinham is Mr Sclater’s line

¹ *Fair Work Act 2009* (Cth) s.382.

manager. Once aboard, Mr Dinham attended the wheelhouse, where he observed the vessel's *Engineer*, Mr Jaroslaw Drygajlo, at the helm, with Mr Sclater asleep on a small bench located in the wheelhouse.

[6] Transdev undertook an investigation, which included taking into account Mr Sclater's explanation and the Engineer's account of the incident. Following the investigation, Mr Sclater was dismissed.

Applicant's submissions and evidence

Evidence of Mr Sclater

[7] Mr Sclater has a qualification of Master Class 4, which allows him to work as a Ferry Master on the respondent's vessels. Mr Sclater commenced working for Sydney Ferries in 1995. In 2012, his employment transferred to Harbour City Ferries, which is now known as Transdev Harbour City Ferries.

[8] Mr Sclater provided two witness statements, one dated 28 July 2019 and the other 16 August 2019.² Mr Sclater did not call any other witnesses in support of his application. He was subjected to cross-examination.

[9] Mr Sclater's evidence was that up until the incident leading to his dismissal, he had never been subject to any disciplinary action and that he enjoyed his work as a Ferry Master.

[10] Mr Sclater stated that following a heart attack in 2015 he was taking four types of heart medication (Brilinta, Lipitor, Coversyl and Aspirin), which thin his blood and lower his blood pressure. He has occasionally missed a dose but has not suffered any adverse effects and holds a full medical clearance to work as a Ferry Master.

[11] Mr Sclater's evidence was that in late March 2019 he caught a cold which left him with a persistent cough. As a result, he purchased an over-the-counter cough mixture known as 'Dry Tickly' from a chemist. On 27 March 2019, he started to use it and, on the same day he sent by text a picture of one side of the packaging box to his line manager, Mr Dinham, advising that he was taking the cough mixture, which Mr Dinham noted in response.

[12] On one side of the box was a warning, which he did not read at the time he took the mixture, stating "*This medication may cause drowsiness. If affected do not drive a vehicle or operate machinery.*"³ Mr Sclater did not send a picture of this side of the box to his line manager, as he did not think to do so. Mr Sclater's evidence was that he expected that his manager would ask him about the cough mixture if he had any concerns, or that his manager would research it himself.⁴

[13] Mr Sclater took the cough mixture as needed for over a week and did not notice any fatigue or other side effects. The pharmacist did not point out any potential side effects or ask any questions about his use of the cough mixture.⁵ In his witness statement of 16 August

² Exhibits A1 and A2 respectively.

³ Exhibit A3

⁴ PN149.

⁵ Exhibit A2 [11].

2019, Mr Sclater stated that he did not know the Drug and Alcohol Policy required him to ask the pharmacist about the potential effects of the cough mixture.⁶ However, under cross-examination, Mr Sclater agreed that he knew of this requirement.⁷

[14] Mr Sclater normally commenced work at 5:15 am. As it takes one hour for him to drive to work, he would leave home at 3:45 am. Mr Sclater's evidence was that on 11 April 2019, he left home 15 minutes late due to a flat battery in his motor vehicle, took a dose of the cough mixture at 4:50 am (presumably while driving to work) and arrived at work to sign on at 5:14 am. At around 6:30 am, he took a further dose of the cough mixture. Mr Sclater stated that he normally took his heart medication at 8.00 am, but did not do so on this day, as he had left his medication in his motor vehicle in his rush to arrive at work in time.

[15] Mr Sclater explained that while, as the Master, he is in ultimate control of a vessel, it is not uncommon to hand over driving or control of 'the sticks' to other qualified crew, to allow for short breaks, and for other staff to gain experience driving a ferry. On the day in question, Mr Jaroslaw Drygajlo was the Engineer on board. He also had the qualification of Master Class 4 and was therefore able to work as a Ferry Master. Mr Sclater had previously handed control of a ferry to Mr Drygajlo. Also working on the vessel on 11 April 2019 was a General-Purpose Hand.

[16] On 11 April 2019, the 'May Gibbs' was travelling in a loop from Pymont Bay to Watsons Bay via Barangaroo and Circular Quay. When the ferry arrived at Circular Quay, the crew took a crib break of approximately 45 minutes, while another crew took the vessel to Rose Bay and returned. Mr Sclater then drove the ferry from Circular Quay to Pymont Bay Wharf, arriving at approximately 9:00 am.

[17] Mr Sclater states that at the Pymont Bay wharf, he began to feel tired and sat down on the settee in the wheelhouse. Mr Sclater states that he closed his eyes and must have drifted off but believed that he was only "*absolutely unconscious*" for about five minutes.⁸ He did not make a conscious decision to try and have a nap. His falling asleep was an involuntary experience.

[18] Mr Sclater did not recall the Engineer, Mr Drygajlo, making any comment or attempting to rouse him. If he had done so, Mr Sclater believes that he would have asked Mr Drygajlo to take over the controls, because of the way he was feeling. Mr Sclater recalled "*coming to*"⁹ around 9:34 am, as he saw the time on the wheelhouse clock and noticed that Mr Dinham, his Line Manager, had entered the wheelhouse upon which Mr Sclater then rose to his feet off the settee.

[19] Mr Sclater's evidence was that Mr Dinham catches the ferry at the Balmain East wharf on most mornings. At the time, Mr Drygajlo was driving the ferry and Mr Sclater stood next to him while he piloted the ferry to McMahons Point, the next destination after Balmain East, which is about a five-minute trip. The trip between Pymont Bay Wharf and Balmain East takes about 15 minutes, with one stop in between, Barangaroo, which Mr Sclater states he

⁶ Exhibit A2 [11].

⁷ PN244-51.

⁸ Exhibit A1 [36].

⁹ Ibid [40].

could not recall stopping at.¹⁰ However, during cross-examination Mr Sclater stated that he wasn't asleep but only had his eyes closed. He said he was 'napping' and was conscious of the engine movements at Barangaroo.¹¹

[20] With Mr Drygajlo continuing to pilot the 'May Gibbs' under Mr Sclater's supervision, the ferry berthed at Milsons Point, where Mr Sclater took over the controls to the next stop Circular Quay. Berthing at Circular Quay requires the Master to take control, with the Engineer on standby at the backup controls.

[21] At around 12:00 pm that day (11 April 2019), Mr Sclater met with Mr Dinham and another Operations Manager, Mr Aaron Brown, to discuss the incident of falling asleep while on duty on the 'May Gibbs'. Mr Sclater denies Mr Dinham's allegation that he was confrontational during the meeting and disagreed that he had caused an actual safety risk. While not meaning to suggest that it was always safe to sleep on a vessel, he explained that there was no actual risk to the safety of the vessel. At the end of the meeting, he was stood down with pay. He received a show cause letter on 15 April 2019. The show cause letter alleged that he had been found sleeping on the job while being in control of a Transdev vessel.

[22] Mr Sclater replied to the show cause letter on 18 April 2019, stating that he handed over control of the vessel to the Engineer between Balmain East and McMahons Point for a brief period of approximately five minutes. He stated in his written response to the show cause letter that he did this as he was particularly tired on the day. It was part of managing his fatigue and not putting the vessel at risk. However, in Mr Sclater's witness statement of 28 July 2019, he states that this was badly expressed, and that he did not direct Mr Drygajlo to take control of the ferry.¹²

[23] In Mr Sclater's reply statement of 16 August 2019, he states that it was possible that Mr Drygajlo had asked to take control of the vessel, although he did not recall this.¹³ He further states that while he said in the initial investigation that he was not asleep, what he meant by this statement was that he did not make "*a deliberate decision to try and rest for a long period.*"¹⁴

[24] On 23 April 2019, in the presence of two union representatives, Mr Sclater met with the respondent's *Manager of Human Resources*, Mr Joshua Arul, and *Manager*, Mr Carlos Collins. He was advised that Transdev had conducted an investigation, including interviewing Mr Drygajlo, the Engineer on duty at the time, and that it had considered Mr Sclater's response to the show cause letter. At this meeting, Mr Sclater showed the employer representatives the bottle containing the cough mixture he was taking on 11 April 2019 and told them that he had discovered by reading the entirety of its packaging that the cough mixture may cause drowsiness, as it contained codeine.

[25] Mr Sclater was advised at the meeting that Mr Drygajlo had stated that he had observed him asleep from the Pyrmont Bay wharf to McMahons Point, which he did not

¹⁰ Ibid [62].

¹¹ PN546-9.

¹² Exhibit A1 [63].

¹³ Exhibit A2 [2].

¹⁴ Ibid [6].

deny. Mr Sclater stated that he had never suggested that he did not temporarily pass out from being overwhelmed by fatigue at Pymont Bay. In Mr Sclater's statement, he reiterates that he believed he was only "*completely under*" for about five minutes, but that he could be wrong about that as it was a "*confusing time*".¹⁵

[26] On 24 April 2019, Mr Sclater received a letter summarily terminating his employment.

[27] Mr Sclater contended that the reason he became drowsy and fell asleep was a combination of his underlying illness, not having taken his morning heart medication and taking the cough mixture.¹⁶ It is assumed that Mr Sclater's reference to his underlying illness was a persistent cough after having caught a cold. Mr Sclater explains that he caught a cold in late March 2019, the major symptom being a persistent cough, which did not prevent him from attending work.¹⁷ Before starting work on 11 April 2019, Mr Sclater stated that apart from his cough, which he could manage with the cough mixture, he felt perfectly fit.¹⁸

[28] Mr Sclater provided Transdev with a document from his medical practitioner which he asserts states that he is particularly sensitive to codeine.¹⁹

[29] Mr Sclater says it was never put to him in the investigation that he had been dishonest in his responses to the Transdev investigation regarding how long he had been asleep. Nor was it ever put to him that he had contravened the employer's Drug and Alcohol Policy.

[30] Mr Sclater's responses during cross-examination as to his state of consciousness while on the 'May Gibbs' was somewhat confusing. Mr Sclater stated that he handed over control of the ferry when leaving Pymont Bay Wharf²⁰ and fell into a "*lapse of sleep*" just prior to Balmain East, meaning where he became unconscious.²¹ He stated that he was "*incapacitated*" while napping, but not asleep.²² However, Mr Sclater subsequently acknowledged during cross-examination that he was asleep, and only woke up when he heard Mr Dinham enter the wheelhouse at Balmain East.²³

[31] Mr Sclater agreed that he told Mr Dinham on the day that he was not asleep but just had his eyes closed. However, this response related to events prior to arriving at Balmain East, where he was napping, with his eyes closed.²⁴ Mr Sclater stated that he told Mr Dinham that he was "*managing his fatigue*", which he conceded is the same as stating he was asleep.²⁵

[32] Mr Sclater agreed that it was possible he told Mr Arul the Human Resources Manager at the second meeting, on 23 April 2019, that he just closed his eyes and dozed off for a few

¹⁵ Exhibit A1 [70].

¹⁶ Ibid [51].

¹⁷ Ibid [10].

¹⁸ Ibid [19].

¹⁹ Ibid [52].

²⁰ PN362.

²¹ PN350-6.

²² PN372.

²³ PN382-4, 413.

²⁴ PN398.

²⁵ PN419-20.

minutes.²⁶ When Mr Arul asked him whether he had been asleep for 10 to 15 minutes, he did not respond,²⁷ as Mr Arul chose to move on with his questioning.²⁸ Under cross-examination, Mr Sclater stated that he was not sure if he was asleep for 10 to 15 minutes.²⁹

[33] Mr Sclater agreed that being a dead-end wharf, Barangaroo requires a mandatory lookout.³⁰ However, he said he was napping with his eyes closed, but he could hear the engine movements.³¹ He also accepted that the risk of an incident occurring was heightened while he was asleep and the Engineer was “*effectively on his own*”.³²

Submissions of the applicant

[34] Counsel submitted on behalf of Mr Sclater that when put in context, Mr Sclater’s conduct did not provide a valid reason for his dismissal. It was a disproportionate response, particularly due to his long unblemished service and his personal circumstances. It was further submitted that since the reason Transdev initially proffered for Mr Sclater’s dismissal was that he “[was] *found sleeping on the job while being in control of a Transdev Sydney Ferries Vessel...*”,³³ any reliance now on Mr Sclater being dishonest as an alternate reason for dismissal was never put to him. Counsel also submitted that Mr Sclater was not told that the length of time he was asleep was an issue.

[35] It was submitted on behalf of Mr Sclater that he did not set out to have a nap or fall asleep. That resulted from an unknown sensitivity to codeine contained in the cough mixture, combined with not having taken his heart medication that morning. While Mr Sclater fell asleep from a sudden wave of fatigue, it was a one-off inadvertent event, not capable of being characterised as misconduct justifying dismissal.

[36] It was put that the allegation that Mr Sclater had breached the respondent’s Code of Conduct by not asking the pharmacist for advice on the effects of taking the cough mixture was not raised with him, nor was it referred to in the show cause letter.

[37] It was contended that Mr Sclater’s conduct did not create a serious or imminent safety risk.

Transdev’s submissions and evidence

Evidence of Mr Dinham

[38] Mr Nicholas Dinham has been employed by Sydney Ferries for 16 years. He has been an Operations Manager for the respondent for three years. Prior to his appointment as Operations Manager, Mr Dinham was employed by Sydney Ferries as a Ferry Master. He is responsible for the crews that operate vessels on the Cross-Harbour F4 ferry run for Emerald

²⁶ PN441.

²⁷ PN449.

²⁸ PN472.

²⁹ PN508.

³⁰ PN539.

³¹ PN546-9.

³² PN562-6.

³³ Exhibit A1 annexures NS-05 and NS-07.

and Supercat-class vessels and operational oversight of the outer wharfs from Watsons Bay to Barangaroo, which excludes Circular Quay and Manly.

[39] Mr Dinham tendered a witness statement dated 14 August 2019³⁴ and was subject to cross-examination. Mr Dinham explained that in the course of his job he would regularly board vessels to maintain crew contact, spending one and a half to two hours per day on the respondent's ferries.

[40] About two weeks before the 11 April 2019 incident, Mr Sclater sent him a text message, stating he was taking a cough mixture known as "Dry Tickly", with a photo of one side of the packaging.³⁵ Mr Sclater did not mention the possible effects of the cough mixture, and the photo of the packaging did not reveal the possible effects.³⁶ Mr Dinham's evidence was that as employees are randomly selected for drug and alcohol testing, they are required to self-declare when they are taking medications, to protect themselves against a positive result to a banned substance.³⁷ Mr Dinham stated that it was employees' responsibility to know if there may be side effects from any medication they are taking.³⁸

[41] Mr Dinham stated that on 11 April 2019 he arrived at the Balmain East wharf to board the 9:29 am Cross-Harbour Ferry, the 'May Gibbs'. Mr Dinham stated that while he would normally catch the ferry from Balmain East each day, it would not always be at the same time. Fifty percent of the time, he would depart between 7:00 am and 8:00 am; the other 50% the time was variable.³⁹ From the jetty at Balmain East, through the wheelhouse's window, he saw the Engineer, Mr Drygajlo, wearing his Engineer's white overalls at the controls of the vessel and waved to him. He did not see Mr Sclater, who would have been wearing his Master's uniform. Upon boarding, he entered the wheelhouse as it was departing Balmain East. Mr Dinham acknowledged Mr Drygajlo and saw Mr Sclater lying down (as much as is possible) in the small bench seat and table area of the wheelhouse. Mr Dinham stated that Mr Sclater's head was on the windowsill and he was asleep.⁴⁰

[42] Mr Dinham then assisted Mr Drygajlo in pulling out from the wharf by making sure he was clear. Mr Dinham stated that whenever an Engineer or other crew member takes the helm of a ferry, the Master remains in command and supervises approaches to wharves, berthing, tie-ups and gangway deployment, as these events present the greatest risk of incidents for a ferry.⁴¹

[43] Mr Dinham stated that Mr Sclater woke up about a minute or so after the 'May Gibbs' left Balmain East. Mr Sclater then moved towards the controls but did not take command straight away. Mr Dinham stated that he did not say anything to Mr Sclater at that time as he realised how serious the situation was and wanted to avoid a possible conflict onboard a

³⁴ Exhibit R4.

³⁵ Exhibit R4 [4]. I note that Exhibit R4 contains two paragraphs numerically identified as [4], and that this reference is in respect to the first of those two paragraphs.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ PN905-7.

⁴⁰ Exhibit R4 [4]. I note that Exhibit R4 contains two paragraphs numerically identified as [4], and that this reference is in respect to the second of those two paragraphs.

⁴¹ Exhibit R4 [6].

moving vessel. Mr Sclater took over the controls at Milsons Point and remained in control until Circular Quay. Mr Dinham then left the vessel and spoke to the Acting General Manager Operations. Coverage was then arranged for Mr Sclater to attend a meeting around midday. Mr Sclater attended the meeting with a union delegate, Mr Charles Johnston. Mr Aaron Brown, another Operations Manager for the respondent was also in attendance at the meeting.

[44] Mr Dinham asked Mr Sclater for an explanation about being asleep in the wheelhouse at Balmain East. Mr Sclater replied that he was not asleep and just had his eyes shut. Mr Sclater explained that he was late for work and didn't take his heart medication at the normal time, and that may have put his body "out of whack".⁴² Mr Sclater further stated to Mr Dinham that the vessel was handled in a safe manner, and that he was only not in command between Balmain East and McMahons Point.

[45] Mr Dinham stated that the meeting was quite short and confrontational as Mr Sclater had leaned forward, staring at him, and did not concede he had done anything wrong. Mr Dinham told Mr Sclater that what he had said would be considered and he would be contacted later. Based on his own observations, Mr Dinham did not accept Mr Sclater's denial that he was not asleep. A short time after the meeting, he was directed to stand Mr Sclater down.

[46] Mr Dinham stated that soon after the meeting with Mr Sclater, he interviewed Mr Drygajlo in Mr Brown's presence. Mr Drygajlo advised that he was in control of the 'May Gibbs' on departure from Pymont Bay Wharf and that Mr Sclater had his eyes closed from that point. When asked whether he was asleep or had his eyes closed, Mr Drygajlo's response was:

"He had his eyes shut. Nick you were there, he was snoring. He was awake from McMahons Point."⁴³

[47] Mr Dinham stated that he never formed the view that Mr Sclater was impaired or under the influence of any substance.

[48] Mr Dinham believed that due to the high-rise buildings close to the Pymont Bay, Barangaroo and Balmain East wharves there was a possibility that the public could see into the wheelhouse and observe Mr Sclater asleep, causing the respondent reputational damage.⁴⁴

Evidence of Mr Arul

[49] Mr Joshua Arul is the respondent's *Manager Employee Relations*. Mr Arul provided a witness statement dated 14 August 2019⁴⁵ and was subject to cross-examination. Mr Arul was advised by Mr Dinham on the day in question (11 April 2019) that Mr Sclater had fallen asleep on a vessel while on duty as its Master. He did not, however, interview Mr Sclater; Mr Dinham and Mr Aaron Brown did that. On 15 April 2019, after Mr Sclater had been stood down, Mr Arul issued him a show cause letter. Mr Arul's evidence was that Transdev considered Mr Sclater's actions as serious misconduct and contrary to the *Code of Conduct*, *Disciplinary Policy* and *Drug and Alcohol Policy*.

⁴² Exhibit R4 [18].

⁴³ Exhibit R4 [21].

⁴⁴ Exhibit R4 [7].

⁴⁵ Exhibit R5.

[50] On 23 April 2019 and following receipt of Mr Sclater's response to the show cause letter, Mr Arul interviewed Mr Sclater. During that interview, Mr Sclater produced a doctor's certificate and showed him the packaging for the cough mixture he had been taking. Mr Sclater pointed out that the packaging stated that the cough mixture could cause drowsiness.

[51] Mr Arul's evidence was that Ms Sclater, when asked how long he had been asleep, replied: "*I just closed my eyes and dozed off, maybe for a few minutes*".⁴⁶ Mr Arul then responded that Transdev had been told it was 10 to 15 minutes between wharves.⁴⁷ Mr Sclater did not respond. Mr Johnston, Mr Sclater's support person, then asked where that information had come from. Mr Johnston was told that the 10-to-15-minute figure had come from an interview conducted with the Engineer, Mr Drygajlo.

[52] Mr Arul states in his witness statement that he considered Mr Sclater had been dishonest in regard to the length of time he was asleep. He also considered that Mr Sclater's stating in his show cause response that he had handed over control to the Engineer for approximately five minutes was a dishonest response. This view was based on the Engineer stating that he had control of the vessel from Pymont Bay to Barangaroo, to Balmain East and partway to McMahons Point, when Mr Sclater woke up.⁴⁸

[53] Upon hearing Mr Sclater's additional comments and responses, he called a break in the meeting and spoke to the *General Manager People and Culture*, Mr Lindsay Olsson. He decided that Mr Sclater should be dismissed for misconduct. He then returned to the meeting and informed Mr Sclater of his decision.

[54] During cross-examination, Mr Arul stated that Mr Sclater's actions had caused an imminent risk because there should be two people always in the wheelhouse with one looking out. Mr Arul described his understanding of "*imminent*" risk as meaning any possible risk.⁴⁹ Mr Arul conceded that he should have interviewed the Engineer, Mr Drygajlo, personally.⁵⁰ Mr Arul also acknowledged during cross-examination that at no stage had he put to Mr Sclater that he was dishonest in his account of the incident.⁵¹

[55] While Mr Arul accepted that had he investigated matters further he may have formed a different view on some aspects of his conclusion, he maintained that at the end of the day the issue was Mr Sclater's sleeping on the job.⁵²

[56] Mr Sclater's dismissal letter, dated 24 April 2019, was drafted by Mr Arul and signed by Mr Olsson. On 26 April 2019, following Mr Sclater's dismissal a further meeting was held at the request of Mr Littlewood, a national organiser from the Australian Institute of Marine and Power Engineers. Mr Sclater did not attend. At the meeting, Mr Olsson stated that it was

⁴⁶ Exhibit R5 [12].

⁴⁷ Ibid.

⁴⁸ Exhibit R5[16]-[17].

⁴⁹ PN1645-6. Under re-examination, Mr Arul provided a further explanation: PN1957.

⁵⁰ PN1705.

⁵¹ PN1721, 1889.

⁵² PN1880-1, 1899.

clear that Mr Sclater was asleep on the job and Harbour City Ferries considers this as serious misconduct and the decision to terminate stands.⁵³

Evidence of Mr Drygajlo

[57] Transdev also relied on the evidence of the Engineer onboard the vessel, Mr Drygajlo, who provided a witness statement dated 14 August 2019.⁵⁴ As his witness statement is brief, it is set out in full below:

“I am an engineer, qualified as a Marine Engine Driver Grade 1, and have been employed by Transdev Sydney Ferries Pty Ltd since May 2015. I am known as “Jarek”.

I am also qualified as a Master Class 4.

On 11 April 2019 I was acting as engineer on the ferry May Gibbs on the Cross-Harbour ferry run. We were on a brief layover at Pyrmont Bay wharf at about 9.00 or 9.05 am and I offered to Nigel Sclater to take over control of the ferry, which we often do to assist and to keep up experience. The master remains in control of the vessel at all times when the engineer takes the console. The master usually supervises berthing and tie up, and gangways being put out and taken away, as these are when most accidents occur.

Nigel had told me he had had car problem that morning but still made it to work. I knew he took medication as I have seen him take it in the past, but I don’t recall him saying anything about it that day.

We left Pyrmont Bay. Nigel sat down at the small couch and table at the back of the wheelhouse.

I was in control of the ferry to Barangaroo wharf, then to Balmain East.

At Balmain East wharf Nick Dinham joined the ferry and came to the wheelhouse. After we left Balmain East I heard Nigel snoring and said, “This is awkward” to Nick, and he shook his head as though disappointed.

Nigel woke up maybe two minutes later. He didn’t say anything. He took over the controls after departing Milsons Point and took the ferry to Circular Quay.

I was interviewed later that day by Nick and Aaron Brown, and confirmed to them what had occurred as said in this statement.”

[58] As Mr Drygajlo was not required for cross-examination, his evidence stands uncontested.

Submissions of Transdev

⁵³ Exhibit R5 [21].

⁵⁴ Exhibit R6.

[59] Transdev state that a ferry will always have a Ferry Master (who will at all times have control of the ferry), a qualified Engineer and a General Purpose Hand. The Master is to retain overall command of the vessel. This cannot occur when the Master is asleep. Such conduct was sufficiently serious to warrant an investigation. Mr Sclater was given an opportunity to explain his actions, and his responses were considered in arriving at the decision to terminate his employment.

[60] It was submitted that whether Mr Sclater intended to fall asleep was irrelevant to the seriousness of the incident. His conduct was reckless and negligent. Transdev also put that Mr Sclater gave evidence in an evasive and less-than-candid manner. Further, the fact that there had not been a safety incident while Mr Sclater was asleep does not detract from the potential risk that was created by his actions.

Was the dismissal harsh, unjust or unreasonable?

[61] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

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

[62] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.⁵⁵ I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

⁵⁵ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 [14]; *Smith & Ors v Moore Paragon Australia Ltd* PR915674 (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) [69].

[63] In order to be a valid reason, the reason for the dismissal should be “*sound, defensible or well founded*”⁵⁶ and should not be “*capricious, fanciful, spiteful or prejudiced*”.⁵⁷ However, the Commission will not stand in the shoes of the employer and determine what it would do if it was in the position of the employer.⁵⁸

[64] Where a dismissal relates to an employee’s conduct, as in this matter, the Commission must be satisfied that the conduct occurred and that it justified termination.⁵⁹ Further:

“The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”⁶⁰

[65] In submitting that there was a valid reason for Mr Sclater’s dismissal, Transdev argue that Mr Sclater breached the employer’s Code of Conduct. I accept, as submitted by Mr Sclater, that Transdev’s reliance on the Code of Conduct to impose an obligation on an employee to ask the pharmacist about the side effects of taking the cough mixture is drawing a long bow. It is far from clear that the Code of Conduct at cl 18.3 requires an employee to seek medical advice when taking an over-the-counter cough mixture. Further, it does not appear that Transdev ever put this interpretation to Mr Sclater prior to his dismissal.

[66] I do accept, however, that section 7, “*Responsibilities*”, of Transdev’s drug and alcohol policy, contained in the *Transdev Sydney Ferries Management Manual* at section 3.6, “*Alcohol and Drugs*”, states at cl 7.3(f) that employees are required to “*Check with their treating medical practitioner and pharmacist that they are safe to work while taking prescription and over the counter medications*”.⁶¹ Mr Sclater failed to do so. However, in Mr Sclater’s favour he did forward a copy of one side of the cough mixture packaging to Mr Dinham.

[67] I do not accept that Mr Sclater’s conduct was a breach of s.26 of the *Maritime Safety Act 1988* (NSW), which makes operating a vessel under the influence of prohibited drugs a criminal offence. Mr Sclater was never asked to undertake a drug test and it was not demonstrated that Mr Sclater either took, or was under the influence of, a prohibited drug.

[68] Irrespective of the fact that Mr Arul’s view that Mr Sclater was dishonest about how long he was asleep was never put to Mr Sclater, I do not find that his responses raise issues of dishonesty. While his responses may have been guarded or less than candid, Mr Arul did not explain how he could reasonably expect Mr Sclater to state accurately how long he had been asleep.

[69] In Mr Sclater’s letter of termination, signed by Mr Olsson, the following is stated:

⁵⁶ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁵⁷ *Ibid.*

⁵⁸ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁵⁹ *Edwards v Giudice* (1999) 94 FCR 561 [7].

⁶⁰ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000) [24].

⁶¹ Exhibit R5 annexure JA-5.

“I confirm that the Allegations against you have been substantiated. Specifically, the investigation concluded that you engaged in the following conduct.

This conduct amounts to a breach of:

- Serious misconduct;
- Gross negligence in your duties
- Inappropriate behaviour;
- Code of Conduct;
- Working safely and ensuring safety and security of HCF customers, employees and assets.”⁶²

[70] In stating for example; that there has been a breach of “*serious misconduct*” and breach of “*gross negligence in your duties*”, the above-mentioned section of the termination letter is poorly drafted. However, the correspondence goes on to state what appears to be the essence of Transdev’s reasons for the dismissal:

“... HCF views your actions as serious misconduct and gross negligence in performing your duties in a safety critical role and endangering the safety and security of customers, staff and assets.”⁶³

[71] In defence of being found asleep on the vessel ‘May Gibbs’, Mr Sclater submits that he became drowsy and ultimately fell asleep due to the combination of not having taken his usual heart medication on the morning of 11 April 2019 and taking the cough mixture that same morning.

[72] The difficulty with Mr Sclater’s belief is that no medical evidence was provided to support his hypothesis.

[73] On Mr Sclater’s own evidence, he had been taking the cough mixture since 27 March 2019 without any side effects.⁶⁴ In support of linking the side effect of drowsiness with his underlying illness and not having taken his normal heart medication, Mr Sclater provided a note from his General Practitioner, Dr Ivor Zetler, which he describes as a medical certificate. The note is dated 18 April 2019. Dr Zetler, who was not called to give evidence, states the following:

“THIS IS TO CERTIFY THAT

Mr Nigel Sclater informs me that he has been found napping (at 9.30AM) while working as a master on a ferry. Nigel had taken a dose of Dry Tickly cough mixture to suppress his cough at 6.30 am (10ml approximately). This medication, freely available without a prescription, contains a small amount of codeine which can cause drowsiness. Nigel was unaware of this side effect. Rikodeine, which does require a prescription, has a much higher dose of codeine and would be much more likely to cause fatigue. My impression is that this incident was an innocent error on Mr Sclater’s part and given the experience he has had, he will be extra careful in taking

⁶² Exhibit A1 annexure NS-07.

⁶³ Ibid.

⁶⁴ PN302.

medications that may cause fatigue. It would seem that Nigel is particularly sensitive to codeine and should avoid its use in the future.

Nigel's general health is good. He has had a coronary artery stenting in the past and takes medication for this.

He has no issues with sleep apnoea or fatigue in general."⁶⁵

(My underline)

[74] Dr Zetler's note makes no mention of Mr Sclater having taken the cough mixture since 27 March 2019 without any drowsiness effect. The medical note does not provide any support for Mr Sclater having fallen asleep due to a combination of Mr Sclater's underlying illness, not having taken his heart medication, and taking a dose of cough mixture. The highest support for Mr Sclater's hypothesis is Dr Zetler's observation that it would seem that Mr Sclater is particularly sensitive to codeine.

[75] Mr Sclater was the Master in charge of the 'May Gibbs' when it departed Pymont Bay. It berthed at and departed two wharves, Barangaroo and Balmain East, while he remained on the settee in the wheelhouse at all times, with his eyes closed and on his own admission, asleep for five minutes – and in the employer's submission asleep for 10 to 15 minutes. The travel time between Pymont Bay and Balmain East is approximately 10 to 15 minutes.⁶⁶

[76] Irrespective of whether he was asleep for the entirety of this period, he supervised neither the ferry's approaches to the Barangaroo and Balmain East wharves nor the berthing, tie-ups and gangway deployment at those wharves, which in Mr Dinham's evidence are the times a ferry is at the greatest risk of incidents. Mr Sclater in his witness statement of 28 July 2019 states that he could not recall stopping at the Barangaroo wharf.

[77] The respondent, in providing a ferry service in Sydney Harbour, is responsible for public safety. It is simply untenable for a Master of one of its ferries to be asleep for *any* period while on duty. The ramifications of a safety incident occurring during such a period are considerable. While I do not accept Mr Arul's view that any possible risk is an imminent risk, there certainly existed a potential risk of significant proportions with the Master of the vessel asleep.

[78] Had Mr Sclater fainted or been rendered unconscious as a result of a medical episode, the considerations in this matter would be entirely different. However, as discussed above, other than Mr Sclater's own personal view of why he fell asleep, there was no medical evidence before the Commission to demonstrate that his falling asleep could be considered in this context as a medical episode. Rather, I find that he allowed himself to fall asleep having sat down on the settee in the wheelhouse, while the Engineer was in control of the vessel. On this basis, a valid reason for his dismissal is established.

⁶⁵ Exhibit A1 annexure NS-06.

⁶⁶ Written submissions of Transdev, 14 August 2019 [14].

[79] As a Full Bench of the Commission stated in *Urso v QF Cabin Crew Australia Pty Limited t/a QCCA*⁶⁷ at [30], intention is not a necessary element of misconduct that might constitute a valid reason for dismissal. Breaches of safety policies and procedures may be the result of recklessness, negligence or misjudgement.

Was the Applicant notified of the valid reason?

[80] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment.⁶⁸ It was not in dispute that Mr Sclater was notified of the reason for his dismissal, though further grounds regarding his dishonesty that Transdev raised when opposing the unfair dismissal application were not directly put to him.

Was the Applicant given an opportunity to respond to any valid reason related to his capacity or conduct?

[81] An employee protected from unfair dismissal should have an opportunity to respond to any proposed reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.⁶⁹ Mr Sclater attended a meeting on 11 April 2019 with Transdev to discuss his falling asleep while on duty and, on 15 April 2019, was provided with a show cause letter asking him to explain why he should not be dismissed for sleeping on the job while being in control of a ferry. On 18 April 2019, Mr Sclater provided a written response. On 23 April 2019, Transdev held a final meeting with Mr Sclater. I am satisfied that Mr Sclater was provided with ample opportunity to respond to the allegation of sleeping on the job while being in control of a ferry, before Transdev decided to dismiss him.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[82] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that. There is no allegation that Transdev refused to allow Mr Sclater to have a support person present at discussions relating to the dismissal. Mr Sclater had at least one union representative with him at both the 11 April 2019 and 23 April 2019 meetings.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[83] As the dismissal did not relate to unsatisfactory performance, but rather a one-off incident of misconduct, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

⁶⁷ [2019] FWC 1322.

⁶⁸ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 ('Crozier'), 151.

⁶⁹ *Crozier* (2000) 98 IR 137 [75].

[84] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal. I find that the size of the Respondent's enterprise had no such impact.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[85] The respondent's enterprise does not lack dedicated human resource management specialists or expertise. It should have conducted its investigation and reached a conclusion applying a level of professionalism, to reflect its human resource expertise. While I have accepted, as put on behalf of Mr Sclater, some deficiencies in the investigation process, they do not detract from the central finding against Mr Sclater: that he was asleep while on duty without reasonable explanation.

What other matters are relevant?

[86] Section 387(h) of the Act requires the Commission to take into account any other matters that it considers relevant.

[87] Mr Sclater was required to be in control at all times of the 'May Gibbs'. It was not the role of the Engineer, Mr Drygajlo. Mr Sclater recognises this in his show cause response, in which he states:

"I recognise and acknowledge that as the designated Master of the vessel, it was a mistake on my part to hand over control of the vessel to the Engineer in these circumstances."⁷⁰

[88] On Mr Sclater's evidence, he failed to read the information regarding the possible side effects of taking the cough mixture. He also failed to follow the prescribed dosage, having taken a second dose without allowing for the recommended period of at least six hours to elapse.⁷¹ On any account, having the Master of a ferry asleep (without good reason) while on duty when providing a public transport service in Sydney Harbour cannot be countenanced. Mr Sclater's explanation for falling asleep, as discussed above, falls well short of exculpating his conduct. As the Master, he must remain alert and in control of the vessel at all times, which he failed to do.

[89] An employee's long and satisfactory work performance or history may be taken into consideration under s.387(h) of the Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or unreasonable.⁷² Mr Sclater has a long history of employment through a succession of employers since 1995, having commenced with Transdev in 2012. Transdev did not submit that his employment record was anything other than satisfactory before the 11 April 2019 incident. However, in this matter, due to the seriousness of the conduct, I am not persuaded that Mr Sclater's long service and good record make the dismissal harsh, unjust or unreasonable. Indeed, on one argument, it is precisely because of his long service that Mr

⁷⁰ Exhibit A1 annexure NS-06.

⁷¹ PN724.

⁷² *Telstra Corporation Ltd v Streeter* (2008) 170 IR 1 [27].

Sclater should have been acutely aware that he should never have put himself in the position where he might fall asleep.

[90] It has long been established that the effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s.387(h) of the Act in considering whether a dismissal is harsh.⁷³ While Mr Sclater is the Director of Party Time Cruises Pty Ltd, which has four charter boats, he states it has been operating at a loss and he derives no income from the business. He has been looking for work, but “*word of [his] dismissal has got out on the wharves*”⁷⁴ and he remains unemployed. I accept that there has been a serious financial impact on Mr Sclater due to his failure to secure alternate employment. I am, however, unable to elevate this unfortunate consequence, which often follows a dismissal, to allow a finding that the dismissal was harsh.

Conclusion

[91] Having considered each of the matters specified in s.387 of the Act, I am not satisfied that Mr Sclater was unfairly dismissed within the meaning of s.385 of the Act. His application is therefore dismissed.



DEPUTY PRESIDENT

Appearances:

Ms L Saunders of counsel and *Mr S Littlewood*, Australian Institute of Marine and Power Engineers, for the applicant.

Mr M Baroni of counsel and *Mr P Ludeke*, solicitor, Mills Oakley, for the respondent.

Hearing details:

Sydney.

2019.

August 20.

September 10.

Printed by authority of the Commonwealth Government Printer

⁷³ *Ricegrowers Co-operative Ltd v Schliebs* PR908351 [26] (AIRCFCB, 31 August 2001).

⁷⁴ Exhibit A1 [77].

[2019] FWC 7968

<PR714519>