DECISION

Fair Work Act 2009
s.604—Appeal of decision

Michael Hatwell
v
Esso Australia Pty Ltd t/a Esso
(C2019/1451)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER BISSETT

SYDNEY, 9 MAY 2019

Appeal against decision [2019] FWC 931 of Deputy President Colman at Melbourne on 13 February 2019 in matter number U2017/11683.

Introduction and background

[1] Michael Hatwell has lodged an appeal, for which permission to appeal is required, against a decision of Deputy President Colman issued on 13 February 2019[1] (remedy decision) pursuant to s 604 of the *Fair Work Act 2009* (FW Act). The remedy decision concerned an application for an unfair dismissal remedy made by Mr Hatwell in respect of the termination of his employment with Esso Australia Pty Ltd (Esso). Mr Hatwell's application, together with another application for an unfair dismissal remedy against Esso made by Michael Gelagotis, was initially dealt with in a decision issued by the Deputy President on 2 May 2018[2] (first decision). In the first decision, the Deputy President determined, in summary, that there was a valid reason for Mr Hatwell's dismissal, that his dismissal was not harsh, unjust or unreasonable and therefore not unfair, and that his application should be dismissed. Mr Gelagotis' application met the same fate. Mr Hatwell and Mr Gelagotis lodged appeals against the first decision. In a decision issued on 2 October 2019[3] (appeal decision), a Full Bench of the Commission granted Mr Hatwell permission to appeal, upheld his appeal, determined upon a rehearing of his unfair dismissal remedy application that his dismissal was harsh and therefore unfair, and remitted the question of the remedy to be awarded for determination by the Deputy President. Mr Gelagotis was refused permission to appeal. The remedy decision was issued pursuant to the Full Bench's remitter. The Deputy President declined to reinstate Mr Hatwell to his former employment with Esso, and awarded him the amount of $68,443.07 as compensation. In his appeal, Mr Hatwell contends that the Deputy President erred in the remedy decision in refusing to reinstate him.

[1] [2019] FWC 931

[2] [2018] FWC 2398

[3] [2018] FWCFB 6092

[2] Mr Hatwell was employed by Esso as a power and control technician at its gas plant in Longford, Victoria in January 2007. His dismissal by Esso occurred in the context of an industrial dispute concerning the use of a particular contractor and its employees to perform maintenance work at the Longford plant and on Esso's offshore gas platforms. This led to industrial action, the establishment of a protest line outside the Longford plant and various expressions of hostility by members of Esso's workforce towards employees of the contractor. Mr Hatwell was dismissed on 30 October 2017 after he was found to have been involved in some of this activity. Esso's letter of dismissal stated:

> "The Company's investigation has concluded that your behaviour and conduct was not acceptable, and contributed to creating a hostile & intimidating workplace, in breach of the Company's Harassment in the Workplace Policy.
>
> Your behaviour included involvement in conduct designed to ignore, exclude and isolate employees of contractors on site, and use of offensive and intimidating language towards and about employees of contractors. In particular the Company found that you were directly involved in the decision to exclude [Mr S.P.] from the lunchroom and that on 31 July 2017 you said to Travis Flens '*You're doing every cunt's job now are you?*' and '*You're working your RDO today, oh that's right, you fucking traded it off, you don't have an RDO, you're a fucking scab*'."

[3] In the circumstances earlier explained, the Deputy President's determination of remedy in the final decision proceeded on the basis of the Full Bench's conclusion in the appeal decision that Mr Hatwell's dismissal was unfair. In reaching that conclusion, the Full Bench was required to and did take into account the matters identified in paragraphs (a)-(h) of s 387 of the FW Act. With respect to s 387(a), the Full Bench simply adopted the Deputy President's finding in the first decision that there was a valid reason for Mr Hatwell's dismissal.[4] The finding in that respect made by the Deputy President was as follows (footnotes omitted):

> "[140] It was a term of Mr Hatwell's contract of employment that he comply with the policy. He was reminded, in the warning letter he received on 30 June 2017 in relation to his unauthorised absence from the site, that it remained a condition of his employment that he comply with company policy. He was also reminded of the harassment policy on 22 June 2017, the day the protest line commenced, when Mr Kostelnik sent an email to all employees and contractors, including Mr Hatwell, reiterating that they were to comply with the Harassment Policy. Mr Hatwell had himself invoked the harassment policy on two occasions."
>
> [141] The obligations set by the harassment policy were in my view reasonable. Mr Hatwell contravened the policy by engaging in inappropriate conduct that had 'the purpose or effect of … creating an intimidating, hostile or offensive work environment', namely by uttering the abusive words to Mr Flens on 31 July 2017.
>
> [142] In closing oral submissions, counsel for Mr Hatwell noted that, in her evidence, Ms Butler had said that she would not dismiss an employee for the single use of the word 'scab'. The context of this evidence makes clear that she is not referring to the single use of the word 'scab' by Mr Hatwell in the circumstances of the present case.

[4] Ibid at [175]

> She was answering a question of an un-contextualised nature. As I discuss further below in the context of Mr Gelagotis' alleged conduct, an abusive word can be used in a range of possible contexts (including, significantly, in private). Ms Butler was not in my view suggesting that, had the only allegation against Mr Hatwell concerned his use of the word scab in the context of what he said to Mr Flens, she would not have dismissed him.
>
> [143] In any event, regardless of what may be Ms Butler's view of the matter, I consider that to call a person a 'fucking scab' in the circumstances of my findings above is a very serious matter. It constitutes a valid reason for dismissal...".

[4] For reasons set out later in this decision, it is significant that the Deputy President found that the conduct described in the above passage occurred over Mr Hatwell's denials in his sworn evidence.[5] Later in the first decision the Deputy President characterised the conduct which constituted the valid reason for Mr Hatwell's dismissal as "serious misconduct".[6] The Deputy President rejected the other allegations made against Mr Hatwell in the proceedings, including the allegation contained in the dismissal letter that he was directly involved in the decision to exclude Mr S.P from the lunchroom.

[5] In respect of paragraphs (b)-(g) of s 387, the Full Bench also proceeded on the basis of the findings of the Deputy President in the first decision as they had been summarised in paragraph [161] of the appeal decision.[7] The Full Bench's summary of those findings was as follows:

> "➢ Mr Hatwell was notified of the reason for his dismissal and given an opportunity to respond (s.387(b) and (c)) (see [242] to [246]);
>
> ➢ it was not contended that Esso had refused to allow Mr Hatwell to have a support person present (s.387(d)) (see [248]);
>
> ➢ the dismissal did not relate to unsatisfactory performance and hence there was no need to warn Mr Hatwell prior to his dismissal (s.387(e)) (see [249]); and
>
> ➢ No submissions were made as to the relevance of the considerations in s.387(f) and (g) in the present matter. Esso is an organisation with considerable resources, including dedicated human resources specialists, some of whom gave evidence at the hearing. The size of the employer's enterprise would have no adverse impact on the procedures followed in effecting dismissal. One would expect that allegations of misconduct would be extensively investigated, as was the case here. There was no 'absence of dedicated human resources person' and accordingly the consideration in s.387(g) has no application (see [251])."

[5] Ibid at [121]-[139]

[6] [2018] FWC 2398 at [281]

[7] [2018] FWCFB 6092 at [175]

[6] Finally, in respect of s 387(h), the Full Bench took into account the matters it identified in paragraphs [168] to [172] of the appeal decision.[8] The matters referred to in those paragraphs were, in summary:

- the valid reason for Mr Hatwell's dismissal was a single contravention of Esso's harassment policy constituted by his conduct in calling Mr Flens "*a fucking scab*";

- this conduct occurred in the context of a protracted industrial dispute which had resulted in significant tension in the workplace and a material change in the working environment;

- the relevant decision-maker at Esso, Ms Kirsteen Butler, had given evidence that she would not dismiss an employee for a single use of the work "*scab*";

- Ms Butler had also decided to issue first and final warnings to two other employees, Mr Osborn and Mr Burton, for the use of language like "*scab*" and "*grub*" rather than dismissing them; and

- the dismissal had very significant effects on Mr Hatwell and his family, including suspension for a long period while an investigation into allegations which included those which were found by the Deputy President to be unsubstantiated was undertaken.

The remedy decision

[7] Because Mr Hatwell's appeal is only concerned with the Deputy President's refusal to grant him the remedy of reinstatement, it is only necessary to refer to that part of the remedy decision which deals with that issue and not to the Deputy President's assessment of monetary compensation. The Deputy President first identified a number of matters which weighed in favour of reinstatement as follows (footnote omitted):

> "[30] There are several considerations that support Mr Hatwell's contention that the Commission should order his reinstatement. Although the Full Bench decision does not presuppose any particular outcome on the question of remedy, it is significant that the Full Bench considered that Mr Hatwell should not have been dismissed. It is inherent in the nature of a remedy that it seeks to make good or abate the harm that a person has sustained. The harm in this case, on the Full Bench's analysis, is not that there was procedural deficiency in the process leading up to dismissal, but rather that Mr Hatwell was dismissed instead of receiving a lesser disciplinary sanction for his conduct. In addition, Mr Hatwell had a good disciplinary record. He had been employed by Esso for ten years. There was no suggestion of any deficiency in the quality of Mr Hatwell's work or the manner in which he performed it, or his relationships with others in the workplace. Furthermore, as the Full Bench noted in the course of concluding that the dismissal of Mr Hatwell was harsh, the conduct for which his employment was terminated was a single contravention of the harassment policy constituted by the abuse of Mr Flens in which Mr Hatwell called him a 'fucking scab'. There was no evidence of Mr Hatwell having abused other people in the past."

[8] Ibid at [175]

[8] The Deputy President then stated that these factors supported the contention that Mr Hatwell could be reinstated and that a viable and productive relationship between him and Esso could continue.[9] The Deputy President also took into account Ms Butler's evidence that she would not have dismissed an employee for the single use of the word "*scab*", but said:

> "[32] …The Full Bench noted this evidence and said at [169] that it was plainly relevant to the question of unfairness that Ms Butler was of the view that 'conduct of the type engaged in by Mr Hatwell did not warrant dismissal'. I take account of this. However, although Ms Butler was, as the Full Bench said, speaking about the same type of conduct as that engaged in by Mr Hatwell (using the word 'scab'), she was not speaking about conduct that was the same as Mr Hatwell's conduct (directing the word 'scab' at someone). In my assessment, the context of her evidence shows that she was talking about a situation where the word 'scab' was spoken but not directed towards anyone."

[9] The Deputy President also referred to the fact, which the Full Bench took into account, that two other employees had not been dismissed for the use of the word "*scab*" and similar epithets but rather had been given only a first and final warning. However the Deputy President found that the two employees in question, Mr Osborn and Mr Burton, had not unlike Mr Hatwell directed the offensive language at particular persons or abused anyone, but had rather used the offensive language about employees of the contractor in discussions with fellow Esso employees, so that their conduct could not be said to be the same as Mr Hatwell's.[10]

[10] The Deputy President accepted that if he was wrong in the distinction he made concerning Ms Butler's evidence and the conduct of the other two employees, these matters would have to be given different weight,[11] and then said:

> "[35] In any event, in my view, taking into account Full Bench decision, Mr Hatwell's treatment of Mr Flens should not be considered a reason why reinstatement is inappropriate. I reject the contention that because Mr Hatwell was found to have breached the Working Together Policy, he has shown he is unwilling to comply with Esso's policy and directions, and that this grounds a conclusion that the company cannot have trust and confidence in him, rendering reinstatement inappropriate. However, other matters require consideration."

[11] The Deputy President then noted that Mr Hatwell had never expressed remorse for the conduct which constituted a valid reason for his dismissal,[12] and said that this was significant not only because of the lack of an apology but also because of the "absence of any recognition that the conduct in question was unacceptable".[13] The Deputy President concluded on this score:

---

[9] [2019] FWC 931 at [31]

[10] Ibid at [33]

[11] Ibid at [34]

[12] Ibid at [36]

[13] Ibid at [37]

> "[38] The Full Bench found that it was unfair in the circumstances to dismiss Mr Hatwell for his serious misconduct, and that he should not have been dismissed. But what is now the appropriate remedy for that dismissal is a separate question, to be considered in the context of all the circumstances. I find it difficult to see how reinstatement is appropriate in this case if Mr Hatwell does not recognise that what he did was wrong, or, at least, that the conduct that he was found to have committed (but may still deny) was wrong."

[12] The position in this respect was distinguished from that discussed in the evidence of Ms Butler and the position of the other two employees who received warnings, whereby if offensive language was used but not directed to anyone, there was no victim to whom an apology could be directed.[14] The Deputy President then found that reinstatement was not appropriate because of Mr Hatwell's lack of an apology or acknowledgment that the conduct he was found to have engaged in was unacceptable, and said that this provided a rational basis for Mr Butler's conclusion that there had been an irreparable breakdown in the relationship between Esso and Mr Hatwell.[15] He also found that Mr Flens and other employees of the contractor still worked at the Longford site, and that Mr Hatwell's non-acknowledgment of the seriousness of his misconduct meant that there was a risk of its recurrence.[16]

[13] The Deputy President also found that that Ms Butler had a sound and rational basis to believe that Mr Hatwell had not been honest and candid when investigated by Esso prior to his dismissal about the incident with Mr Flens and that accordingly Mr Hatwell had breached Esso's Ethics Policy and caused an irreparable breakdown in the employment relationship. This, he concluded, also made reinstatement inappropriate,[17] and would also justify further investigation were Mr Hatwell to be reinstated.[18] The Deputy President also recorded that he rejected the propositions that because Ms Butler and Mr Jeffries had not supervised they could not give persuasive evidence about the appropriateness of reinstatement,[19] that the refusal of reinstatement would set at nought the appeal decision,[20] that Mr Hatwell had admitted in cross-examination that he had been untruthful,[21] and that reinstatement would be futile because Mr Hatwell's previous position no longer existed.[22]

Appeal grounds and submissions

[14] Mr Hatwell advanced four grounds of appeal. The first was that the Deputy President erred by misdirecting himself in paragraphs [38] and [40] of the remedy decision that reinstatement was inappropriate because Mr Hatwell had not apologised nor acknowledged wrongdoing on his part. It was submitted that the Full Bench had already concluded that Mr Hatwell's conduct warranted a disciplinary outcome short of dismissal, and any want of acknowledgment of that conduct on Mr Hatwell's part did not change or undermine that conclusion. The Deputy President did not find that re-occurrence was probable or even likely,

---

[14] Ibid at [39]

[15] Ibid at [40]

[16] Ibid at [40]

[17] Ibid at [41]-[53]

[18] Ibid at [56]

[19] Ibid at [57]

[20] Ibid at [58]

[21] Ibid at [59]

[22] Ibid at [60]

only that there was a risk of re-occurrence, and such a hypothetical risk did not rationally support a finding that the employment relationship was unworkable or irreparable. Mr Hatwell submitted that the other disciplinary responses to his conduct short of dismissal did not require any acknowledgment of fault, that he was found to have engaged in a single instance of misconduct and otherwise had an unblemished disciplinary record, there was no evidence of the likelihood of re-occurrence and the Deputy President had himself found that the conduct did not demonstrate an unwillingness to comply with Esso's policy or directions. On those circumstances, it was not reasonably open for the Deputy President to find that reinstatement was inappropriate because of the lack of acknowledgment or apology.

[15] The second ground of appeal was that the Deputy President failed to take into account the Full Bench's finding in paragraph [169] of the appeal decision concerning Ms Butler's evidence that conduct of the type engaged in by Mr Hatwell did not warrant dismissal, and that she had issued first and final warnings to two other employees rather than dismissing them "*for the use of language like 'scab' and 'grub'*." It was submitted that the Deputy President materially altered the findings of the Full Bench by re-characterising them by reference to his own conclusion, and used this to support his conclusion at paragraph [39] of the remedy decision as to the rationality of Ms Butler's view that the relationship had irreparably broken down, rather than treating those findings as binding upon him.

[16] The third ground of appeal was that the Deputy President misdirected himself at paragraph [53] of the remedy decision that Esso's loss of trust and confidence was soundly and rationally based, and reinstatement was inappropriate, in circumstances where there was no finding that Mr Hatwell was dishonest, the Deputy President had expressly declined to make such a finding, no adverse credit finding had been made against Mr Hatwell, the Deputy President did not find that the employment relationship between Esso and Mr Hatwell was unworkable, and Esso was bound by the Commission's findings. These matters, it was submitted, rendered the view formed by Ms Butler that Mr Hatwell had lied in the investigation as baseless and could not rationally sustain her subjective belief.

[17] Mr Hatwell's fourth ground of appeal was that the Deputy President's exercise of the discretion in the remedy decision was legally unreasonable, in that excessive weight was given to the findings concerning the lack of apology or acknowledgment of wrongdoing and the loss of trust and confidence, no or inadequate weight was given to the statutory emphasis on the remedy of reinstatement, the Full Bench's finding that the dismissal was harsh and called for a disciplinary response short of dismissal, the Full Bench's finding at paragraph [169] of the appeal decision, the Deputy President's own finding that Mr Hatwell's treatment of Mr Flens did not render reinstatement inappropriate and his refusal to find that Mr Hatwell was dishonest, Mr Hatwell's own disciplinary and work record, and the absence of any evidence from Mr Hatwell's own supervisors. It was also contended that the errors identified in the first three grounds of appeal also exposed legal unreasonableness.

[18] Mr Hatwell submitted that the grant of permission to appeal was in the public interest because the grounds of appeal raised sufficient doubt for the Full Bench to conclude that the discretion had miscarried and that Mr Hatwell had been denied a fair go all round and this required correction on appeal. It was also submitted that the appeal raised matters of general importance concerning the terms, scope and purposes of s 390(1) of the FW Act and the proper approach to the assessment of an employer's belief that reinstatement is inappropriate due to a lack of trust and confidence.

[19] Esso submitted that:

- appeal grounds 1-3 alleged error within the first category in *House v The King*,[23] but the Full Bench would not intervene merely because it would have taken a different course than that of the Deputy President, and complaints about the weight afforded to factors considered is not a valid ground for appellate review;

- no error was disclosed by ground 1 of the appeal, which did not address any material point of principle and amounted to no more than a complaint that it was wrong to take into account Mr Hatwell's repeated denials and his repeated refusals to demonstrate contrition;

- the Full Bench's observation that Mr Hatwell's conduct warranted a disciplinary response which fell short of dismissal was made in the context of the re-exercise of the jurisdiction under s 387 and not in relation to the question of remedy under s 390(1), and the Deputy President was required to independently exercise his discretion on remedy in circumstances where the Full Bench's finding that the dismissal was harsh was relevant to but not determinative of the remedy to be granted;

- the contention in ground 2 of the appeal that the Deputy President did not evaluate or give due weight to paragraph [169] of the appeal decision was incorrect, since this was clearly evaluated in paragraphs [32]-[34] and [39] of the remedy decision;

- the Full Bench decision did not dictate to the Deputy President the view he should take as to the trust and confidence Esso could place in Mr Hatwell as distinct from Mr Osborn and Mr Burton, and there was a rational basis for Esso to take a different view about the latter two employees including that they engaged in conduct of a different nature and engaged with the investigation differently;

- ground 3 of the appeal was in substance also a complaint about weight, and the submission that Ms Butler's opinion concerning Mr Hatwell's honesty was "baseless" was in truth one that the Deputy President mistook or disregarded the facts, which he did not do;

- the invocation in ground 4 of the appeal of legal unreasonableness, which is a ground of judicial review of administrative action, was not relevant to the Full Bench's function, and the question was whether there was a second category *House v The King* error;

- no inference of such error could be drawn merely because Mr Hatwell's direct supervisors were not called to give evidence, in circumstances where the issue was not whether he could perform his day-to-day duties satisfactorily but rather whether he could meet Esso's baseline standards of truth, accountability and honest dealings; and

- permission to appeal should be refused because the Deputy President's findings were not attended with sufficient doubt to warrant their reconsideration, Mr Hatwell was

[23] [1936] HCA 40, 55 CLR 499 at 505

now in alternative full-time employment and he had received the maximum compensation available.

Consideration

Permission to appeal

[20] We consider that the grant of permission to appeal would be in the public interest for two reasons:

(1) the appeal raises a significant issue of general application concerning the relevance to the evaluation of the appropriateness of reinstatement of a failure on the part of an unfair dismissal remedy applicant to apologise or acknowledge wrongdoing, in circumstances where there has been found to be a valid reason for dismissal based on the applicant's misconduct; and

(2) the grounds of appeal raise a question as to whether the Deputy President determined the question of any remedy to be awarded to Mr Hatwell consistent with the basis upon which that question was remitted to him by the Full Bench in the appeal decision, which should be resolved in the interests of the proper administration of justice.

[21] Permission to appeal must therefore be granted in accordance with s 604(2) of the FW Act.

Merits of the appeal

[22] Before we turn to the specific grounds of appeal, it is necessary to make three general comments about the nature of the statutory power exercised by the Deputy President and the way that power was exercised by the Deputy President.

[23] First, s 390 of the FW Act confers a broad and largely unconstrained discretionary power to award the remedy of reinstatement once findings have been made that an applicant for an unfair dismissal remedy was protected from unfair dismissal and has been unfairly dismissed. Section 390 provides:

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.

[24] It may be inferred from s 390(3)(a), which prohibits the award of compensation for unfair dismissal unless the Commission is satisfied that reinstatement is "*inappropriate*", that the relevant statutory standard for the award of the remedy of reinstatement is whether it is appropriate. The assessment of whether something is "appropriate" necessarily involves the exercise of a broad evaluative judgment. The FW Act does not in s 390 or elsewhere identify any particular matters which are required to be taken into account in assessing whether reinstatement is appropriate (unlike s 387 in relation to whether a dismissal is harsh, unjust or unreasonable or s 392 in relation to the assessment of monetary compensation), nor is the assessment otherwise guided other than by the object of the FW Act as a whole in s 3, the object of Pt 3-2 in s 381, and the subject matter to which s 390 relates. In that circumstance, the primary decision-maker is allowed considerable latitude as to the decision to be made.[24]

[25] Second, it may be discerned from s 390(3)(a), as well as the statement in s 381(1)(c) that the object of Pt 3-2 includes "*to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement*", that reinstatement is the primary remedy in the sense that it must be considered, and rejected as inappropriate, before any consideration may be given to the alternative remedy of monetary compensation.[25] However this does not mean that there is a right to reinstatement consequent upon a finding that a dismissal was unfair.[26] In this case, the Full Bench determined upon a rehearing that Mr Hatwell's dismissal was unfair, but in the circumstances earlier explained wholly remitted the question of the determination of remedy to the Deputy President. This remittal was not accompanied by any directions as to how the Deputy President was to deal with the remitted matter made pursuant to s 607(3)(c)(ii), so the Deputy President had the same latitude to make a decision as to remedy as in any normal unfair dismissal proceeding following a finding that the relevant dismissal was unfair. There is no basis to say that the Deputy President was in some sense required by the appeal decision to order reinstatement as a remedy for Mr Hatwell's unfair dismissal or that reinstatement was, as the Deputy President put it, a "foregone conclusion".[27]

[26] Third, as is apparent from our earlier summary of the Deputy President's decision, the Deputy President took into account a range of matters, including the findings of the Full Bench, matters which weighed in favour of reinstatement, and particular matters he identified as weighing against reinstatement. His conclusion that reinstatement was not appropriate was a result of a balancing exercise in which he assigned determinative weight to the last-mentioned category of matters.

---

[24] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194, 99 IR 309 at [19]

[25] *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 at [10]

[26] Ibid at [35]

[27] [2019] FWC 931 at [27]

[27] It is therefore necessary for Mr Hatwell, in order to succeed in his appeal, to demonstrate error in a decision-making process which involved the exercise of a broad discretion. The type of errors that might be made in this type of decision-making process were identified in *House v The King* as falling into two categories: the first is where the decision-maker "acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, [or] if he does not take into account some material consideration"; the second is where the result of the decision-making process is "unreasonable or plainly unjust" such as to allow the inference that in some way there has been a failure properly to exercise the discretion, notwithstanding that no specific error in the decision-making process is discoverable and it is not apparent how the result was reached.[28] An error in the discretionary decision-making process justifying appellate intervention may not be established by a contention that the decision-maker did not have "adequate regard" to or give sufficient weight to a particular relevant matter; it is only where a relevant matter has been given no weight because it was not considered at all that error in the exercise of the discretion will be demonstrated.[29]

[28] Mr Hatwell's first ground of appeal concerns the Deputy President's conclusion that Mr Hatwell's failure to apologise or acknowledge wrongdoing in respect of the misconduct which the Full Bench found constituted a valid reason for his dismissal was a matter which weighed determinatively against a finding that reinstatement was appropriate. It cannot in our view be reasonably contended that this was not a material consideration. In circumstances where Mr Hatwell had been found to engage in misconduct constituting a valid reason for his dismissal, but that there were mitigating factors which rendered the dismissal harsh, a critical issue was necessarily whether there were grounds for confidence that Mr Hatwell would, if reinstated, not engage in the same or similar conduct again having regard to the continuing presence of Mr Flens and other employees of the maintenance contractor at the Longford site. The role of an apology or an acknowledgment of wrongdoing in that context was explained in the Full Bench majority decision in *Mt Arthur Coal Pty Ltd v Jodie Goodall*[30] as follows:

> "[78] The primary issue which arose for consideration before the Commissioner in respect of remedy was whether there were proper grounds for confidence that Mr Goodall would, if reinstated, never again engage in conduct of the type which occurred on the night shift of 10-11 November 2015. That confidence was what was necessary to make the employment relationship workable. As we have already stated, the Commissioner with the advantage of having seen and heard Mr Goodall give his evidence was persuaded that he had a sufficient understanding that his conduct was inappropriate, unacceptable and not to be repeated. Nothing which has been put to us by Mt Arthur Coal has articulated a proper basis for the Commissioner's findings in this respect to be disturbed on appeal. That being the case, there was a reasonable and rational basis for the Commissioner to conclude that Mr Goodall would be able to regain the trust of his colleagues and thereby re-establish a viable working relationship."

---

[28] [1936] HCA 40, 55 CLR 499 at 505

[29] *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159, 258 FCR 312 at [448], [485]; *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [25]- [32]; *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, 243 IR 132 at [57]-[58]

[30] [2016] FWCFB 5492, 260 IR 391

[29] The circumstances of the proceedings here meant that once the question of remedy was remitted by the Full Bench to the Deputy President for determination, Mr Hatwell had the opportunity to give evidence, or make a statement via his counsel, to demonstrate that he understood that the conduct which was found to constitute a valid reason for his dismissal was "inappropriate, unacceptable and not to be repeated" such as to form a basis for confidence that a viable working relationship could be re-established. This might have taken the form of an apology to Mr Flens, an acknowledgment that the conduct he was found to have engaged in was wrong, or a commitment to never engage in such conduct in the future and to treat fellow workers with respect. However Mr Hatwell declined to take advantage of this opportunity, and as a result we consider that it was reasonably open to the Deputy President to conclude, as he did, that this meant there was a risk of a recurrence of the behaviour if reinstatement was granted, and to treat this as a matter of determinative weight.

[30] The various matters raised by Mr Hatwell in connection with the first ground of appeal are in substance, we consider, criticisms of the weight the Deputy President assigned to the issue of Mr Hatwell's failure to apologise or acknowledge wrongdoing. There was no "*misdirection of the statutory criterion for refusing reinstatement*" as Mr Hatwell contended in circumstances where the Deputy President did no more than take into account and give weight to a plainly relevant matter in his application of the broad statutory standard of appropriateness.

[31] Mr Hatwell criticises the Deputy President's finding concerning the risk of a recurrence of the conduct as merely hypothetical in nature and incapable of supporting a finding that that a re-establishment of the employment relationship would be unworkable. However, as was stated in *Mt Arthur Coal*, an assessment of whether trust and confidence can be restored upon reinstatement is necessarily conjectural since it involves an assessment about what is likely to happen in the future.[31] The degree of weight placed on the risk identified by the Deputy President in his evaluative assessment as to whether a viable working relationship could be restored was a matter for him, and it did not cease to be a material consideration merely because there was no finding that a recurrence of the offending conduct was likely or probable or because other matters such as Mr Hatwell's prior unblemished disciplinary record might arguably suggest that the degree of risk was not high.

[32] The finding in the appeal decision that Mr Hatwell's conduct warranted a disciplinary outcome short of dismissal in light of Ms Butler's evidence and the approach taken with respect to Mr Osborn and Mr Burton - a disciplinary outcome which presumably would not have required an acknowledgement of wrongdoing - does not render Mr Hatwell's failure to make such an acknowledgment in the proceedings before the Deputy President irrelevant or incapable of being given weight. The Full Bench's finding related to the question of whether Mr Hatwell's dismissal in October 2017 was unfair, and for the reasons earlier explained a finding that Mr Hatwell should not have been dismissed for his conduct at that time cannot be extrapolated into a conclusion that in February 2019, when the Deputy President issued his decision, he had to be reinstated. Consideration of the remedy of reinstatement must always take into account the circumstances which have pertained since the relevant dismissal took effect as well as the circumstances of the dismissal itself and the applicant's previous employment history. In Mr Hatwell's case, he had after being dismissed given sworn evidence to the Commission that he had not called Mr Flens a "*scab*"; this evidence had not been accepted and he was found to have engaged in that very conduct; this conduct was held to

[31] Ibid at [77]

constitute a valid reason for his dismissal; and, notwithstanding this, he failed to acknowledge that this conduct was wrong when he asked the Commission to reinstate him to his former employment. Although reasonable minds might differ as to the significance of all of this, we consider that it was open to the Deputy President to treat it with the importance that he did. The first appeal ground is therefore rejected.

[33] Appeal ground 2 is concerned with the way in which the Deputy President took into account paragraph [169] of the appeal decision, which in its entirety read as follows (footnotes omitted):

> "[169] The fact that the employer (for present purposes Ms Butler as Esso's representative) was of the view that conduct of the type engaged in by Mr Hatwell did not warrant dismissal is plainly relevant. Ms Butler was the person at Esso who was responsible for considering the outcomes of an investigation into conduct directed at Mr Flens and Mr SP by various Esso employees; and for deciding whether there should be any disciplinary action. It is pertinent to note in this regard that Ms Butler decided to issue 'first and final' warnings to Mr Osborn and Mr Burton for the use of language like 'scab' and 'grub', rather than dismissing them."

[34] The evidence of Ms Butler to which reference was made above was set out in the preceding paragraph. The pertinent question and answer was as follows:

> "In the circumstances I just put to you in the question I asked about what you knew from Mr [SP's] evidence you said the word "scab" in and of itself could not justify termination of his employment, could it?---If the only thing that I was faced with considering was an isolated example of an employee using the word "scab" once I would not terminate somebody's employment, no."

[35] It is readily apparent that from a perusal of the transcript that the question and answer actually related to Mr Gelagotis' conduct, and concerned something he said in conversation with other Esso employees rather than to an employee of the contractor. The answer did not directly relate to the word "*scab*" being used to abuse the employee of a contractor, which is what Mr Hatwell was found to have done in relation to Mr Flens. This is made clear in the following exchange between the Deputy President and Ms Butler which appears in the transcript shortly following the above question and answer (emphasis added):

> "Yes, but I am wondering what you had in mind when you said it wouldn't have been a reason for termination?---So if I had a case presented to me where the only allegation against an employee or against a worker was that they used the word scab *in a conversation*, and that was the only piece of evidence and that evidence was corroborated that single act would not meet the threshold of termination."[32]

[36] This evidence supports the conclusion reached by the Deputy President in paragraph [32] of the remedy decision concerning the context of the evidence of Ms Butler's referred to in paragraph [169] of the appeal decision. However in the subsequent question and answer it became somewhat unclear whether Ms Butler made any distinction in her perception of the degree of seriousness between the use of "*scab*" in a conversation and its use to abuse someone (emphasis added):

---

[32] Transcript 1 February 2018, PN4480

> "Yes, where the conversation is between two people and it's being used directed at someone in that conversation. Is that what you mean, I'm just curious to understand?---No, no, I'm probably going more on the singularity of the event. I still think it's significant that two individuals may talk about a third party or a different individual in a derogatory way. *If that is said and the person doesn't hear it doesn't make it any less serious* is probably what I'm trying to say. So if I'm having a conversation with somebody else, I'm talking about a third person and I say 'Fred is' – pick a derogatory word – *the fact that Fred hasn't heard that doesn't make it any less serious to me*."[33]

[37] Although there is a rational basis for a distinction to be made between offensive language used in a conversation about third parties who are not present, and its use to abuse someone directly, as the Full Bench majority held in *Mt Arthur Coal*,[34] from the above evidence it appears that Ms Butler did not herself make that distinction in her assessment of the seriousness of the different types of conduct. Certainly the Full Bench did not appear to consider that Ms Butler was making any distinction concerning "conduct of the type" that was the subject of the evidence set out in paragraph [168] of the appeal decision and that of Mr Hatwell. In this respect, there is substance to Mr Hatwell's submission that the Deputy President "re-characterised" the finding of the Full Bench.

[38] It is less clear that this occurred in relation to that part of paragraph [169] which related to Ms Butler's treatment of Mr Osborn and Mr Burton. The Full Bench noted as "pertinent" that they were not dismissed without making a finding that their conduct was necessarily the same in nature of seriousness as that of Mr Hatwell. The Deputy President further analysed the conduct of Mr Osborn and Mr Burton and the way they responded to the investigation of their conduct by Esso, and ultimately drew the conclusion that their behaviour was distinguishable to that of Mr Hatwell, but we do not consider that in doing so the Deputy President "re-characterised" the Full Bench finding.

[39] If the Deputy President proceeded to determine whether reinstatement was appropriate based on findings of fact that conflicted with the findings upon which the Full Bench determined that the dismissal was unfair, that would clearly be problematic. However, as the Deputy President made clear in paragraph [35] of the remedy decision, his approach to paragraph [169] of the appeal decision was ultimately immaterial to his conclusion that reinstatement was not appropriate because he decided, in Mr Hatwell's favour, that the conduct which was found to constitute a valid reason for his dismissal did *not* operate to render reinstatement an inappropriate remedy. Contrary to Mr Hatwell's submission, we do not consider that the Deputy President used his "re-characterisation" of the findings in paragraph [169] to support what was said to be the conclusion in paragraph [39] of the remedy decision that the relationship had irreparably broken down; rather the Deputy President merely stated that unexceptional proposition that the attitude of an employee who has committed misconduct is, consistent with Ms Butler's evidence, relevant to the decision as to an appropriate sanction, and is equally relevant to the issue of reinstatement.

[40] For this reason, we do not consider that the Deputy President's consideration, or perhaps reconsideration, of paragraph [169] formed part of the *ratio decidendi* for his decision to refuse reinstatement, and accordingly we do not uphold the second ground of appeal.

---

[33] Transcript 1 February 2018, PN4481

[34] [2016] FWCFB 5492, 260 IR 391 at [57]-[58]

[41] The third ground of appeal contends that the Deputy President "*misdirected himself*" in concluding that Esso's loss of trust and confidence in Mr Hatwell was soundly and rationally based by reference to the five identified matters earlier outlined, but again this is in substance a complaint that these matters were not given the weight which Mr Hatwell would have liked them to be given. The first three matters which Mr Hatwell seeks to invoke in his favour in this respect relate to the fact that the Deputy President did not find that Mr Hatwell was dishonest or make a credit finding adverse to him. However on one view the remedy decision was attended by excessive delicacy in relation to these matters. The simple facts were: Mr Flens gave sworn evidence that Mr Hatwell called him a "*fucking scab*"; Mr Hatwell gave sworn evidence in which he made an outright denial of this; the Deputy President believed the evidence of Mr Flens over that of Mr Hatwell; Mr Hatwell challenged the Deputy President's finding in this respect in his first appeal; and the Full Bench affirmed the Deputy President's finding. We doubt that these matters were capable of being taken into account in a way which favoured Mr Hatwell's case. It is sufficient to say that they had obvious implications for the trust and confidence capable of being derived from Mr Hatwell's approach to the investigation of the incident with Mr Flens. To say that Esso would be bound by the Commission's findings in relation to Mr Hatwell's evidence (the fifth matter raised in connection with ground 3) does not take into account that the Deputy President expressed those findings in a deliberately restrained way.

[42] In relation to the fourth matter, it is correct that in relation to the issue of Esso's alleged loss of trust and confidence in Mr Hatwell, the Deputy President did not find in terms that the restoration of the employment relationship between Esso and Mr Hatwell was "unworkable". However that submission does not go much beyond semantics: as was made clear in the Full Bench decision in *Nguyen v Vietnamese Community in Australia*, the issue of trust and confidence in the context of the consideration of the reinstatement remedy refers to what is necessary to make the employment relationship workable.[35] We consider that it is reasonably apparent, reading the Deputy President's reasons for refusing reinstatement as a whole, that he considered that it would not be possible to restore a productive and viable employment relationship because there was a sound and rational basis for Esso's loss of trust and confidence in Mr Hatwell. The third appeal ground is rejected.

[43] The fourth appeal ground seeks to raise the concept of legal unreasonableness, although Mr Hatwell's written submission in reply framed this in the context of the second type of *House v The King* error earlier identified, namely where the outcome is unreasonable or plainly unjust even if no specific error in the reasoning process is discoverable. In *King v Catholic Education Office Diocese of Parramatta*,[36] the Full Bench said in relation to the second category of *House v The King* error:

> "[41] It is this latter part of the judgment that Mr King relies upon to ground his argument concerning "manifest injustice". Where a decision is accompanied by full reasons, the basis upon which the decision has been reached will usually be apparent, and any specific error in the exercise of the discretion will be identifiable. In that circumstance, consideration of whether the decision or outcome was "unreasonable or plainly unjust" will usually be unnecessary. It is only where the outcome is demonstrated to be wholly outside the range of outcomes reasonably available to the

[35] [2014] FWCFB 7198 at [23]

[36] [2014] FWCFB 2194, 242 IR 249

> first instance decision-maker that the "manifest injustice" ground of error will allow an appeal to be upheld without specific error being identified. In the unfair dismissal context, if not generally, this will only occur in rare cases."

[44] We do not consider that the remedy determined by the Deputy President could be said to be manifestly unjust or wholly outside the range of reasonably available outcomes. Mr Hatwell received the maximum amount of compensation permitted under s 392 of the FW Act. Reinstatement was refused in circumstances where Mr Hatwell was found, over his sworn denial, to have engaged in misconduct constituting a valid reason for dismissal, and had failed to make any expression of contrition or acknowledgment of wrongdoing in respect of that conduct or even to evince any recognition that that type of behaviour was inappropriate and would not be engaged in if reinstatement was ordered. The matters raised by Mr Hatwell as demonstrating legal unreasonableness are, in both expression and substance, a criticism of the weight assigned to various matters which were treated. It is not contended that any matter said to have been given "*excessive weight*" was not relevant to the decision-making task, and we do not accept that any matter in relation to which it is said that the Deputy President "*failed to give any weight, or gave inadequate weight*", was not taken into account by the Deputy President and given due consideration. Accordingly the fourth appeal ground is also rejected.

[45] None of the appeal grounds having been upheld, the appeal must be dismissed.

Orders

[46] We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is dismissed.

VICE PRESIDENT

Appearances:

M Harding of counsel and *G Borenstein*, solicitor, on behalf of Michael Hatwell
F Parry QC and *L Howard* of counsel and *A Hudson*, solicitor, on behalf of Esso Australia Pty Ltd

Hearing details:

2019.
Melbourne:
1 April.

Printed by authority of the Commonwealth Government Printer

<PR707618>