DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Chris Plesiotis
v
Huhtamaki Australia Pty Ltd T/A Huhtamaki
(U2019/5922)

COMMISSIONER LEE MELBOURNE, 16 JANUARY 2020

Application for an unfair dismissal remedy.

[1] This is an application for unfair dismissal remedy made pursuant to s. 394 of the *Fair Work Act 2009* (the Act).

[2] Mr Chris Plesiotis (the Applicant) was summarily dismissed on 28 May 2019 for serious misconduct by his employer, Huhtamaki Pty Ltd (the Respondent). He was dismissed for alleged wilful and serious misconduct for failing to comply with the Respondent's safety protocols concerning pedestrian walkways on four separate occasions on 10, 11 and 24 September 2018. At the time of the alleged misconduct regarding the pedestrian walkways, the Applicant was already the subject of a first and final warning that had been issued on 10 April 2018 for wilful damage to the Respondent's property. There are also a number of other allegations of misconduct of the Applicant that are relevant and are dealt with below. The matter was heard before me in Melbourne on 11 and 12 September and 25 October 2019. Mr Dalton of the Australian Industry Group represented the Respondent. Ms Larkins from the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) represented the Applicant.

[3] The Applicant gave evidence on his own behalf. Evidence for the Applicant was also provided by:

- Mr Andrew Kotsiris who is employed as a Pulpman for the Respondent and is a CFMMEU delegate;
- Mr Nick Manolopolous who is employed as a Leo operator, the same occupation as the Applicant. Mr. Manolopolous is also a delegate of the CFMMEU; and
- Dr Owens, the Applicant's treating psychologist.

[4] Evidence for the Respondent was provided by:

- Mr Alex Morelli, who is the Operations Manager for the Respondent and has been employed by them since 2014;

- Ms Kate Hawking, who is the National Human Resources manager for the Respondent and has been employed by them since 2014;

- Mr Victor Borg, the Maintenance Manager for the Respondent and has been employed by the Respondent since 2014; and

- Mr Robert Law, the Production Manager for the Respondent and has been employed by the Respondent since 2012.

Background

[5] The Applicant was employed by the Respondent as a level 2 classification employee pursuant to the *Huhtamaki Australia Pty Ltd, Moulded Fibre Division, Preston Plant, Enterprise Agreement, 2017 (*the Agreement)[1] primarily on the printer line and most often at the machine designated as Leo 5. He had been employed by the Respondent for a period of approximately 20 years.[2] The Respondent manufactures moulded paper products, primarily egg cartons at the Preston site. The Respondent employs approximately 130 employees at the Preston site**.**

[6] As referred to above, the Applicant was dismissed for alleged serious misconduct. The letter of termination dated 28 May 2019 states as follows, omitting formal parts:

> "We write to confirm the summary termination of your employment with Huhtamaki Australia Pty Ltd as a Level 2 Leo Operator due to your wilful and deliberate serious misconduct.
>
> Specifically, as advised, this misconduct involved, you wilfully and deliberately failing to observe and follow safety requirements on numerous occasions as outlined in a letter dated to you 9 October 2018.
>
> On 5th April 2019 you were given with an opportunity to provide a response as to why you failed to follow safety instructions. Your explanation through your representatives was that you felt you were not the only employee to fail using the walkway appropriately. We do not consider your explanation to be satisfactory. In this context, we consider your actions to be deliberate, and wilful.
>
> Chris Huhtamaki feels we have provided you with several opportunities to improve your behaviour. Given this wilful and deliberate misconduct and taking into account you are currently in receipt of a first and final warning for inappropriate behaviour in the workplace, we have lost the necessary trust and confidence we require to make your ongoing employment viable.
>
> Consequently, we have decided that the appropriate course of action is to terminate your employment effective immediately. Given that we are satisfied that you have engaged in wilful and deliberate serious misconduct we have determined that

[1] AE425509

[2] Exhibit A1, Witness Statement of Chris Plesiotis at [3]

summary dismissal is warranted. Your accrued leave balances and any unpaid wages have been paid.

Please return your swipe card and any other company property to Mr Robert Law — Production Manager by no later than Friday 24th May 2019.

Please contact me if you would like to discuss the contents of this letter further.

We are sorry the employment relationship had to end this way and wish you well in your future endeavours. However, given your conduct we formed a view that this was the appropriate course of action."[3]

[7] The letter of termination refers to opportunities afforded to the Applicant to improve his behaviour and a previous first and final warning. To understand this, it is important to consider the chronology of events. The Respondent provided a chronology, which will be referred to throughout the decision.[4] The Applicant agreed that the chronology was factually accurate.[5]

[8] The Applicant submits that the termination is unfair. The primary remedy sought by the Applicant is reinstatement without loss of pay and continuity of service. The Respondent submits that in all the circumstances, the Commission should find that the Applicant engaged in serious misconduct that was wilful and deliberate and that the dismissal was not unfair. In the event that the Commission finds the dismissal to be unfair, reinstatement is strongly opposed by the Respondent.

The law to be applied

[9] Under the Act, a person is protected from unfair dismissal if:

"**382 When a person is protected from unfair dismissal**

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

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

[3] Exhibit A1, Witness Statement of Chris Plesiotis,, Annexure CP10 letter of ter,i

[4] Exhibit R12, Timeline

[5] PN2776.

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold."

[10] The Applicant is a person protected from unfair dismissal as he had completed the minimum employment period and an enterprise agreement applied to the Applicant in relation to his employment.

[11] Unfair dismissal is governed by Part 3-2 of the Act. Section 385 of the Act sets out what constitutes an unfair dismissal:

"**385 What is an unfair dismissal**

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

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

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

[12] With regard to s.385 it is not in dispute that the Applicant was dismissed by the Respondent in line with the meaning of dismissal outlined in s.386(a) of the Act.

[13] With regard to s.385(c) of the Act, the Respondent is not a small business. The Small Business Fair Dismissal Code does not apply in this matter.

[14] With regard to s.385(d), there was no suggestion that the Applicant's dismissal was a case of genuine redundancy. Section 385(d) does not apply in this matter.

[15] The only matter for consideration is whether the dismissal was harsh, unjust or unreasonable pursuant to s.385(b) of the Act.

[16] Section 387 of the Act provides as follows:

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

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

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

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

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

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

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

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

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

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

The Evidence

Sick leave taken by the Applicant in 2018 in breach of the Agreement

[17] The Respondent submits that the Applicant did not contest that he had failed to comply with clause 35.2 (b) of the Agreement, to provide proof, such as a medical certificate, for work absences in excess of 3 single day absences in a year.[6] The Applicant concedes that for the year of 2018 this is true.[7] It is apparent that the letter of termination does not refer specifically to these absences as a reason for termination. However, it is apparent it was included in the agenda for the investigation meeting regarding the failure of the Applicant to walk on the designated pedestrian walkway.[8] The relevant paragraph is as follows:

> "Additionally, in contravention of clause 35.2 of the Huhtamaki Australia Pty Ltd Moulded Fibre Division Preston Plant Agreement, since July 1, 2018, you have been absent from work without a medical certificate for 4 full days, plus 1 occasion of 7 hrs and plus 1 other occasion of 4 hours."[9]

[18] The admitted failure to comply with this aspect of the enterprise agreement by the Applicant is relevant to the consideration of whether there is a valid reason for the dismissal.

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[6] Respondent's closing submissions, filed 18 October 2019 at [9]

[7] PN2826.

[8] Exhibit A1, Witness Statement of Chris Plesiotis, Exhibit CP8

[9] Exhibit A1, Witness Statement of Chris Plesiotis, Exhibit CP8

The damage to the air conditioner duct

[19] The Applicant admits that in February 2018, he wilfully damaged a portable air conditioning unit. His own evidence on the matter is as follows:

> "The workspace is actually very small that we have to work in around the machine, and I was running back and forth in a small, contained area. The workspace also gets incredibly hot in summer. In that small work area is a portable air conditioner that is approximately two meters high. Two long plastic adjustable nozzles jut out from the air conditioner. I had to keep pushing one of the nozzles out of the way to make my way past to remove the damaged cartons and then to stack the new cartons and I kept stumbling over the air conditioner in the space.
>
> I finally just lost my temper and hit one of the nozzles in frustration. I just saw red when it happened and I did it because I was feeling really overwhelmed. The damage was minor, and only sustained to the nozzle feature, not to the air conditioner itself, which continued to work fine afterwards.
>
> I realise that this is company property and that I should not have damaged it intentionally. I admit fault for that action. However, it was action taken in frustration after being overwhelmed by the fact I felt I had to do a two-person job on my own, and clean up after my colleagues as well. I find it difficult to stand up for myself sometimes, and I think it was a bit of a cry for help to company so they would notice the work they had me doing wasn't fair. My intention was never to destroy the air conditioner, or to harm the company in any way."[10]

The Applicant complained about the workplace being left dirty and that he was left to do work alone.[11] The Applicant said he did not know how the Respondent knew about the damage to the air conditioner duct. However, it is apparent Mr Law had the damage reported to him and through checking the cameras, established the Applicant was responsible.[12]

[20] An initial investigation meeting was scheduled for 2 March 2018 which the Applicant attended with his support person, Mr Kostiris. The Applicant's evidence of this meeting was as follows:

> "In the meeting, I admitted fault and was honest about the damage I had caused. I apologised to the company. I remember saying that I had damaged the air conditioner because "it was in my way as I was running back and forth on the machine" or words like that."[13]

[21] A further investigation meeting was scheduled for 15 March 2019 to deal with the issue of damage to the air conditioner, which the Applicant failed to attend. The Applicant's evidence is that he tried to refuse to attend the meeting as he just wanted to accept his fate and felt exhausted by all of the meetings and paperwork about what he thought was a fairly minor

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[10] Exhibit A1, Witness Statement of Chris Plesiotis at [23] – [25]

[11] Exhibit A1, Witness Statement of Chris Plesiotis at [18] – [22]

[12] Exhibit R10 Witness Statement of Robert Law at [2]

[13] Exhibit A1, Witness Statement of Chris Plesiotis at [28]

incident. His evidence was that, "It just felt like overkill and all the meetings made me really anxious."[14]

[22] Mr Morelli gave evidence that the Applicant had never requested the air conditioner location be moved to a different position.[15] Mr Morelli says that the Applicant, when initially asked about the damaged air conditioner, said he knocked into it with his side.[16] When asked why he did not notify the Respondent about the damage on the day, Mr Morelli said that the Applicant replied that he "just didn't."[17]

[23] As a result of his actions in damaging the air conditioner unit and failing to attend the second disciplinary meeting, The Applicant was issued with a first and final warning on 10 April 2018.[18] That letter reads as follows:

> "This is to record that following a disciplinary meeting on 18th March 2018, you are now being issued with a first and final warning for willfully (sic) damaging property, refusing to comply with a reasonable and lawful instruction to attend for a meeting; and displaying inappropriate behaviour (sic) in the workplace.
>
> On 2nd March 2018 you attended a meeting with Alex Morelli — Operations Manager and Robert Law — Production Manager. At this meeting you were advised of the allegation that you had damaged property and you were given an opportunity to respond.
>
> Following consideration of your response you were then requested to attend a meeting on Thursday 15th March 2018 which you failed to do and you had notified Mr Law the previous day, that you did not intend to present for the meeting on the 15th March. You were then instructed, in writing, to attend a further meeting on 16th March 2018 and informed that making a conscious decision to not attend a meeting was unacceptable.
>
> During the meeting on 16th March 2018 you met with Mr Law and myself, Kate Hawking — Human Resources Manager, where you were advised by Mr Law that the investigation had found that your actions in damaging the equipment were intentional and wilful. You advised Mr Law that you didn't know why you were here and that you had nothing more to say. During the meeting I asked you why you did not attend the meeting scheduled for the 15th March 2018, you stated "I said what I had to say at the initial one (meeting), I expected here's your letter, a warning, or dismissal and that was it".
>
> You were advised at the meeting that you were required to attend all meetings as part of following due process. You were also advised that you would receive a first and final warning as a result of your actions and that future instances of misconduct may lead to termination of employment.

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[14] Exhibit A1, Witness Statement of Chris Plesiotis at [29]

[15] Exhibit R11, Witness Statement of Alexander Morelli at [44]

[16] Exhibit R11, Witness Statement of Alexander Morelli at [6]

[17] Exhibit A1, Witness Statement of Chris Plesiotis at [6]

[18] Exhibit A1, Witness Statement of Chris Plesiotis, Annexure CP2.

> The company expects that there will be no further instances of unacceptable behaviour by you, and that in future you will not refuse to carry out a lawful and reasonable instructions. Please take this matter seriously and make steps to improve your conduct in the workplace.
>
> You are again provided with a copy of the Huhtamaki Code Of Conduct. If you wish to respond to this first and final warning letter please do so by contacting me on XXX or by replying in writing. This warning will be placed on your file."[19]

[24] The Applicant claims that the warning issued to him was extremely harsh and "it was the first warning of its kind issued to any employee for the company to [his] knowledge."[20] Mr Morelli disputes this and gave evidence that first and final warnings have been issued to other employees previously.[21] I prefer the evidence of Mr Morelli on this point.

The breaking of the door on the Leo 5 machine

[25] The Respondent submits that the Applicant admitted that in April 2018, he damaged the safety door on the Leo 5 machine and the Applicant does not challenge that following this incident, his employment was terminated, and that this termination was subsequently withdrawn on the basis that he would pay for and attend an anger management program.[22] The Applicant's representative agreed that is what occurred.[23]

[26] Notwithstanding the admitted conduct of damaging the door of the Leo 5 machine, it is necessary to examine the circumstances, surrounding the event and in particular the claimed mitigating circumstances.

[27] The Applicant's evidence as to what occurred is as follows:

> "There is a little metal door on the Leo machine, approximately 0.5 meter by .4 meters, that when slid open allows you to access the line up to the stacker and you can grab cartons that have gotten stuck and are a potential obstacle.
>
> The door has a bracket attached to it to prevent it from being able to be pulled all of the way out. The bracket is made out of very thin, flimsy metal. The bracket was very worn down and bent on the day in question, being worn down from frequent use. It is typical that the door is opened and closed multiple times throughout every shift as it is just a feature of the operation of the machine.
>
> On or around 11 April 2018, I ran up to the door because I wanted to get a stuck carton out of the line that might end up obstructing and halting the whole production line. I slid open the door as per normal, and the bracket must have snapped and the door came off and flew out of my hands. There were no witnesses to this, just the video

[19] Exhibit A1, Witness Statement of Chris Plesiotis, Annexure CP2.

[20] Exhibit A1, Witness Statement of Chris Plesiotis at [31]

[21] Exhibit R11, Witness Statement of Alexander Morelli at [145]

[22] Respondent's closing submissions, filed 18 October 2019 at [7].

[23] PN2812 - PN2815.

footage. In the video footage it actually appears that the bracket was already snapped off, and I just didn't realise when I pulled the door.

Also on 11 April 2019, our in-house fitters welded the brackets back on. This was after I told Simon Crilley what happened. Again on the 12 August 2019 on my shift it came off in my hands as the bracket broke again."[24]

The company has now supplied the video footage and it is annexed hereto in **CP-4.** They claim that this happened on 11 April 2018. It only pertains to the 11 April 2018, though the door also came off in my hands on 12 April 2018. The footage shows that I am frustrated somewhat, I am running around trying to clean up, and working hard. I did not damage the door intentionally. If anything it was a consequence of me wanting to do my job right and clean up the mess in my workspace. When the door came off I was surprised, and you can see clearly in the video that I pick it up and put it back in place gently.[25]"

[28] Mr Kotsiris claims the video footage shows someone running around working hard and cleaning up, not someone who wanted to destroy property.[26] Mr Kotsiris also gave the following evidence in regard to the door on the Leo 5 machine:

"I can't recall when, but I have definitely broken the little bracket on the sliding door before and the sliding door has ended up on the floor. So has my colleague `Angelito' (surname unknown) who is a much smaller guy than me and Chris. It's so easy to other bracket is tiny and overused and always kind of bent. Like I said, nothing ever gets fixed properly. I just can't see how you can blame Chris for that, it is so over the top to me and unfair.

…

I was shown the video footage on 24 July 2019 by Chris' legal representative of Chris sliding out the door onto the floor. This video footage showed Chris supposedly damaging the door in some way. There was nothing in it. By my observation, I couldn't actually see the bracket on the door at all, it looked like it was already broken. The sliding door actually also used to be really sticky, so Chris might have expected that and yanked harder than it needed. It just looked like a commonplace accident to me, one I know it is easy to make from my own experience."[27]

[29] Mr Kotsiris also claimed that the Leo 5 door is always jamming. He was also inconsistent, in his evidence, changing his evidence to say that pulling the door off was not easy but it depends on the strength of the bracket and the weld.[28] However, he later conceded that in fact he had no knowledge as to whether the weld was done properly.[29]

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[24] Exhibit A1, Witness Statement of Chris Plesiotis at [32] – [35]

[25] Exhibit A1, Witness Statement of Chris Plesiotis

[26] Exhibit A2, Witness Statement of Andrew Kotsiris Annexure at [5]

[27] Exhibit A2, Witness Statement of Andrew Kotsiris at [8] – [10]

[28] PN936.

[29] PN963.

[30] In contrast to the evidence of Mr Kotsiris and the Applicant, Mr Borg, stated that the Leo 5 machine gate is the same as the gates on the other machines and these gates do not break all the time.[30] Mr Borg had no knowledge of Mr Kotsiris breaking one of the gates.[31]

[31] Mr Manolopoulos claimed the bracket on the door was worn down from daily use and it was no surprise it would snap off.[32] However, Mr Manopolous then admitted that he had actually never examined the door.[33] Mr Manopolous was not in any position to make this claim.

[32] There is video footage of the incident. It is very clear and was played to the Commission during proceedings. In my opinion, it is apparent that the Applicant applies significant force to the door of the Leo machine and pulls it so hard it the flies out of his hand and travels some distance across the room hitting some other object (which is obscured from view) with enough force that the gate in question rebounds to the centre of the room. Contrary to the claim that the Applicant is surprised by this occurring, it is apparent that as the gate flies out of his hand, he does not even turn his head to watch it go. His actions are not, in my view, consistent with his claim that he was surprised that the door had come off. Put simply, the claim of the Applicant as to what occurred is not supported by an objective observation of the video evidence.

[33] Mr Victor Borg, the Maintenance Manager gave evidence that stands in significant contrast to that of the applicant and Mr Kotsiris and Mr Manolopoulos:

> "On more than one occasion maintenance staff have been called to the Leo 5 printer to repair the Slide Gate Stopper at the stacker end. On each occasion we have asked our shift fitter who was called to repair the safety sliding door what had occurred and each time the information relayed back was that Chris Plesiotis, (the Applicant) had been the operator at the time of failure and that the door appeared to have been handled aggressively.
>
> The last time this occurred we asked for further information from production which resulted in footage showing the gate being operated as suggested in feedback, i.e. aggressively.
>
> The gate is equipped with a two piece safety switch which enables the printer to run only when it is shut. The magnetic half of the switch is mounted to the sliding gate bracket which also acts as the stopper for the sliding gate.
>
> If this bracket is out of position, bent or broken the printer will not run. This then requires maintenance to be called to adjust the sensor back into its correct position so the safety circuit can be reset so printer can then restart. On these particular occasions the bracket was found to be torn away from its mount and on the ground.

[30] PN1892 - PN1893

[31] PN1896.

[32] Exhibit A3, Witness Statement of Nick Manonopoulos at [10]

[33] PN1283.

> In my opinion it takes excessive force to break the door and is certainly not the cause from general use.
>
> The gate in question (in this matter), on Leo 5 is the same as on the other 5 lines that have this gate configuration. They operate in the same manner and are a simple slide gate. The gate on the other 5 machines have not required repairs that I am aware of."[34]

[34] The Applicant disputes Mr Borg's evidence that the Leo 5 had to be repaired several times and that each time it was the applicant on the shift.[35]

[35] Ms Hawking acknowledged that the fitters need to reweld doors from time to time but that but that the maintenance manager told her that "…the door was rewelded about 3mm so it was very sturdy."[36]

[36] I prefer the evidence of Mr Borg as to the circumstances surrounding the Leo 5 door incident to that of the applicant, Mr Manopolous and Mr Kotsiris. Key parts of the evidence of Mr Manopolous and Mr Kotsiris is not grounded in any particular direct knowledge or observations. The evidence of the Applicant simply does not align with what can be observed in the video. I do not accept that there was any particular flaw with the Leo 5 machine which is the reason that the door flew off in the hands of the Applicant. I am satisfied that the Applicant has deliberately applied excessive force to the door, likely because of a loss of temper.

Mr Law initiated the investigation into the broken door on 11 April 2018 after it was reported that it was broken. It was Mr Law who observed the camera footage of the incident and determined that the matter requires an investigation.[37] This is a relevant factor when considering the claims of bullying directed at Mr Morelli which are considered later in the decision.

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[34] Exhibit R8, Witness Statement of Victor Borg at [2] – [7]

[35] PN386.

[36] Exhibit R9, Witness Statement of Kate Hawking at [16]

[37] Exhibit R10 Witness Statement of Robert Law at [4]

The investigation of the broken Leo 5 door and the outcome

[37] As noted earlier, it is agreed that following this incident, the Applicant's employment was terminated and that this termination was withdrawn on the basis that he would pay for and attend an anger management program.

[38] The evidence as to the circumstances that lead to this were as follows:

- There was an investigation meeting held on 24 April 2019. At that meeting, the Applicant, Mr Kotsiris, RC and Mr Morelli were present. It does not appear to be in contest that at that meeting the Applicant said the door damage was an accident and/ or unintentional. It was put to the Applicant that he used excessive force and asked whether he thought he was aggressive. The Applicant denied both propositions. The Applicant however claims that Mr Morelli said to him that he "did this with anger".[38]
- That meeting of 24 April 2018 terminated with Mr Law telling the Applicant the matter would be considered further, and he would be advised of any future meetings.[39]
- After the 24 April 2018 meeting, the Applicant was absent on annual leave from 7 to 13 May 2018 and on unpaid leave on 16 May 2018. On 17 May 2018, a letter was sent scheduling a disciplinary meeting for 16 June 2018. The Applicant went on a further period of annual leave as well as sick leave during June and July 2018. The details are in are found at Exhibit R12. Ultimately, there was a disciplinary meeting held on 2 August 2018.

The disciplinary meeting of 2 August 2018 regarding the broken door on Leo 5

[39] Present at the disciplinary meeting was the Applicant, Mr Kotsiris, Ms Hawking, Mr Law and Mr Morelli.

[40] At the meeting, the Applicant was told by Mr Morelli that the Respondent had formed the view he had used excessive force on the Leo 5 door, that this had caused damage and that Mr Morelli thought he had a problem controlling his temper.[40]

[41] Mr Morelli told the Applicant that he should undertake an anger management course at his own expense and the alterative was that his employment would be terminated.[41] The Applicant refused to do the course. Ms Hawking suggested that the Applicant think about it. Mr Morelli advised the Applicant that he could take the afternoon off and they would meet on the next day, 3 August 2018. This was agreed to.[42]

[42] The next day, on 3 August, the same people attended a further meeting. At that meeting, according to Mr Morelli, the Applicant stated that the Respondent should pay for the course. Mr Morelli maintained the Applicant should pay for the course and that he needed to show willingness to change. The Applicant said he did nothing wrong and did not have any anger issues.[43]

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[38] Exhibit A1, Witness Statement of Chris Plesiotis, at [39]

[39] Exhibit R11, Witness Statement of Alexander Morelli at [14]

[40] Exhibit R11, Witness Statement of Alexander Morelli at [72]

[41] Exhibit R11, Witness Statement of Alexander Morelli at [23]

[42] Exhibit R11, Witness Statement of Alexander Morelli at [23]

[43] Exhibit R11, Witness Statement of Alexander Morelli at [24]

[43] Mr Morelli's evidence is that the following occurred:

> "I recall that I asked the Applicant for a specific answer regarding his agreement to participate in the course or not. I remember asking this specifically because he had not previously said that he would not do the course but had kept saying that he shouldn't need to do the course." AM said that he asked the applicant what was his reply on a number of occasions but he did not reply. He then advised the applicant his employment was terminated.

[44] Mr Morelli then says the following occurred:

> "After I advised the Applicant of his termination both he and Kotsiris left the room and I returned to my office to continue to work. Sometime later, I do not recall exactly, but possibly 5 or so minutes, Hawking came to see me to discuss the possibility for the Applicant to remain an employee if he changes his mind and agrees to participate in the course. I told Hawking that I would be pleased with that result as that was the company preference from the beginning of the disciplinary meeting. Hawking left and returned with both the Applicant and Kotsiris. Law was also in my office at the time. The Applicant remained in the corridor outside my office while Kotsiris and Hawking are closer around the entry door. I don't recall exactly how the conversation started at that time, but I do know that I was asked whether the Applicant could remain employed if he participated in the Anger Management Course. I said that he could remain but that he needed to do the course at his expense. The Applicant again stated that he didn't see the need for him to do a course when he didn't have a problem. I said that all he needed to do was say that he agreed and to again take some more time to consider doing the course and if he did, his termination would be revoked. Finally, after some delay, the Applicant said that he would take the time to consider doing the course. I accepted this and told him that we will need to meet again as soon as possible to get his decision and that his termination of employment was revoked. The parties then departed. This was a very exhausting period."[44]

[45] The Applicant claims that during part of the discussion that occurred at this time, Ms Hawking said "look the fitters did not do a very good job" in regards to the bracket, and then words like "I have seen that footage and there is nothing in it."[45]

[46] Similarly, Mr Kotsiris' evidence was:

> "After the meeting about the door, Chris needed a breather so I went outside with him and Kate followed us out. She said words to us like "I have seen the footage and don't believe there is much in it and I am not really sure why Alex is behaving the way he is about this" or words to that effect and she went on to say something like "by doing the anger management thing it need not stay with you permanently, I don't want you to lose your job, I don't want to sack you, so just do it and get it over with."[46]

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[44] Exhibit R11, Witness Statement of Alexander Morelli at [27]

[45] Exhibit A1, Witness Statement of Chris Plesiotis at [42]

[46] Exhibit A2, Witness Statement of Andrew Kotsiris at [11]

[47] Ms Hawking refutes that she made these comments. Her evidence on the point was:

> "In regard to the Applicant's claims that the door of the Leo machine is thin and flimsy. I do acknowledge that the fitters need to reweld doors from time to time. However, I spoke with our Maintenance Manager at the time and he advised the door was rewelded about 3mm so it was very sturdy. I completely refute the Applicant's statement that I said, "the fitters didn't do a good job" and that I also said, "I have seen that footage and there's nothing in it." That is a complete misrepresentation of the conversation. I advised the Applicant that I thought he should maintain his employment by agreeing to undertake an anger management program. I maintained this position throughout the discussions as Huhtamaki's position is to not terminate but to change behaviour.
>
> I note that Mr Kotsiris states in his statement that, "I have seen the footage and there's nothing in it and I am not really sure why Alex is behaving the way he is about this". That statement is the same as the Applicant's. I repeat this is a misrepresentation of the conversation I had with both of them and I do not hold that view. The video demonstrates the Applicant's anger as it clearly shows him walking back to the sliding door on two occasions and yanking at the door."[47]

[48] I prefer the evidence of Ms Hawking on this point. With one exception discussed later in the decision, she was a credible and reliable witness. The same cannot be said for Mr Manolopoulos, Mr Kotsiris and the Applicant. I prefer the evidence of Ms Hawking as to what was said outside of the meeting.

[49] A further meeting attended by the Applicant, Mr Manolopulos, Ms Campbell-Burns of the CFMMEU, and Mr Morelli was held in relation to the matter of the broken Leo 5 gate. At this meeting the Applicant agreed to attend the anger management program.

[50] On 16 August 2018, Mr Morelli sent the Applicant a memo with options for anger management programs and counselling.[48] The Applicant did not attend an anger management program. The Applicant says that he never had time to.[49] He did however commence seeing a psychologist Dr Owens sometime in October 2018.

Failure to wear hearing protection and alleged aggression of the Applicant and /or Morelli on 9 August 2019

[51] On 9 August 2019, Mr Morelli approached the Applicant at his workplace and spoke to him about his failure to wear hearing protection. Mr Morelli said he noticed that the Applicant was not wearing hearing protection when he went to check on the progress of a product run.[50] This occurred at around 9:00am according to Mr Morelli. Mr Morelli says that at 12:36pm he returned to where the Applicant was working and that he was still not wearing

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[47] Exhibit R9, Witness Statement of Kate Hawking at [16] – [17]

[48] Exhibit A1, Witness Statement of Chris Plesiotis, Annexure CP5.

[49] PN570.

[50] Exhibit R11, Witness Statement of Alexander Morelli at [31]

hearing protection and again Mr Morelli says he told the Applicant to put his ear plugs in.[51] According to Mr Morelli, the following exchange then occurred:

> "He asked me whether he should make people wait for him to put them in. I said yes and added that they should be inserted on entry to the plant. The Applicant asked if cartons were falling off the press outfeed table whether he should let that happen or put in his ear plugs. I said are you testing me? I reminded him again that he is on a Final Warning and that once again his job is at risk. I said that he must put his ear plugs in. The Applicant then approached me very close and shoved his face into my face as a confrontation. I said that I did not appreciate that aggressive behaviour and it is not the behaviour of someone that doesn't have an anger management issue.
>
> The Applicant was attempting to put his earplugs in during that final part of the conversation. I left at 1242."[52]

[52] Mr Morelli made a detailed diary note of this event at the time that it occurred. His evidence is broadly consistent with that note. [53]

[53] The Applicant's version of this event is as follows:

> "Alex immediately approached me and brought up the investigation, he said words like "the investigation had to happen because there was damage to the door" and then he said "where are your ear plugs?", I said "the cartons were about to fall so I grabbed them and I have just gotten back from my break" or words to that effect, as an explanation as to why I didn't have the ear plugs in. Alex put his face very close to mine, and raised his voice and he said "I don't want you to lose your job for something like this". I experienced that as again very threatening.
>
> I said words to the effect of "what should I have done, put my plugs in and let the cartons fall? This is a legit question", and he stood over me aggressively and said "are you testing me?" I ended up walking away because of the aggression, and because he was getting close to me and raising his voice."[54]

[54] Despite it being a requirement that he wear hearing protection such as earplugs, the Applicant's own evidence demonstrates that he is unwilling to wear them for various reasons:

> "I find ear plugs very uncomfortable to wear. It is also my view, that they can be dangerous. I like to be spatially aware at all times on the factory floor and I find that the best way for me to preserve OHS is to be aware of my surroundings and be able to hear what the machines are doing. Some of my colleagues at this time, including my supervisor Aurelio Evangelista, also chose not to wear ear plugs.

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[51] Exhibit R11, Witness Statement of Alexander Morelli at [32]

[52] Exhibit R11, Witness Statement of Alexander Morelli at [32] – [33]

[53] Exhibit R11, Witness Statement of Alexander Morelli, Annexure AM4.

[54] Exhibit A1, Witness Statement of Chris Plesiotis at [15] – [16]

> Alex approached me and told me "you have to wear ear plugs at all times in the factory" or words to that effect. He told me that the company would pay for some and asked me "what kind do you like?"[55]

[55] During the hearing the Applicant agreed it was reasonable to be "pulled up" about not wearing hearing protection.[56]

[56] Where there is a conflict of the evidence as to what occurred during this discussion, I prefer the evidence of Mr Morelli. Further, with one exception discussed later in the decision, Mr Morelli gave evidence that was measured, credible and consistent. In particular, in regards to this matter, Mr Morelli had kept a contemporaneous and detailed note of what had occurred. For these reasons I am satisfied that the Applicant was the one who was aggressive during this exchange. Further, the Applicant's own evidence demonstrates that he wilfully ignored directions to wear hearing protection claiming they can be dangerous and stop him from being "spatially aware." There is no basis to this claim.

The pedestrian walkway incident

[57] The Applicant admits that in September 2018 he did not use the pedestrian walkway. The evidence as to the circumstances surrounding this is as follows.

[58] On or around 24 September 2018, Mr Morelli observed the Applicant failing to use the pedestrian walkway that was the subject of the specific safety instruction given to him and other employees on 25 July 2018. Mr Morelli checked some of the historical camera footage and confirmed that it was not uncommon for the Applicant to not follow the designated pedestrian walkway.[57]

[59] The use of the walkways is a mandated OHS requirement. Ms Hawking gives the following evidence as to the importance of safety and the use of walkways in particular:

> "Safety is a serious concern for the company. We operate several forklifts and there are regularly semi trailers on site for loading. Keeping foot traffic safe and away from vehicles is an important safety issue. To facilitate this the company has designated walkways that pedestrians are required to use. It is a breach of the safety protocols to not use the specified walkways.
>
> I am aware that on several occasions it has been necessary to remind the Applicant of his OHS obligations including wearing hearing protection and observing the walkways."[58]

[60] Ms Hawking states that the Applicant received retraining and reinduction by the OHS Officer, Ms Helen Goudy in safety matters of the Preston plant on 27 April 2017. The training involved the Applicant working through the Safety Information Handbook[59] and then

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[55] Exhibit A1, Witness Statement of Chris Plesiotis at [11] – [12]

[56] PN290.

[57] Exhibit R11, Witness Statement of Alexander Morelli at [36]

[58] Exhibit R9, Witness Statement of Kate Hawking at [21] – [22]

[59] Exhibit R7, Safety Information Handbook Released August 2016 Revision B.

participating in answering a questionnaire to ensure he understood.[60] Question 61 is specifically on pedestrian walkways and crossing. The Applicant provided a correct answer to the following question:

> *"Q61 Pedestrians should adhere to pedestrian walkways and crossings; Select one*
>
> *a) At all times they are available a)*
> *b) Provided it's not raining b)*
> *c) Only if someone is watching c)*
>
> The correct answer is a) which the Applicant correctly answered.[61] The safety training questionnaire Ms Hawking said was completed by the Applicant is Exhibit KH3."

[61] Despite this rather clear evidence that the Applicant had been trained on the matter, the Applicant denied in his witness statement that he had been trained in walking on the walkways, yet at the same time accepted that he had signed a document that said he understood he must walk on them:

> "We did not receive training in walking on the walkways despite the claims made by the company in the Form 3 response to the Fair Work Commission that is annexed hereto in annexure CP-6. We were made to sign a document that said that we understood we must walk on the walkways, this is annexed hereto in annexure CP-7, but there was never any training. We never were shown or trained in any specific policy pertaining to the walkways, including in the company's traffic management policy. I have never seen this document."[62]

[62] I note there was some controversy about whether there was a traffic plan and/or whether it was available to staff. It is not necessary to determine this as Ms Hawking made clear that the respondent relied on the training the Applicant undertook, not the traffic plan.[63] Ms Hawking also gave evidence that the Applicant had been given the code of conduct and that it had been attached to warnings on several occasions.[64] I accept this to be the case. It is clear from the text of the warning provided in April 2018 that the code of conduct was attached.

[63] When cross examined about the questionnaire apparently completed by the Applicant, that was supplied by Ms Hawking, the Applicant at first said when asked about filling it out that, "I must have, yes" and "I can't recall it but if it was given to me I would have filled it out."[65] However, shortly after making that statement, the Applicant claimed that another employee, Ibrahim filled in the questionnaire for him.[66] The Applicant claimed he was too busy to do it.[67] I do not believe the claim of the Applicant that he did not fill out the questionnaire himself. The handwriting does not look the same, one has answered the

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[60] Exhibit R9, Witness Statement of Kate Hawking at [25]

[61] Exhibit R9, Witness Statement of Kate Hawking at [25]

[62] Exhibit A1, Witness Statement of Chris Plesiotis at [53]

[63] PN1982.

[64] PN1984.

[65] PN185 PN186.

[66] PN196.

[67] PN204.

multiple choice questions with a stroke, the other with a circle.[68] The Applicant's evidence changed from saying he must have filled it out, to then claim a clear recollection that he was too busy to do it and that a fellow employee did it for him. The claim that the Applicant had someone else complete the questionnaire because he was too busy, is in my view false.

[64] Mr Kotsiris is an occupational health and safety representative on site.[69] When shown the safety handbook, Mr Kotsiris said that it "looked familiar" but could not recall doing a training session where they went through the book.[70] However, Mr Manopolous, also a health and safety representative confirmed that the safety handbook was part of the one day training.[71]

[65] Mr Kotsiris agreed that employees needed to follow the pedestrian walkways as they are there for a reason.[72]

[66] On 19 July 2019, there was a near miss incident that occurred regarding the designated pedestrian walkways. As a result, the Respondent specifically reminded all staff of the need to observe the walkways and the danger associated with not doing so and had them sign a document attesting to that. As noted earlier, the Applicant agreed he signed that document and understood that he must walk on the designated walkways.[73]

[67] The Applicant's attitude to the requirement to use the walkways at all times and his complaint of inconsistent treatment for not doing so is set out clearly in his witness statement:

> "For as long as I can remember during the employment I have cut across the corner of the carpark, outside of the designated walkways. The area is question is a very odd shape, requiring the employee to go out of their way and walk around a space near the carparks in any way that is totally unnecessary and not in any way conducive to increased safety. There would not be any cars parked in the space in question that I would cut across and no imminent risk to me in doing so.
>
> I do not deny cutting across the walkways. I have always done so. I have never put myself or others at risk by doing so. Cutting across the walkways is something that occurs on a daily basis among all employees, including managers at the factory. **I** have walked with others frequently and we have both cut the corner, and I have observed up to four of my colleagues doing it at once on many occasions. Nearly everyone that smokes and then returns to work at the factory will cut the corner to some degree. To target only me for this behaviour is absurd and unfair.
>
> Further to this if the company were genuinely concerned from an OHS perspective about my cutting across the walkways they would have intervened in me doing so. Instead, Alex went through all of the video footage to capture examples of me doing it in order to justify my dismissal. This would have taken him hours. This tells me that he is more interested in making sure he can get some sort of reason to dismiss me than

[68] PN222.

[69] PN1001.

[70] PN1031.

[71] PN1337.

[72] PN1038.

[73] Exhibit A1, Witness Statement of Chris Plesiotis at [53]

> actual safety, particularly as I have been cutting the corner for 19 years of employment without incident or disciplinary action.
>
> There are also no railings around the walkways, and while I realise abiding by the walkways is an OHS requirement, if there was really such a huge OHS risk to me cutting across a carpark slightly, the company would have put in railings to ensure that this never occurred. They do have a railing in front of the warehouse, presumably because that is where the forklifts sometimes go in and out and they present more of an immediate hazard than parked cars.
>
> As an example, around July 2018, I cut across the corner in front of Alex. He did not intervene or warn me about that conduct. I never received a warning about cutting the corners of the walkways and I never understood that the company perceived the cutting of the corners as something serious enough to warrant my dismissal. I would have stopped doing it immediately had I known I would be fired for doing it."[74]

[68] The claim that the cutting across of the designated walkway is frequently done without repercussion for employees is a claim also made by Mr Manolopoulos.[75] Mr Manopolous claimed he had seen a senior manager walk diagonally through the area in contravention of the rules.

[69] Mr Kotsiris provided a photo of his shift manager[76] which showed the manager standing outside of the walkway in the space the Applicant was accused of cutting across, as an example of a senior employee not complying with the requirement.[77]

[70] Mr Morelli responded to that photo with the following statement:

> "The photo does not show the person traversing across the walkway which was the non-compliance issue by both the Applicant and Employee 1 (as mentioned earlier). The person in the photo is standing at the edge of the space."[78]

[71] During the hearing, Mr Morelli drew a distinction between the person in the photo and the fact that the Applicant cut across the whole road.[79]

[72] As to the claims of the Applicant that even if ignoring the rule to use pedestrian walkways he is not at risk, the evidence of Mr Morelli refers to a map of the site[80] and includes the following:

> "The area in question is a high traffic area where delivery vehicles (semi-trailers, B-double trucks, delivery vans and cars –including employee cars) enter the site through the main Security Entry Gate. The path of the trucks entering through the main Security Entry Gate is shown.

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[74] Exhibit A1, Witness Statement of Chris Plesiotis at [48] – [52]

[75] Exhibit A3, Witness Statement of Nick Manonopoulos at [36]

[76] Exhibit A2, Witness Statement of Andrew Kotsiris, Annexure AK1.

[77] Exhibit A2, Witness Statement of Andrew Kotsiris at [14]

[78] Exhibit A2, Witness Statement of Andrew Kotsiris at [94]

[79] PN2626.

[80] Exhibit R11, Witness Statement of Alexander Morelli, Annexure AM7

> The path of the forklift (purple) is also shown. The forklift travels from the upper part to the lower part of the image in reverse because it is loaded with a pallet of manufactured product.
>
> On the return journey, the forklift travels in the forward orientation. Because the area is a high traffic area it is important that, as directed by the Safety Induction training that the pedestrian walkways are observed.
>
> …
>
> The Applicant confirms that he has breached the safety instructions at the site. His claim that he is the only person to have been targeted for this failure to comply with the safety instruction is not true."[81]

[73] I note at one point in the evidence, Mr Manopolous claimed that the walkways were confusing.[82] Having observed the photo of the relevant area this is indeed a remarkable claim. The walkways marked in bright yellow could hardly be clearer.

[74] Mr Morelli responded to the claims that other employees have also ignored the safety walkway without repercussions claiming this was not true. Mr Morelli referred to another employee (Employee 1), who had been disciplined for not complying with the safety direction to keep to the pedestrian walkway in the utility area. While this employee was not terminated, Mr Morelli's explanation for this was that Employee 1 was not on a final warning and as such the cumulative effect was not similar to the Applicant's situation.[83]

[75] Mr Morelli said that Employee 1 was being disciplined for timekeeping issues, specifically taking excessive meal breaks. CCTV footage was reviewed to confirm specific details and he observed Employee 1 breaching the safety directive, despite having formally acknowledged that the pedestrian walkways must be observed. Mr Morelli states that Employee 1 agreed that he had failed to comply with the safety instruction and was given a first and final warning.[84]

[76] As to the claim of the Applicant that around July 2018 he cut across the corner in front of Mr Morelli and that Mr Morelli did not intervene or warn him about that conduct, Mr Morelli's evidence was that he did not recall seeing the Applicant around the time that he claims in his witness statement. Mr Morelli also stated:

> "There have been times when I have been in the vicinity, walking on the pedestrian walkways between buildings and have had to stop people from cutting the corner in the same way that the Applicant has done. I do not jump to giving people warnings, but on each of these occasions I have reminded the person or persons of the requirement that they observe the pedestrian walkways and instructed them to do so."[85]

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[81] Exhibit R11, Witness Statement of Alexander Morelli at [173] –[176]

[82] PN1367.

[83] Exhibit R11, Witness Statement of Alexander Morelli at [78]

[84] Exhibit R11, Witness Statement of Alexander Morelli at [78] – [79]; [82]

[85] Exhibit R11, Witness Statement of Alexander Morelli at [182] – [183]

[77] During the hearing there was also the following exchange which is relevant:

> "But you could have said if you cut that corner again it's all over. You didn't think to do that? -I could have done that forever. However, we had already done that multiple times on other incidents and many other - other parts of his behavioural problems, and there was no change."[86]

Findings in respect to the pedestrian walkway issue

[78] There is no doubt, even on the Applicant's own evidence, that he was aware of the requirement to use the pedestrian walkway. By not observing that requirement, the applicant wilfully and deliberately disobeyed a lawful and reasonable direction. His actions in doing so amount to an act of serious misconduct. It is also apparent that despite the requirement to use the walkways, that the Respondent had been inconsistent in the past in enforcing the requirement to do so. However, there is then the near miss incident on 19 July 2018. After that time, the Respondent has reinforced the direction to comply and has put one employee on a first and final warning. However, Mr Morelli has on his own evidence not been consistent saying that he does not jump to give warnings. This inconsistent treatment of previous, similar conduct by other employees in the workplace is most certainly relevant to the consideration and is dealt with in the consideration of whether the dismissal is unfair.[87]

The process leading to the dismissal

[79] Mr Morelli states that, having observed the Applicant not following the walkway, being aware that the Applicant was one of the employees that had exceeded the Agreement's limit for leave absences without proof and this needed to be raised with him, considered with the current status of being on a first and final warning, as well as the events surrounding the Leo 5 Machine, he considered the breaches warranted further investigation.[88]

[80] Mr Morelli then prepared a letter,[89] and provided it to the Applicant on 26 September 2018. The letter alleged that the Applicant had failed to comply with the instruction to follow the walkways on four separate occasions and had exceeded the limit for numbers of days absent without a medical certificate. The letter required the Applicant to attend a meeting on 29 September 2018. However, that meeting did not proceed as a member of the Applicant's family provided a work cover certificate of capacity for the Applicant prior to the meeting taking place.

[81] The Applicant then proceeded on a lengthy period of absence from the workplace, most of which was unpaid leave. The details are set out in Exhibit R12. The meeting was rescheduled to 9 October 2018 but it is apparent it did not take place presumably due to the ongoing absence of the Applicant from the workplace. Consequently, there was no further meetings regarding the matter until 5 April 2019. This was a further meeting to deal with the

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[86] PN2662.

[87] *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 128 (McHugh and Gummow JJ), [(1995) 185 CLR 410 at p. 465]; See also *Australia Meat Holdings Pty Ltd v McLauchlan* Print Q1625 (AIRCFB, Ross VP, Polites SDP, Hoffman C, 5 June 1998), [(1998) 84 IR 1 at p. 10].

[88] Exhibit R11, Witness Statement of Alexander Morelli at [36] – [38]

[89] Exhibit R11, Witness Statement of Alexander Morelli, Annexure AM6.

investigation into the Applicant's failure to use the pedestrian walkways and absence without medical certificates.

[82] At the 5 April meeting, the Applicant, Mr Alex Millar of CFMMEU, Ms Denise Campbell-Burns of the CFMMEU, Mr Kotsiris, Mr Morelli and Ms Hawking attended.

[83] Ms Hawking says that Mr Millar spoke on behalf of the Applicant. He said that the Applicant acknowledged that he did not observe the walkways, but it was not dangerous at the time as there was no traffic and he did not consider it a hanging offence.[90]

[84] Ms Hawking's evidence went on to state that:

> "Mr Millar also advised that he believed Huhtamaki did not believe it was a serious offence either as Mr Morelli did not address the Applicant when he witnessed him not observe the walkways. Mr Morelli did not comment as the Union had requested that he be silent during the meeting.
>
> At the conclusion of the meeting I thanked everyone for their time and reminded them that the purpose of the meeting was for the Applicant to provide a response to the allegations before him."[91]

[85] Mr Morelli gave similar evidence that this is what Mr Millar said during the meeting.[92]

[86] There was a further meeting on 23 May 2019. The Applicant, Ms Campbell-Burns, Mr Kotsiris and Ms Hawking were all present at that meeting. Mr Morelli says at that meeting:

> "We briefly discussed the matters raised including the issue that the Applicant had not denied breaching the safety direction regarding the pedestrian walkways. I recall noting that the Applicant had acknowledged this due to his signature on the communication record at Annexure AM-1. I recall that Campbell-Burns did not appear aware that the document existed and requested a copy.
>
> I advised that the company had decided to terminate the Applicant's employment due repeated behavioural problems manifesting as serious misconduct as evidenced by wilful damage to property and failure to comply with company policies, in particular safety policies and instructions."[93]

Evidence as to whether Morelli engaged in bullying or other behaviour targeting the Applicant

[87] The Applicant submits that the Respondent has engaged in a course of unreasonable management action that meets the definition of bullying. The bullying claim is directed at Mr Morelli. In final submissions, the Applicant sets out six matters that they say constitute bullying as follows:

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[90] Exhibit R9, Witness Statement of Kate Hawking at [33]

[91] Exhibit R9, Witness Statement of Kate Hawking at [34] – [35]

[92] Exhibit R11, Witness Statement of Alexander Morelli at [44]

[93] Exhibit R11, Witness Statement of Alexander Morelli at [47] – [48]

1. Mr Morelli coming in at all hours to monitor the Applicant's work unannounced and standing over him as he worked;
2. Mr Morelli choosing to hand letters about disciplinary processes to the Applicant directly, upon finishing night shift, having probably had due notice that Plesiotis found him threatening (via Mr Manolopoulos' complaint to the General Manager);
3. Mr Morelli terminating (though he later continued the employment contract after Ms Hawking intercepted) the Applicant for pulling a little sliding door off its railings that he knew was something that had occurred before in the course of other employees' work;
4. Mr Morelli targeting the Applicant for dismissal by checking his rosters and scouring video footage to find evidence of him cutting the corners of a walkways;
5. Mr Morelli treating others differently and more favourably from the Applicant in relation to the walkways; and
6. Mr Morelli insisting on meeting on Grand Final Day at 2:30pm on a Saturday outside of paid time with the Applicant about the walkways.

[88] The Applicant claimed that all of his problems in his employment commenced 2-3 years ago when Mr Morelli was promoted. It was from that time that the Applicant claims that Mr Morelli targeted him specifically for bullying and harassment.[94]

[89] I do not accept the claims that Mr Morelli was bullying the Applicant. My reasons for forming this view and the relevant evidence follow.

[90] The claim that the choice made by Mr Morelli to hand disciplinary letters to the Applicant personally was bullying is spurious. His explanation for doing so, essentially that the Applicant was on his last night shift and would be off for 3 days, is perfectly reasonable.[95]

[91] The occasion referred to earlier in the evidence where Mr Morelli approached the Applicant and asked him to wear his ear plugs was described by the Applicant in the following terms:

> "Alex approached me and told me "you have to wear ear plugs at all times in the factory" or words to that effect. He told me that the company would pay for some and asked me "what kind do you like?"[96]

[92] This is hardly bullying behaviour. Mr Morelli is simply asking the Applicant to wear the appropriate hearing protection. I have earlier determined that it was the Applicant, not Mr Morelli who was aggressive during one of these exchanges about his hearing protection.

[93] The Applicant made general accusations of being "singled out" by Mr Morelli. However, the evidence does not support this rather vague claim. As just one example, the investigation of the air conditioner incident was initiated by Mr Law and the decision maker in that case as to the disciplinary action was also Mr Law, not Mr Morelli.

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[94] Exhibit A1, Witness Statement of Chris Plesiotis at [8]

[95] PN2710 -PN2713.

[96] Exhibit A1, Witness Statement of Chris Plesiotis at [12]

[94] The Applicant believes that Mr Morelli is on a campaign against him and, that he is micromanaged. Further, that this alleged bullying and harassment has also taken the form of unreasonable management action via the various disciplinary actions that finally lead to his dismissal.[97]

[95] It is apparent that, the actual evidence of the Applicant as to the behavior of Mr Morelli that was said to constitute bullying was either not consistent with bullying behavior or simply not credible.

[96] Mr Law said that he had never observed Mr Morelli being aggressive or bullying anyone.[98]

[97] As to the events surrounding the meeting of 24 April 2018, Mr Morelli had made clear that in light of the second occurrence of the Applicant engaging in damaging equipment, that he would terminate him unless he undertook an anger management course. Again, this hardly demonstrates bullying behaviour to provide an employee on a first and final warning who has again engaged in misconduct, an opportunity to canvass an option for him to remain employed. Ms Hawking, again a most credible witness, claimed that Mr Morelli was not aggressive at that meeting and I prefer her evidence on the point.

[98] Mr Kotsiris claims that the Applicant had raised concerns as to the alleged bullying behaviour of Mr Morelli with him, prior to his termination. His evidence was:

> "After this meeting, and before the next disciplinary meeting about the broken bracket on the sliding door, Chris came to me and said "Alex won't leave me alone, he is always trying to intimidate me" or words like that. He also said "I don't know what I have done to that bloke, but he keeps checking up on me, coming in on the night shift at odd hours, like 2am or 7am, and just standing there watching me work and not saying anything" or words to that effect. Chris seemed really disturbed by Alex's treatment and just like he was really taking it to heart."[99]

[99] Mr Kotsiris gave evidence that he had informed his shift supervisor, Mr. Crilley of the alleged bullying. This evidence had not formed part of his written witness statement. Mr Kotsiris was challenged on the truthfulness of this new evidence.

[100] The Respondent submits that this evidence prejudiced the Respondent as when it was given, it denied the Respondent the opportunity to present Mr Crilley as a witness and the credibility of this evidence must be treated with appropriate caution. I agree with that submission.

[101] In any case, the claim of Mr Kotsiris that he raised this matter with Mr Crilley appears to be the only action Mr Kotsiris took in respect to the matter. He acknowledged that he did not report the matter to the HR manager, Ms Hawking.

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[97] Exhibit A1, Witness Statement of Chris Plesiotis,

[98] PN2245.

[99] Exhibit A2, Witness Statement of Andrew Kotsiris at [6]

Mr Kotsiris also acknowledged that notwithstanding that he was a union representative on site, he did not report the issue to the union, nor notwithstanding that he was an OHS representative, he did not report it to WorkSafe.[100]

[102] It is also clear, as set out in the Respondent's final submissions, that nor did Mr Kotsiris escalate the matter as a dispute in accordance with the terms of the Agreement.[101]

[103] I agree with the Respondent's submissions that the claims of Mr Kotsiris lack credibility.

[104] Mr Manonopoulos gave the following evidence in relation to the alleged bullying of the Applicant:

> "Mr Manonopoulos claims that the Applicant had complained to him in August 2018. Mr Manolopoulos also states; 'Chris also made a complaint to me on and around August 2018 where he said "Alex comes in at all hours and watches me work, just standing there watching me and not saying anything" or words like that. I took this to mean Alex was trying to intimidate Chris or wait for him to trip up'95.

[105] It in noteworthy that the claimed discussion Mr Manonopolous had with the General Manager for the Respondent was some 9 to 10 months after this claimed complaint was made by the Applicant to Mr Manolopoulos. The Respondent submits, and I agree that this is hardly a timely response."[102] In fact, by the time Mr Manopolous had this discussion, the applicant had already been dismissed.

[106] The evidence of Mr Manonopoulos on this point was not credible. The key issues of concern with Mr Manonopoulos' evidence is helpfully set out in the Respondent's final submissions and is reproduced below:

- "Mr Manolopoulos also states; 'I was told by Chris about Alex's bullying treatment and that it started to really intensify after the incident with the air conditioner.' The air conditioner incident was on 4th of February 2018, some 14 to 15 months prior to Mr Manolopouos's discussion with the General Manager.

- Mr Manolopoulos's credibility in this matter is further stretched concerning his claim that he followed the disputes procedure. He claimed, 'I followed the issue resolution procedure that's in our - - .' But he acknowledges that, 'It never went anywhere'.

- When it was put to Mr Manolopoulos that he didn't follow up on the lack of action re the alleged dispute, his answer was, 'We didn't have an OH&S manager who I would normally report this stuff to.' When asked why he didn't report it to the human resources manager, he responded, 'Who I reported an incident to many years ago and nothing was done about it, so - - -.'

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[100] PN1417.

[101] Respondent's closing submissions, filed 18 October 2019 at [47] – [49]

[102] Respondent's closing submissions, filed 18 October 2019 at [61].

- When it was put to Mr Manolopoulos that he did not report the claim to the union he responded, 'I would've spoken to the union. I would've spoken to them at some point'101. When questioned why there was nothing in his witness statement concerning speaking to the union he responded, 'Well, I would've been - like it might've not been - - -.'

- Mr Manolopouos was asked about his statement that everybody is complaining about Alex Morelli, but he didn't do anything about it apart from saying he went to see the General Manager. His response, 'Well, that's all I could do.' Clearly given his other options and his experience as a long standing union representative and OH&S representative, that is not all he could have done if there had been a genuine complaint to respond to."[103]

[107] Mr Manonopoulos also claimed that Mr Morelli would not show the video footage regarding the Leo machine. He then after some questioning, agreed that Mr Morelli did offer to show the video.[104]

[108] The Respondent submits that Mr Manolopoulos's evidence is subjective and skewed, and as such it lacks reliability and credibility and should be treated with appropriate caution. Weighed against the evidence of the Respondent's witnesses, considering the balance of probability, the evidence of the Respondent's witnesses should be preferred.[105] I agree with this submission.

[109] It is noteworthy that it was never put to Mr Morelli that he was bullying the Applicant.[106] In any case, the evidence as a whole shows that Mr Morelli was doing nothing more than monitoring machines and their operation for which he was responsible and undertaking disciplinary action which he was entitled to do. He was entitled to ask the Applicant to wear his hearing protection. He was not targeting the Applicant.

[110] Also, as to the Grand Final day meeting, the evidence was that this was arranged to coincide with when the Applicant was next rostered to work. This is hardly bullying behavior. Further, Mr Morelli, having observed the Applicant not following the pedestrian walkway, was entitled to check the video footage to see if the Applicant had done this on other occasions. Also, Mr Morelli is entitled to hand disciplinary letters to the Applicant directly. This is not bullying behavior.

[111] Mr Morelli terminated the Applicant, who was on a first and final warning for deliberately damaging the Leo 5 door. His actions in reversing that decision after the Applicant agreed to undergo anger management training is hardly bullying behavior.

[112] I am not satisfied that there was any complaint of bullying made against Mr Morelli by the Applicant prior to him being terminated. It is apparent that the Applicant is not at all happy for being disciplined for his actions and I am sure that as a result he does not like Mr

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[103] Respondent's closing submissions, filed 18 October 2019 at [62] – [66]

[104] PN1517.

[105] Respondent's closing submissions, filed 18 October 2019 at [76]

[106] PN2831.

Morelli, the manager who has been holding him to account. However, this does not constitute bullying behavior. It is reasonable management action on behalf of Mr Morelli.

[113] I note that there was some controversy as to whether anyone else had made a complaint against Mr Morelli for bullying. Mr Morelli claimed in his witness statement that was not the case and Ms. Hawking gave the same evidence.[107] However during the hearing Ms. Hawking conceded that a Ms. Evans had made a complaint about Mr. Morelli and aggressive behavior.[108] Ms. Hawking gave evidence that Ms. Evans made complaints about "everybody," including M. Hawking.

Mr Morelli changed his evidence during the hearing saying "…after the witness statement there had been an allegation that was made by another person from Huhtamaki" This included an allegation that Mr. Morelli was rude and abrupt.[109] However, Mr. Morelli gave evidence on re-examination that an investigation of that matter had found the claims made were unsubstantiated.[110]

[114] Looked at in context, this change in the evidence of M. Morelli and Ms Hawking on this one matter does not significantly affect my findings as to their credibility as witnesses overall.

The Respondent submits that "we are offered vague and unsupported accusations against Mr Morelli that are somehow meant to absolve the Applicant of misconduct that were the result of actions solely attributable to the Applicant and no one else."[111] Having considered the evidence, there is considerable force to this submission I am not satisfied Mr Morelli has bullied the applicant.

The psychologist report

[115] Dr Anthony Owens, the Applicant's treating psychologist gave evidence. The evidence of relevance provided by Dr Owens is that:

> "Mr Plesiotis has been formally assessed on Stress, Anxiety and Depression using the DASS21 and the Impact of Events Scale. His results improved from February 26, 2019 to June 25, 2019. On the DASS21 Stress reduced from Mild to Normal, Anxiety was mild to moderate and Depression remained Severe at both testings. On the Impact of events scale scores reduced substantially from 73 to 59."[112]

[116] Dr Owens also claimed that the Applicant now seems quite happy and able to return to work and that he does not have any personal problem with regard to anger. I accept this as Dr Owens assessment of the Applicant's psychological condition.

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[107] PN2005.

[108] PN2020.

[109] PN2513 -PN2516.

[110] PN2745 – PN2746.

[111] Respondent's closing submissions, filed 18 October 2019 at [80]

[112] Exhibit A4, Witness Statement of Dr Anthony Matthew Owens

[117] The balance of the evidence of Dr Owens is a restatement of the Applicant's views as to the alleged behaviors of Mr Morelli. Dr Owens accepts that he has no direct knowledge of the matters other than what he has been told by the Applicant.[113]

[118] His evidence on such matters is of no value and is afforded no weight. Indeed, the evidence of Dr Owens in my view strayed far from what should have been provided in his professional capacity. Just one example was the claim made that "Mr. Morelli appeared to relish his extra power and began picking on Mr Plesiotis, perhaps the most meticulous and perfectionist worker." Dr Owens is simply not in a position to make such statements and should have refrained from doing so. Ultimately, Dr Owens did concede this statement was "a little bit strong."[114] This is quite the understatement in my view.

Other matters

[119] The Applicant submits that the dismissal has had a disproportionately detrimental effect on the Applicant. This is because he is unlikely to find comparable work, or as an older semi-skilled worker, any work at all. The Applicant has no other social connection outside of his family. He has diabetes and is in recovery from depression.[115] The Applicant also attends to his sick mother, for whom he is the primary carer. As the Applicant lived close to his mother, he could visit her on his lunch breaks while at work for the Respondent

[120] Mr Manopolous made reference to the death of the Applicant's sister 18 years ago and the associated consequences having a significant effect on the Applicant.[116]

[121] It is apparent that the dismissal has had a significant effect on the applicant and that he is unlikely to find comparable work. I also agree that his diabetes and depression need to be taken into account as well as the pressures on him to care for his mother.

Previous service record

[122] The Applicant submits that he had a long period of unblemished service. However, Ms Hawking gave evidence that aside from the misconduct matters canvassed as part of this decision, the Applicant had on occasions left work without informing his shift manager displaying inappropriate behavior showing disregard for the rules and disrespect to the shift manager.[117] Also, that the Applicant had on several occasions not followed the rules on the taking of sick leave.[118]

[123] However, I have also considered that Mr Morelli also gave evidence that the Applicant was a productive worker[119] and a good worker[120].

Compliance with the Agreement's disciplinary process

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[113] PN1664.

[114] PN1701.

[115] Applicant's Closing Submissions, filed 4 October 2019 at [41]

[116] Exhibit A3, Witness Statement of Nick Manonopoulos at [4]

[117] Exhibit R9, Witness Statement of Kate Hawking at [41]; Exhibit KH7.

[118]Exhibit R9, Witness Statement of Kate Hawking at [42]

[119] Exhibit R11, Witness Statement of Alexander Morelli at [156]

[120] PN2569.

[124] The respondent provided a first and final warning for the conduct involving the air-conditioner. The applicant argues this conduct was not of sufficient seriousness to underpin a first and final warning. I disagree. It is clear from all of the evidence, that the applicant intended to damage the air-conditioner. It was deliberate and willful misconduct and it was open to the respondent to issue a first and final warning in accordance with the terms of the Agreement.

[125] The applicant also submits that:

> "The agreement at c1.47.1.1(v)(b) requires that all warnings expire after 12 months. The Applicant was dismissed outside of this period, on 23 May 2019. The First and Final warning had expired pursuant to the terms of the agreement at the time of dismissal.
>
> The First and Final warning should not have informed the dismissal, and to consider it as part of the reasons for the dismissal is in contravention of the agreement".[121]

[126] I agree that the agreement provides that all warnings "expire" after 12 months. The further misconduct of the applicant, including the pedestrian walkway incident, all occurred prior to the expiry of the warning. However, it is apparent that, given the lengthy period of time to conclude the disciplinary process and effect the dismissal, that the warning had expired some weeks prior to the applicant being dismissed. I agree this is a matter to take account in considering the fairness of the dismissal.

Consideration

Section 387(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)

[127] There must have been a valid reason for the dismissal related to the Applicant's capacity or conduct, although it need not be the reason given to the Applicant's at the time of the dismissal.[122] To be a valid reason it must be "sound defensible or well founded."[123] The Commission must make a finding as to whether the conduct occurred based on the evidence before it.[124]

[128] The Applicant has engaged in a number of acts of misconduct over a period of time. He admits to breaking the air conditioner duct due to frustration and anger. During the disciplinary process for that matter, the Applicant refused to attend a disciplinary meeting. He admits to breaking the safety door of the Leo 5 machine, albeit that he denies he broke the door in anger or deliberately. Notwithstanding this denial, I am satisfied that the Applicant applied excessive force to the door. I do not accept that the door broke because of poor welding or as a result of some sort of fault with the door. Nor do I accept the other claims of the Applicant going to mitigation. The claim that the breakage is the fault of the machine or

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[121] Applicant's Outline of Argument, filed 29 July 2019 at [28] and [29]

[122] *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21 (4 June 1931), [(1931) 45 CLR 359] at 373, 377–378

[123] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373

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

the fault of others in some way demonstrates the failure of the Applicant to take responsibility for his actions.

[129] It is also clear that following a near miss traffic incident, the Respondent issued to all its employees, a clear instruction to adhere to the pedestrian walkways on site. It seems apparent that prior to this incident, employees were required to adhere to the pedestrian walkways, however the Respondent did not enforce the requirement or at best were inconsistent in doing so. The Respondent submits that it is irrelevant that in previous times this requirement may not have been strictly enforced. I disagree with that submission. It is certainly relevant to whether the Applicant has been treated in a manner consistent with other employees and treated fairly.

[130] However, I agree with the Respondent's submission that a lack of previous enforcement does not prevent the reinstatement of stricter rules and obligations on employees, especially where their safety is concerned. I am satisfied that this is what has occurred here. After the near miss incident, the Respondent has taken action to reinforce a requirement to apply a rule that they had not consistently enforced in the past. They are entitled to do so. However, that does not mean the inconsistency of treatment of the conduct is irrelevant. It is most certainly a matter to be taken into account and I deal with that issue below.

[131] The failure of the Applicant to observe the pedestrian safety walkway is a safety breach. In relation to unfair dismissal cases involving safety breaches, a Full Bench in *BHP Coal Pty Ltd T/A BMA v Schmidt*[125] stated:

> "The criteria for assessing fairness, although not exhaustive, are clearly intended by the legislature to guide the decision as to the overall finding of fairness of the dismissal and are essential to the notion of ensuring that there is "a fair go all round". This is particularly important in relation to safety issues because the employer has obligations to ensure the safety of its employees, and commitment and adherence to safety standards is an essential obligation of employees – especially in inherently dangerous workplaces. The notion of a fair go all round in relation to breaches of safety procedures needs to consider the employer's obligations and the need to enforce safety standards to ensure safe work practices are applied generally at the workplace."[126]

[132] The Applicant admits to not complying with the walkway instruction. The Applicant acknowledges that it is a health and safety requirement to follow that instruction. There is significant traffic in the area and the risk to health and safety of not following the walkways is real. The instruction to use the pedestrian walkways was a lawful and reasonable instruction. This is not challenged.[127] The Respondent has an obligation to enforce safety standards such as the pedestrian walkway policy in order to reduce the risk of injury.

[133] It is not up to the Applicant to determine which instructions he will follow and which he will not. The Applicant accepted this during cross examination[128] The Applicant claims he would have followed the walkway instruction if he knew he would be terminated. However,

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[125] [2016] FWCFB 1540.

[126] Ibid.

[127] PN635.

[128] PN647.

the Applicant was well aware that he was subject to a first and final warning and had indeed already been terminated for previous misconduct, albeit that this was rescinded. The Applicant was aware of the requirement to use the walkway. The Applicant disputed the proposition when put to him that he did not have a big interest in safety, but conceded that it did not appear so.[129]

[134] The Applicant has falsely claimed that he did not complete a questionnaire about pedestrian walkways, claiming that another employee had completed it. I do not accept the Applicant's evidence on this as truthful and again demonstrates a failure to take responsibility for his actions.

[135] It is also the case that the general demeanor of the Applicant is one of denial and dismissiveness. He considers it unreasonable to be required to wear hearing protection and became aggressive to management. The Applicant initially denied responsibility for damaging the air conditioner, then later accepted it was deliberate and when he lost his temper He also sought to blame others for breaking the Leo 5 door.

[136] The Applicant has breached the Agreement's requirements to provide satisfactory evidence for personal leave during 2018.

[137] I am satisfied that the Applicant is guilty of serious misconduct. Even if I am wrong about that, when one takes into account the totality of the Applicant's misconduct as set out above, it is apparent that there is a valid reason for dismissal.

[138] The previous misconduct of the Applicant remains relevant to the consideration. As was said in *John Lysaght (Australia) Limited and Federated Ironworkers' Association of Australia, New South Wales Division & Ors:*[130]

> "It is no doubt possible for the company to waive particular acts of misconduct that would otherwise justify dismissal without notice. These particular acts could not subsequently be used for this purpose once a decision was made not to rely on them. The act of misconduct however does not then disappear and become irrelevant when further misconduct occurs. It remains and makes up the continuing history and record off a man's service."

[139] The Applicant has engaged in misconduct on a number of occasions, the final occasion being for failing to observe a lawful and reasonable direction to walk on the pedestrian walkway. The Applicant's willful damage of machinery, failure to wear hearing protection on numerous occasions, breach of the Agreement's evidence requirements for leave, failure to attend a disciplinary meeting and finally a deliberate failure to adhere to the pedestrian walkway demonstrates that the Applicant has engaged in a course of misconduct.

The continued pattern of misconduct by the Applicant meant that the Respondent was entitled to have lost trust and confidence in the Applicant.

[140] I am satisfied there is a valid reason for the dismissal of the Applicant.

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[129] PN622.

[130] Unreported, Sheppard J, Matter 259 of 1972, 14 September 1972.

[141] The reason is sound and defensible.[131] This weighs in favour of finding that the dismissal is fair.

387(b) whether the person was notified of that reason and 387 (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[142] As to the acts of misconduct prior to the walkway incident, the Applicant was clearly notified of the reasons for the disciplinary action taken at that time. The Applicant was already on a first and final warning at the time of the pedestrian walkway incident. The Applicant had in fact been terminated previously and then had this revoked. The evidence shows that the Applicant was clearly on notice of the misconduct leading up to the pedestrian walkway incident and had an opportunity to respond.

[143] The letter of 26 September 2018 prepared by Mr Morelli made clear the allegations as to the failure to properly use the walkway as well as a failure to provide proper evidence of personal leave in accordance with the Agreement.

[144] There was a meeting on 24 April 2019, which was delayed significantly due to the Applicant's absences from the workplace to provide an opportunity for him to respond to the allegations against him.

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

[145] There was no refusal to allow the Applicant to have a support person.

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

[146] This factor is not relevant as the termination related to allegations of misconduct including serious misconduct

387 (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures following in effecting the dismissal; and 387 (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

[147] The Respondent is a large organisation. The factors in s.387(f) and (g) would not have had an impact on the procedures followed in effecting the dismissal. In any case I am satisfied that the procedures followed were procedurally fair. These are neutral considerations.

387 (h) any other matters that the FWC considers relevant

[148] There are a number of other matters that are relevant to the consideration.

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[131] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371

[149] In *B, C and D v Australian Postal Corporation,*[132] the majority noted that it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be "harsh, unjust or unreasonable",[133] notwithstanding the finding that there is a valid reason for the dismissal.[134] Further, a dismissal can be harsh because of various mitigating factors.

[150] In this matter, there are a number of relevant factors to consider in that context:

(a) of the impact of the dismissal on the Applicant's personal circumstances;

(b) the relatively long period of employment that the Applicant had prior to the dismissal;

(c) the Applicant's previous record of behaviour.

d) Whether summary dismissal was disproportionate to the gravity of the misconduct; and

e) Whether the dismissal was consistent with the enterprise agreement that applied to him.

(a) The impact of the dismissal on the Applicant

[151] At the time of the hearing, the Applicant had not secured permanent employment since he was dismissed. I accept that the Applicant is unlikely to obtain comparable work. He suffers from depression and has diabetes. Dr Owens' view was that the Applicant was ready to return to work albeit on a lower time period initially hence the applicant may be able to find other employment. He has responsibility for the care of his mother and the close proximity of her to his workplace was of considerable benefit to him. The consideration of these factors weigh somewhat in favour of a finding of harshness.

(b) The Applicant's work history

[152] The Applicant was employed for a relatively long period of time, 19 or so years. This factor does weigh in favour of a finding that the dismissal was unfair.

(c) The Applicants previous work performance

[153] When the Applicant's work performance is considered in isolation to the misconduct, he was considered a productive and good employee This factor weighs slightly in favour of unfairness.

(d) The gravity of the misconduct and whether termination was disproportionate

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[132] [2013] FWCFB 6191

[133] See *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 and *Australian Postal Corp v Rushiti* [2012] FWAFB 7423, [47]

[134] [2013] FWCFB 6191, [41]

[154] In this matter, the Applicant was dismissed summarily. Whether or not summary dismissal was a disproportionate response is a relevant factor in considering whether a dismissal is harsh.[135]

[155] The Applicant failed to observe the pedestrian walkway. His action was deliberate and wilful in not doing so. There is traffic in the relevant area, including forklifts. The failure to abide by this direction posed a risk to the Applicant's health and safety. Failure to adhere to the walkways is a significant safety concern. Further, the totality of the Applicant's misconduct has to be taken into account, in addition to the walkways incident. Taking into account these matters I do not think that summary dismissal was a disproportionate response.

The inconsistent treatment of employees who do not follow the pedestrian walkway

[156] As set out above, it is apparent that the Respondent has been inconsistent in its application of sanctions to other employees for failure to adhere to the walkways. While I accept it is the right of the Respondent to change that approach and become more rigorous in enforcing the requirement, the inconsistent approach taken previously is a factor that weighs in favour of a finding that the termination is unfair.

Did the Respondent comply with the EBA

[157] Under the terms of the Agreement, warnings expire after 12 months. The first and final warning for damaging the air conditioner was issued to the Applicant on 10 April 2018. At the time that the Applicant failed to adhere to the pedestrian walkway, it had not expired. It certainly had expired by the time he was dismissed, taking into account the length of time it took for the meetings to occur, given the Applicant's long absences from the workplace. The fact the warning had "expired" at the time of the dismissal, does not mean that it is not a relevant consideration when the chronology of events is taken into account. However, accepting that the warning had expired in accordance with the terms of the Agreement some six weeks or so prior to the termination, I accept that this is a factor weighing slightly in favour of unfairness.

Conclusion

[158] The Applicant is guilty of serious misconduct. He has a history of engaging in misconduct. His actions were wilful and deliberate. The valid reason for the Applicant's dismissal and the lack of any procedural unfairness in effecting the dismissal are matters that weigh strongly against a finding that the dismissal was unfair.

[159] I have considered whether the decision to terminate the Applicant is disproportionate, taking into account the gravity of the misconduct, the history of the Applicant's misconduct and the fact that the Applicant was summarily dismissed. I am not satisfied that termination was disproportionate for the reasons given. The dismissal process was procedurally fair, with

[135] *Potter v WorkCover Corporation* PR948009 (Ross VP, Williams SDP, Foggo C, 15 June 2004) at para. 55, [(2004) 133 IR 458]. See also *Annetta v Ansett Australia Ltd* Print S6824 (AIRCFB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 10, [(2000) 98 IR 233]

the Applicant being notified of the reason and given an opportunity to respond. There was no refusal of a support person. Consideration of these factor weighs against a finding of unfairness.

[160] In respect to the pedestrian walkways matter, the inconsistent treatment of previous similar conduct of other employees is a factor weighing in favour of a finding of unfairness. The expiry of the written warning that had occurred prior to the eventual dismissal of the Applicant is also a factor weighing slightly in favour of unfairness but for the reasons given, only slightly so.

[161] The factors in ss. 387 (e) and (f) of the Act are neutral considerations.

[162] The impact of the dismissal of the Applicant, the relatively long period of employment of the Applicant and the his otherwise productive and good work performance are factors weighing in favour of a finding of unfairness. However, one must consider that the Applicant's long work history of some 20 years is far from unblemished. Also, the long period of employment needs to be balanced against the Respondent's reasonable expectation that such a long serving employee would be in a position to understand and abide by the rules. The Applicant's insight into the seriousness of his actions is poor. He generally fails to take responsibility for his actions blaming other people or the machinery for his misconduct and on other occasions seeks to excuse his failure to follow directions claiming he was safe in doing so.

[163] In all of the circumstances I find that the termination of the Applicant's employment was not harsh, unjust or unreasonable.

The application for an unfair dismissal remedy is dismissed. An order will be issued concurrently with this decision.

COMMISSIONER

Appearances:
C Larkins for the Applicant

A Dalton for the Respondent

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Melbourne:
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