DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Adam Jolley
v
Cannon Hill Services Pty Ltd
(U2019/14276)

COMMISSIONER SIMPSON — BRISBANE, 7 MAY 2020

Application for unfair dismissal remedy – Serious misconduct – Alleged theft – Applicant did not deny theft – Whether dismissal harsh in circumstances – Applicant employed over 9 years Loss of accrued long service leave – Dismissal unfair – Applicant seeks compensation in lieu of reinstatement – Compensation ordered.

[1] An application pursuant to s.394 of the *Fair Work Act 2009* (the Act) was made by the Australasian Meat Industry Employees Union (the AMIEU) on behalf of Mr Adam Jolley, alleging that the termination of his employment from Cannon Hill Services Pty Ltd trading as Australian Country Choice (CHS) was harsh, unjust or unreasonable.

[2] Mr Jolley was employed by CHS from 15 June 2010 until the termination of his employment on 11 December 2019. At the time of his dismissal, Mr Jolley was employed as a boner at the CHS abattoir at Cannon Hill.

[3] Mr Jolley's employment was terminated due to serious misconduct. The AMIEU was given a termination letter on 12 December 2019 confirming Mr Jolley was terminated. The letter stated Mr Jolley was terminated for having failed to demonstrate a commitment to a level of conduct that is considered acceptable to CHS, and that Mr Jolley had breached the terms of his employment outlined in the *Australian Country Choice (Slaughter and Boning Operations) Enterprise Agreement 2015,* and the *Company Code of Conduct.* The termination letter stated that specifically, Mr Jolley stole a can of Coke from the vending machine located on site.

[4] The matter was listed for conciliation, but the dispute was not resolved. The matter was allocated to my Chambers for hearing and I issued directions for filing of material in the matter.

[5] The hearing took place by telephone on 29 April 2020. At the hearing Mr Jolley was represented by Mr Craig Buckley of the AMIEU, and the CHS was represented by Mr Clint Adams, Group Human Resources Manager for CHS.

[6] Mr Jolley provided a witness statement[1] and also relied on evidence contained in the witness statement of Mr Clinton Yaxley[2] and the witness statement Mr Luke Brinkworth[3]

who were both fellow employees at the Cannon Hill abattoir. Neither Mr Yaxley or Mr Brinkworth were required for cross examination and their statements were admitted into evidence uncontested.

[7] CHS did not file any witness statements or submissions in the matter. CHS provided by way of material the Form F3 Employer Response Form and an email from Ms Sue Hughes, Office and Accounts Manager of Personalised Vending, the business which provided and maintained the vending machines at CHS's Cannon Hill abattoir. Mr Buckley did not object to the email from Ms Hughes being identified as a document to be put before the Commission although it was not tendered as evidence through a witness.

RELEVANT LEGISLATION

[8] s.394 of the Act sets out:

> **"394 Application for unfair dismissal remedy**
>
> (1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.
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> Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.
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> Note 2: For application fees, see section 395.
>
> Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.
>
> (2) The application must be made:
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> > (a) within 21 days after the dismissal took effect; or
> >
> > (b) within such further period as the FWC allows under subsection (3).
>
> (3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
>
> > (a) the reason for the delay; and
> >
> > (b) whether the person first became aware of the dismissal after it had taken effect; and
> >
> > (c) any action taken by the person to dispute the dismissal; and
> >
> > (d) prejudice to the employer (including prejudice caused by the delay); and
> >
> > (e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position."

[9] Further, ss.385 and 387 relevantly provide as follows:

"**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."

"**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."

[10] As to any remedy to be ordered, s.390 provides:

"**390 When the FWC may order remedy for unfair dismissal**

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

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

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

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

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

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

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

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

EVIDENCE AND SUBMISSIONS

[11] There is no significant factual contest between the parties as to the events leading to Mr Jolley's dismissal and so it is appropriate to set them out in brief here.

[12] On 22 November 2019, Mr Jolley was on a break and noticed the vending machine door of one of the vending machines in the upstairs break room at the Cannon Hill abattoir was open. Mr Jolley at first pushed the door shut, but then reopened the door and took a single can of soft drink without paying for it.

[13] Mr Jolley said that the day he took the soft drink from the vending machine was the last day before the plant shut down for annual maintenance and that the plant was shut until early December. Mr Jolley said upon his return to work on 4 December 2019, he started work but was later called to the office, where he met with Ms Renee Broanda (CHS's HR advisor) and Mr Steven Morris (CHS's production manager).

[14] Mr Jolley said that he was asked if he wanted Mr Warren Reynolds, the AMIEU representative for the boning room, present at the meeting. Mr Jolley said it would depend on what the meeting was about and was showed a photo of him walking away from a vending machine and asked if it was him in the photo. Mr Jolley said at this point they had better get Mr Reynolds and the meeting stopped until Mr Reynolds arrived.

[15] Mr Jolley was asked at the meeting if it was him in the photo and Mr Jolley agreed that it was. Mr Jolley was advised CHS had footage of him taking a soft drink from the

vending machine and was asked why he did it. Mr Jolley said he said something like, “I don’t really know why I did it, it’s out of character for me.”

[16] Following the meeting, Mr Jolley was stood down until further notice and given a show cause letter requiring him to make a written response by 6 December 2019. The show cause letter said:

> “Dear Adam,
>
> **Re: Show Cause following investigation**
>
> A recent investigation into allegations that you have breached the Company Code of Conduct has now been completed, and I wish to advise you that on the balance of probabilities the allegations have been upheld. It was found that:
>
> On the 22nd November 2019 you were viewed opening the door of the upstairs boning room lunch room vending machine, you placed your hand in and took a can of soft drink without paying for it.
>
> The Company has formed the view that your actions constitutes serious misconduct under the *Australian Country Choice (Slaughter and Boning Operations) Enterprise Agreement 2015,* and is in breach of the *Company Code of Conduct,* specifically relating to theft.
>
> Due to the serious nature of your conduct and behaviour, we are considering terminating your employment with Australian Country Choice. Before making this decision, we are providing you with an opportunity to advise why we should not terminate your employment.
>
> You are required to provide a written response by 5pm, Friday 6 December 2019. This response is to be e-mailed to Renee Broanda - HR Advisor at hra-dvisor@accbeefnet.au. Should you not be able to e-mail your response, please provide it to Reception.”

[17] On 6 December 2019, Mr Jolley provided a written response to the show cause letter which he prepared with the assistance of Mr James Cottrell-Dormer, the AMIEU organiser, which read:

> “Dear Renee,
>
> Re: Show Cause following investigation
>
> Thank you for the opportunity to respond further as to why my employment should not be terminated.
>
> When we met on the issue, I told you that I didn’t know why I had taken the can of drink without paying as it is out of character for me to do so. I further expressed that taking things without paying is something that I teach my children not to do.

On further reflection I would like to explain why at the time I felt it was okay to take the drink. I have put money into the drink machine on numerous occasions in the past only to have it take my money and not provide a drink. I believe this happens regularly to others as well. I justified it to myself that taking the drink was recompense for all the times I had purchased but not received a drink in the past.

I realise now that it was wrong for me to take the drink. The way I rationalised the decision to take the drink was a mistake. I should have resolved the issue with my prior purchases at the time they happened. I will never make such a mistake again.

I am filled with remorse and would like to offer my sincere apology for any damage that I have caused, and I would like to offer to pay for the drink I took. I greatly value the nine and a half years I've been employed at ACC and would very much like the opportunity to continue in my job. With renewed focus I believe I can show the Company that I can be a valuable and trustworthy employee.

Yours Faithfully,

Adam Jolley"

[18] A further interview took place on 11 December 2019. The interview was attended by Mr Jolley and his AMIEU representative; Mr Anthony Lee, CHS's Executive Director of Operations, Mr Paul Wightman, CHS' General Manager and Mr Clint Adams, CHS' Group HR Manager.

[19] As noted above, on 12 December 2019, the AMIEU received a letter on behalf of Mr Jolley confirming Mr Jolley's employment was terminated. The letter read:

"Dear Adam

Re: Termination of employment

This letter is to confirm the outcome of disciplinary meetings held with you on 11 December 2019 in the presence of your nominated representative.

You have failed to demonstrate a commitment to a level of conduct that is considered acceptable to the Company.

You have breached the terms of your employment outlined in the *Australian Country Choice {Slaughter and Boning Operations) Enterprise Agreement 2015,* and the *Company Code of Conduct.* Specifically, you stole a can of coke from the vending machine located on site.

Full consideration has been given to your explanation and responses provided during the disciplinary interviews, including your show cause response provided.

Following comprehensive consideration of all the facts the Company is of the firm view that your conduct is considered is of such a serious nature that it warrants the termination of your employment.

> As a result of your employment with the Company is to be terminated with effect as from the close of business on **11 December 2019** for reasons related to your conduct. Payment of outstanding entitlements due to you shall be made direct to your nominated bank account.
>
> Should you have any queries, please direct them to HR."

[20] Mr Yaxley's evidence was that he used the vending machines in the upstairs break room and had had many negative experiences with them, losing $1 and $2 coins on many occasions. Mr Yaxley estimated he had lost more than $100 to the machines. Mr Yaxley said that the most recent occasion that he recalled was around the middle of October 2019, and that he was thirsty, and only had a single $10 note which he put into one of the machines to buy a can of Coke, but only received 20 cents in change. Mr Yaxley said he was fuming and complained to some of his workmates, who just laughed and told him how many times they had lost money to these machines.

[21] Mr Brinkworth's evidence was in the same vein and he recalled that he would often not get correct change from the drink machines in the upstairs meal room, and that he would often put $2 into the machine and not receive any change when the drink cost only $1.50.

[22] Mr Brinkworth said that he stopped using the vending machines until the machines were stocked with Vanilla Coke, which Mr Brinkworth liked. Mr Brinkworth said that when he started attempting to purchase Vanilla Coke from the machine, he would often receive standard Coke and would have to buy a second drink to get the Vanilla Coke.

[23] Mr Brinkworth said that after this happened a number of times, he began to keep count and found that over three weeks, he received the wrong drink nine times. At this point, Mr Brinkworth said he noticed a service telephone number on the vending machine and contacted the vending machine company. Mr Brinkworth said that he was told that a refund would be arranged and left at the security gatehouse at his workplace and to check there in the next couple of days. Mr Brinkworth said he did so and was told no money had been left, and after checking every day for three days with no money having been left, he gave up.

[24] Mr Jolley's evidence included that in the first couple of years of his employment he had so many problems with the vending machines that he stopped using them altogether. He said for the last three years he went back to using the machines a couple of times a week and estimated that he had lost at least ten dollars to the machines and probably more.

[25] Mr Jolley said he was aware of other employees trying to obtain refunds and he had the impression it was more trouble than it was worth and said he remembered Mr Yaxley telling him he had complained at the office and it was a hassle because they would not believe Mr Yaxley that he lost the money.

[26] Mr Jolley confirmed in his oral evidence he had not tried to obtain a refund. Mr Jolley did not contest that the vending machine would have had a telephone number on it. It was put to Mr Jolley there is a float with the security guards for refunds and he said he was unaware of that.

[27] In its submissions, the AMIEU did not dispute that Mr Jolley took the can from the vending machine.

[28] The AMIEU submitted that the decision to dismiss him was harsh in all of the circumstances. The AMIEU identified a number of circumstances they considered rendered the dismissal harsh:

(a) Mr Jolley's length of service with CHS of approximately nine and a half years;
(b) The previously impeccable disciplinary record of Mr Jolley;
(c) The relatively trivial value of the item taken;
(d) The taking of the property was out of character for Mr Jolley;
(e) Mr Jolley readily admitted what he had done, and did not attempt to mislead CHS about his culpability;
(f) The seriousness of the conduct was mitigated to some extent by the fact that Mr Jolley had lost a significant amount of money to the vending machine, in excess of the value of the property taken, giving rise to a view that he was not really depriving the vending machine owner of money to which they were entitled;
(g) The termination of Mr Jolley meant that he was not paid any amount of pro-rata long service leave, despite the length of his service with CHS.

[29] It was submitted for Mr Collins that Mr Adams raised a notion of there being a mechanism available to obtain a refund, however the evidence showed quite a few people had problems with the vending machine and it was a common experience that people lose money in vending machines and very few go through the process of trying to obtain a refund and over a period of time the amount of money builds up and is part of the context as to why Mr Jolley did something that he would not ordinarily do.

[30] In relation to Mr Jolley's previous disciplinary record, the AMIEU submitted Mr Jolley had not previously been disciplined in relation to his conduct during his employment with the CHS.

[31] The AMIEU referred to the Full Bench decision of the Commission in *Dawson v Qantas Airways Limited*[4] (*Dawson*), which it summarised as involving the dismissal of an employee who had taken property belonging to his employer and the dismissal was held not to have been harsh, despite the employee's lengthy period of service and the relatively trivial value of the property.

[32] The AMIEU sought to distinguish this case from *Dawson*, submitting that in *Dawson* it was clearly significant to the Full Bench that the employee had been dishonest during the investigation, changing his account only after the employer had investigated the matter and issued findings. The AMIEU submitted that the case can be clearly distinguished here as Mr Jolley made no attempt to dissimulate.

[33] The AMIEU further submitted that during the termination interview on 11 December 2019, Mr Anthony Lee, asked Mr Jolley how the other boning room employees would react if he were allowed to return to work. The AMIEU submitted this exchange implied that CHS was prepared to contemplate sending Mr Jolley back to work, but for the possible effect on other workers, and that CHS did not ultimately do so seems to be attributed not to any loss of faith in Mr Jolley's capacity to be a good employee, so much as the impact sending him back to work might have on other workers.[5]

[34] It was put for Mr Jolley that the concern of CHS that not terminating Mr Jolley may create a perception of a double standard suggests the decision was finely balanced and that CHS appeared to accept it was out of character for Mr Jolley.

[35] The AMIEU accepted that CHS' desire to maintain a consistent approach to discipline is a legitimate concern, but submitted that concern for creating a double standard is misplaced in the circumstances, submitting that the Commission has "long adopted a reluctance to hold that an Employer has created a double standard in the absence of clear evidence."[6] The AMIEU submitted the fact that employees who have engaged in misconduct have been given different punishments is not to be considered a double standard unless the Commission is convinced that their circumstances are genuinely similar.

[36] The AMIEU submitted that the Commission adopted this approach so that employers will not be deterred from extending leniency in appropriate cases, and referred to *Sexton v Pacific National (ACT) Pty Ltd*[7] at paras [36] – [38]:

> "The Commissioner dealt exclusively with what he saw as being inconsistent punishment. We have serious doubts whether alleged inconsistency of punishment should form part of the consideration of the reasons for intervention under s.246 in the manner in which the Commissioner say was appropriate. The response to misconduct is a matter of discretion. The time, place and circumstance of one breach, the circumstances of the offender and the implications for adequate administration of an enterprise, will seldom coincide. It is desirable that employers where they can should exercise leniency. Employers should not be discouraged from such a course by labouring under the disability that once a benign view is taken in one case that no other view is available."

[37] The AMIEU initially submitted reinstatement was the appropriate remedy in the circumstances, with orders pursuant to ss.391(2) and 391(3) for continuity of service and backpay, however at the commencement of the hearing the Commission was advised Mr Jolley had found new employment and no longer sought reinstatement and instead sought compensation. Mr Jolley confirmed this during his evidence.

[38] The AMIEU submitted an order for compensation would be appropriate. Mr Jolley provided a payslip for the period ending 24 November 2019 showing earnings of $38,002.69 for the year to date with CHS. The AMIEU submitted this reflected 21 pay weeks, and as such Mr Jolley's pay per week over that period was $1,809.65. The payslip provided with CHS for the specific week in question described the gross amount for that week as $1,537.23.

[39] CHS submitted that it would accept the amount of approximately $1400 per week reflected Mr Jolley's ordinary time earnings per week.

[40] The AMIEU submitted Mr Jolley had made efforts to mitigate his loss, applying for work online and sending resumes to employers who were advertising. Mr Jolley said in his witness statement he was applying for different types of jobs, not just meat industry work.

[41] Mr Jolley's evidence was that in around late February 2020 he was contacted by one of the meat processing establishments he applied for work at and was offered a job. He accepted the job and attended an induction at the site on 4 March 2020 and was paid $167.66 for attending the workplace for six hours for the induction. As a result, in difficulties

verifying Mr Jolley's Q-Fever vaccination, Mr Jolley did not commence employment until 22 March. Mr Jolley said that he was employed as a labourer, but that there is a possibility of being promoted to work as a boner at the new workplace.

[42] Mr Jolley provided four payslips to the Commission that he said were from his new employer which covered the period up until 14 April 2020. The payslips were admitted into evidence.[8] The first payslip covered the period from 18 March to 24 March, the second from 25 March to 31 March, the third covered the period from 1 April to 7 April, and the fourth covered the period from 8 April to 14 April 2020. Mr Jolley gave evidence that he worked since 14 April but had not received payslips for those periods.

[43] Mr Jolley gave oral evidence that he earned $643.00 as a net amount in his bank account the following week covering the period 15 April to 21 April but could not give a gross amount. Mr Jolley said for the following pay period of 22 April to 28 April he had not yet received a pay as it would be received on a Thursday night. Mr Jolley said in that week he worked for 32 hours and there was the ANZAC day public holiday for which he was rostered but was not required to work and expected to be paid at ordinary rates for that day.

[44] The payslip ending 14 April identified Year to Date earnings of $2,989.78. It was not contested that Mr Jolley's employment was weekly hire at CHS however Mr Jolley's evidence was that his new employment was on a daily hire basis, that is he said could be stood down without wages if there was insufficient work and he said this had occurred on four separate days since he commenced employment.

[45] It was common ground that Mr Jolley was not paid notice pay when terminated.

[46] As noted, CHS did not provide submissions in the matter. In its Form F3, CHS said that on 22 November 2019 it was reported that two male people at the Cannon Hill abattoir site were viewed on video footage opening the vending machine door on site and taking cans of drink from the vending machine without paying. CHS investigated and identified that Mr Jolley may be one of the people involved in the theft.

[47] CHS said that on 4 December 2019, Mr Jolley was interviewed and confirmed that the person in the video was him, and that he took the drink without paying for it. CHS said Mr Jolley stated he did not know why he took the drink, and that Mr Jolley also acknowledged that he understood taking the drink was stealing. CHS said that Mr Jolley at no time raised the broken vending machine with anybody on site.

[48] CHS said Mr Jolley was stood down on pay and provided an opportunity to show cause which was followed up with another meeting on 11 December 2019 with the Chief Operations Officer, the Executive Director, and the Group HR Manager and also included Mr. Jolley's support person.

[49] CHS said that on consideration of all the facts, CHS held the firm view that Mr Jolley's behaviour in stealing the drink from the drink machine, was considered serious misconduct, and breached CHS' policies and trust. CHS said that it was of the belief that Mr Jolley's behaviour in stealing warranted the termination of his employment, and that Mr Jolley's termination was not harsh, or unjust and was for a valid reason. CHS said that Mr Jolley was provided with due process and has received all entitlements due to him.

[50] CHS submitted in closing oral submissions that Mr Jolley was seen as an impeccable employee and ear marked for future promotion however CHS said it regarded theft as a serious issue and a criminal offence and referred to the terms of the enterprise agreement.

[51] The AMIEU submitted that there is no need for the Commission to consider whether Mr Jolley had committed an offence and it was not the Commissions role to do so.

[52] CHS also said the video footage showed other employees looked into the machine when the door was open but did not take any items.

[53] CHS said the vending machine operator provided a float of funds at security and CHS's understanding was no person who had come forward and sought a refund and had not received one. CHS said the issues concerning the vending machines could have been raised at the workplace consultative committee which meets monthly and this did not occur.

[54] CHS said there was another person who also took from the vending machine on the day Mr Jolley did and he was also terminated. CHS said weighing it all up, Mr Jolley's conduct was opportunistic however it was considered whether it could occur again.

[55] CHS relied on an email from the vending machine company sent to CHS which said:

> "Good Morning Clint
>
> Yes, we do keep a service call log and having gone back over the past couple of months, we have only had a couple of issues at ACC. The latest being in the drink machine in the lower lunchroom on the Kill Floor. Our procedure for all complaints is as follows:
>
> Firstly, we have a $20 float left at the Security Gate – where staff can collect any refunds.
>
> When a call comes in this is the procedure we follow:
>
> The caller is asked multiple questions as to the occurrence and then if they have used cash, their name is taken and they are advised that a refund can be collected at the Security Gate. Our refiller is very prompt in attending any service issues and therefore staff have also collected their refund personally from him at the machine.
>
> If they have used cashless (tap and go), which always checks the users balance is at least $15.00 credit to enable a transaction to take place. A selection is made and the cost is deducted from the card. If the product doesn't dispense, the senses on the machine recognises this and a refund is automatically made to the card – this can take between 24-48 hours. The caller is always advised if this does not occur, to advise us so we can manually enter the system and activate a refund. 99.9% of the time the refund is automatically refunded to their card.
>
> The main reason for service complaints have been either bent/damaged coins or foreign objects placed in the coin chute.

> I will give you the name and contact number of our Contractor (refiller) who services the machines on site who will verify the above and will be able to assist you with any further information you may require."

CONSIDERATION

Section 387 of the Act

[128] It is necessary in considering whether the dismissal is harsh, unjust or unreasonable, to have regard to the matters in s.387 of the Act:

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

[56] The AMIEU submitted that rrelevant to the analysis of whether there is a valid reason for the termination of the application's employment is the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd*[9]:

> "In its context in s.170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly."

[57] The AMIEU submitted that the reason given for the termination of Mr Jolley was that he "*…stole a can of coke from the vending machine located on site*." The AMIEU said it is not disputed that stealing of property can be a valid reason for the termination of an employee's employment. It was confirmed in closing oral submissions that Mr Jolley did not contest there was not a valid reason for dismissal on the facts of this case.

[58] In its Form F3 at Q3.1, CHS said that Mr Jolley was dismissed for "serious misconduct – theft." At Q3.2, QHS said that on consideration of all the facts, CHS held the firm view that Mr Jolley's behaviour in stealing the drink from the drink machine, was considered serious misconduct, and breached CHS's policies and trust and that CHS believed that Mr Jolley's behaviour in stealing warranted the termination of his employment. I am satisfied on the evidence that CHS had a valid reason for dismissal.

(b) whether the person was notified of that reason

[59] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[10] and in explicit[11] and plain and clear terms.[12]

[60] Notification occurred at the first meeting on 4 December 2019. This appears from the evidence to have been the first occasion the reason could be communicated to Mr Jolley. Mr

Jolley appears to have had the reason explained to him in the presence of an AMIEU representative and the explanation was in explicit, plain, and clear terms.

[61] I am satisfied that Mr Jolley was notified of the reason for the dismissal.

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

[62] Mr Jolley was given an opportunity to respond to the accusation that he stole from the vending machine at the meeting, and later in response to the show cause letter. Mr Jolley availed himself of that opportunity at the meeting, and by later writing a response which was provided to the employer.

[63] I am satisfied Mr Jolley was given a reason to respond to the allegations against him.

(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

[64] In its submissions, the AMIEU accepted Mr Jolley was given an opportunity to have a support person present and submitted this consideration does not arise in this case.

[65] Mr Jolley was explicitly asked whether he wanted to have Mr Reynolds present. An AMIEU representative was present at both the initial meeting on 4 December and at the later termination meeting. I am satisfied there was no unreasonable refusal by CHS to allow Mr Jolley to have a support person present.

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

[66] In this case, the decision of CHS to terminate Mr Jolley related to the Mr Jolley's conduct, rather than unsatisfactory performance. This consideration does not arise.

(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

[67] CHS' Form F3 states CHS employed 750 employees. CHS did not make any specific submissions on this point.

[68] The AMIEU submitted that the size of CHS' business would not have impacted upon the procedures followed during the termination and that this consideration is not relevant to the circumstances of this matter.

[69] I am satisfied given the size of the business that there was likely no impact on the procedures followed in effecting the dismissal.

(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

[70] The AMIEU submitted CHS had dedicated human resource management specialists and that therefore this consideration is not relevant to the circumstances of this matter.

[71] CHS did not make specific submissions on this point. From the letters provided, it is clear CHS had at least one human resource officer who took an active role in the process.

[72] The process followed was clear and procedurally fair. Mr Jolley was provided with the specifics of allegations against him and given a reasonable opportunity to respond.

[73] This consideration therefore does not arise.

(h) any other matters that the FWC considers relevant

[74] CHS did not call any evidence concerning the process it submitted was available for claiming refunds for faulty vending machines. The evidence of Mr Yaxley that he had lost in the order of $100 over a number of years to the vending machines was uncontested. As was the evidence of Mr Brinkworth that he had to repeat purchases of an item on numerous occasions because the machines dispensed the wrong item, and also having after a number of unsuccessful attempts contacted the service number for the vending machine to be promised a refund that was never delivered. Mr Brinkworth then complained a second time after further failure of the vending machines and never received a phone call from the service provider in response to his complaint.

[75] The uncontested evidence of Mr Yaxley and Mr Brinkworth corroborates Mr Jolley's evidence (again uncontested) that there have been many occasions where he had put money in the vending machines without receiving the item he had paid for or alternatively received incorrect change or no change. I accept this evidence and the evidence that Mr Jolley has lost tens of dollars in recent years for these reasons.

[76] CHS made a submission that another employee was terminated on the same day as Mr Jolley for the same conduct and spoke to the importance of being entitled to a consistent approach on such matters. The AMIEU submitted the fact that employees who have engaged in misconduct have been given different punishments is not to be considered a double standard unless the Commission is convinced that their circumstances are genuinely similar. CHS did not call any evidence about the circumstances concerning the other employee or even elaborate on its submissions in that regard. Given the paucity of the material before me on that submission I do not intend to afford it any significance in my conclusions in this matter.

[77] It is relevant that Mr Jolley had an unblemished employment record for just short of 10 years' service. It is also significant that Mr Jolley was dismissed just prior to completing ten years' service negating his eligibility for long service leave which would result in a substantial lost to him were the decision to terminate him on the basis of misconduct remain undisturbed given the long service leave provision in the *Industrial Relations Act 2019 (Qld).*

[78] I also agree with the submission of the AMIEU that the decision in *Qantas Airways Limited v David Dawson* is distinguishable from the facts in this case on account of the fact that Mr Jolley was honest about his conduct when confronted with it and showed remorse for it.

[79] This matter is also distinguishable from the facts in another matter with some similarity to the facts which was the matter of *David Thomas and Frederick (Junior) Faamausili Ailua v Virgin Australia Airlines Pty Ltd t/a Virgin Australia*[13] where ground crew for Virgin stole two packets of cigarettes from a cargo shipment which was damaged and partially open after a flight. Both staff in that matter denied stealing the cigarettes and continued to deny doing so. They were subsequently found by the Commission to have stolen the cigarettes and the Commission pointed to their deception and dishonesty specifically in the following findings:

> "**[116]** In my view, Virgin's evidentiary case provided a sound, logical and rational foundation for the Commission, to be satisfied that the applicant's denials of involvement in the theft, cannot be accepted. Obviously, neither applicant pleaded the severity (harshness) of their dismissal in the context of a theft amounting to just two packets of cigarettes, valued at probably less than ~$50.00 total. To have done so, would be to contradict their consistent line that they had not done anything wrong and had neither stole, nor received stolen freight. Whether it was a relatively small value theft or something more substantial, is really not the point. Theft is theft - no matter the value. However, had the applicants not been untruthful during their investigation and in their evidence before the Commission and in Mr Thomas' case, his self-serving concoction of invention, I might have put their conduct, particularly in Mr Faamausili Ailua's case, down to a stupid and very bad error of judgment. By not admitting their conduct, I am reminded that it is often not the conduct itself that determines one's fate, but the subsequent attempt at cover-up. Nevertheless, regrettably, the applicants have 'made their bed and must now lie in it'. I am satisfied the allegations against the applicants have been proven. I turn now to the matters the Commission is required to take into account under s 387 of the Act."

[80] There was no deception or dishonesty on the part of Mr Jolley once confronted with his actions in taking the can of Coke. Mr Jolley owned up to taking a can of Coke with a likely value of $2 or $3 in circumstances where he had lost many times that amount to the same vending machines over a period of time without recompense.

CONCLUSION ON HARSH, UNJUST OR UNREASONABLE

[81] I have reached conclusions on each of the relevant elements of section 387 and having weighed all of those matters have determined that in all of the circumstances of this case there are enough mitigating circumstances including his immediate expression of remorse, and his long and unblemished history with CHS, to conclude that Mr Jolley's dismissal was harsh and, on that basis, unfair.

[82] Mr Jolley engaged in one instance of misconduct in nearly 10 years of otherwise unblemished service which in its proper context was a one off opportunistic and momentary lapse of judgement in taking the can of Coke without paying for it. It was out of character for him and occurred in circumstances where it was the last working day before plant shut down, the vending machine door was left open and he had on multiple previous occasions paid money for an item from one of the vending machines without obtaining that item because of some operational fault in the vending machines.

[83] Having determined the dismissal was unfair it is necessary to determine an appropriate remedy.

REMEDY

[84] Given the Applicant has obtained other employment and does not seek reinstatement I am satisfied that reinstatement would be inappropriate. I now turn to consideration of compensation. Section 392 provides as follows:

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

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

Compensation cap

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

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

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

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

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

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

[85] I have adopted the approach in *Sprigg v Paul's Licensed Festival Supermarket*[14] to assessment of compensation. Despite the instance of misconduct that has damaged the previously good relationship, I am satisfied given his length of service and exemplary history it is likely had he not been terminated he would have remained in employment with CHS for at least another 6 months.

[86] There was some difference between the parties about the proper basis to assess his likely earnings had he continued in employment. The difference was based on the AMIEU submission that including penalty payments his earnings in the 21-week period based on year to date figures before he was terminated indicated an average over the period was $1,809.65 per week. The one payslip that was in evidence concerning his employment with CHS and provided by Mr Jolley indicated his gross earnings for that week were $1,537.23.

[87] CHS indicated that the assessment should be based on ordinary time earnings excluding other payments and submitted this was in the order of $1400 per week. Section 392(c) refers to the remuneration that the person would have received or would have been likely to receive. There is no requirement to limit consideration to ordinary time earnings. At the same time, because the evidence is somewhat limited about the clear discrepancy between the sum in the one weekly payslip provided and the average based on year to date earnings, I

have decided to adopt an estimate that falls between the figures provided at an amount of $1650 per week. $1650 multiplied by 26 weeks equals $42,900.

[88] Mr Jolley was terminated on 11 December 2019. He was not paid notice pay. The evidence at the time of the hearing was that Mr Jolley was paid a sum for an induction and then earnings with his new employer commenced on 25 March 2020 and up to his payslip for the week ending 14 April was $2,989.79. In the week ending 31 March he earned $377.54. In the week ending 7 April he earned $655.24. In the week ending 14 April he earned $1020.91. In the week ending 21 April, although not clear based on his claimed net earnings for that week, the gross sum would have been in order of $830 dollars. For the week ending 28 April he said he worked 32 hours and expected to be paid for the ANZAC day public holiday because he was rostered but not required to work. If that is correct he would have been paid for 40 hours which would have amounted to a sum in the order of approximately $1000.

[89] On that basis as an estimate Mr Jolley earned as at 28 April approximately $4,820.00 from his new employer. This amount deducted from $42,900 equals $38,080. I consider it is likely that Mr Jolley will continue to earn amounts in the order of $900 per week from 29 April to the date of this decision and the requirement for CHS to pay compensation which I intend to order 14 days from the date of this decision. On that basis I intend to deduct a further $2,700 based on approximately three weeks, reducing the amount to $35,350.

[90] Mr Jolley has given uncontested evidence about his efforts to mitigate his loss. I make no further deduction in relation to mitigation.

[91] There has been no suggestion from CHS an order for compensation will affect the viability of their business.

[92] The AMIEU accepted that s 392(3) would need to be applied regarding misconduct in this case. I am satisfied that Mr Jolley engaged in misconduct that contributed to CHS's decision to dismiss him and it is plain on the evidence the one instance of misconduct was so serious from CHS's perspective, that it alone warranted summary dismissal.

[93] Whilst I have found CHS had a valid reason for dismissal, I have ultimately rejected the decision that dismissal was the appropriate course taking into account all of the full context and circumstances of this case. However, whilst I have found the misconduct was a momentary lapse of judgement, and out of character, it is important that this decision not be misunderstood as an indication that such conduct should not generally be regarded as serious. The outcome here turned on the specific facts of this case as set out above. Given the nature of the misconduct a reasonably significant discount is appropriate in this case. I have determined it should be 20%. 20% of $35,350 equals $7,070 and reduces the amount of compensation to $28,280.

[94] $28,280 does not exceed the compensation cap. An order will issue separately and concurrently with this decision that Cannon Hill Services Pty Ltd trading as Australian Country Choice pay to Mr Adam Jolley the sum of $28,280 gross taxed according to law within 14 days.

[95] Whilst not strictly a matter for the Commission in the course of the matter it was common ground that in the event of a determination that his termination was unfair, Mr Jolley

would be entitled to payment of pro rata long service in accordance with the long service leave provisions of the *Industrial Relations Act 2019 (Qld)*.

COMMISSIONER

Appearances:

Mr C. Buckley of the Australasian Meat Industry Employees Union appearing for the Applicant
Mr Clint Adams appearing for the Respondent

Hearing details:

2020,
Brisbane:
April 29

Printed by authority of the Commonwealth Government Printer

<PR719202>

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1 Exhibit 3, Statement of Adam Jolley.

2 Exhibit 1 Statement of Clinton Yaxley.

3 Exhibit 2, Statement of Luke Brinkworth.

4 [2017] FWCFB 1712.

5 Applicant's Outline of Submissions dated 24 March 2020 at paragraph 20.

6 Applicant's Outline of Submissions dated 24 March 2020 at paragraph 21.

7 PR931440 (AIRC, Lawler VP, 14 May 2003).

8 Exhibit 4 and Exhibit 5.

9 (1995) 62 IR 371 at 373.

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

11 *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

12 Ibid.

13 [2019] FWC 4464.

14 (1998) 88 IR 21.