



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kimon Stamoglou

v

Banyule City Council
(U2020/2727)

COMMISSIONER BISSETT

MELBOURNE, 15 SEPTEMBER 2020

Application for an unfair dismissal remedy.

[1] Mr Kimon Stamoglou (Applicant) has made an application to the Fair Work Commission pursuant to s.394 of the *Fair Work Act 2009* (FW Act) seeking relief from unfair dismissal. The Applicant was employed by the Banyule City Council (Council) as a multi-skilled operator in the “Cleansing” team of the Council. The Applicant’s employment was terminated on 2 March 2020 effective from 3 March 2020. He was provided pay in lieu of notice.

[2] At the commencement of proceedings I granted permission for the Council to be represented by a lawyer being satisfied that the matter could be dealt with more efficiently if permission was granted. The Applicant represented himself.

[3] Having heard from the parties I determined that the matter should proceed by way of conference pursuant to s.398 of the FW Act.

[4] On 30 January 2020 the Applicant was stood down following an incident in which he was said to have intimidated Mr Steve Watson, the Cleansing Team Leader. On 10 February 2020 the Applicant was provided with a letter in which he was given an opportunity to respond to a number of matters in relation to his behaviour in the workplace. The allegations put to the Applicant were that:

1. You presented in the workplace wearing inappropriate footwear, not in line with the required dress code. When I gave a lawful direction to change into the appropriate footwear you responded adamantly in a disrespectful and rude tone that ‘you didn’t need to’. After being advised there could be repercussions for disobeying this request you walked away and changed your footwear.
2. You were requested by myself to provide account details as proof of evidence for bicycle parts that you were seen taking from a Council asset (‘truck’) and placing in the boot of your personal vehicle on Monday 13 January 2020. This was in relation to concerns raised in the meeting on 16 January 2020. You responded that you weren’t going to provide the information as requested. When Lara McNally,

Senior People & Culture Business Partner later asked if you were going to provide the aforementioned evidence you reiterated that you had no intentions of providing Mr. Darling with proof of your account details. When Ms. McNally advised that refusal to follow reasonable instruction could lead to further disciplinary action you responded in an aloof manner that ‘you didn’t care’.

3. You approached Terry McCarthy, Acting Cleansing and Waste Recovery Supervisor in a ‘highly agitated, aggressive, antagonistic, outwardly defiant and particularly demeaning manner’ asking after details for a completed CRM. Mr. McCarthy advised that such details were confidential and not shared with staff. You would not accept this response, albeit it [was] reiterated by Claudia Oqueli, Operations Infrastructure Coordinator and Steve Watson, Cleansing Team Leader and rushed in a ‘hurried manner to speak to Mr. Darling’.
4. While driving a Council asset (‘truck’) you intentionally sat stationary for 4 minutes on Wadham Street, Ivanhoe in view of a white ute owned and occupied by Mr. Watson, Cleansing Team Leader. This was unwarranted and intimidating towards Mr Watson. When Mr. Watson’s car turned into Wadham Street you turned right into Jellicoe Street, Ivanhoe and drove for a short period of time before stopping and reversing in an unsafe manner and with the intention of following Mr Watson back up Jellicoe Street. Your passenger Shaker Al Noobi, Driver/Labourer, questioned your motives and asked you to stop as he felt your actions were putting both of you at risk. At the intersection of Jellicoe Street and Wadham Street you turned right and parked stationary opposite Mr. Watson’s repositioned ute. Following this Mr. Al Noobi advised you that he would not return to the Operations depot with you as the driver of the truck. Mr. Al Noobi repeatedly asked that you remove yourself from the vehicle as ‘he did not feel safe’.
5. Between 12:26pm and 5:14pm you sent 15 text messages and made 9 calls to Ms. McNally. This continued communication was despite Ms. McNally’s response advising your concerns had been referred to Mr Darling. Your messages were confrontational and targeted Ms. McNally’s character and professionalism. At 5.06pm you wrote ‘Don’t you see this as harassment? Or perhaps my barrage of text and phone calls is being harassing to yourself?’ Only after Ms. McNally responded she ‘was not ignoring you but that she finishes work at 3pm on Thursday’s and was home with her children’ did you cease your messages.¹

[5] The Applicant was invited to a meeting with the Council on 12 February 2020 to enable him to respond to the matters raised. On 21 February 2020 the Applicant received a “show cause” letter following his response to the matters raised in the letter of allegation. That show cause letter indicated that Mr Stamoglou confirmed most of the allegations although disagreed on some details.² The Applicant, through his union, provided a response to the show cause letter on 26 February 2020.³

[6] On 2 March 2020 the Applicant was provided with a letter of termination. That letter, signed by Mr Geoff Glynn, Director Assets and City Services, said, in part:

I acknowledge the points raised in the response particularly regarding your personal circumstances and your desire to be granted one final chance by Council. However,

your behaviours have been inconsistent with Councils Values and Code of Conduct for some time. Despite ongoing support including, specific EAP Managers referral sessions in 2017, coaching/counselling and previous warnings there has not been demonstrated consistent changes in the past and I am not convinced that this will be different in the future. Your responses to situations are unacceptable and it was apparent through the various meetings held recently you have not appeared to take accountability for this behaviour and do not accept that this is inappropriate. Despite the response put forward by the ASU outlining factors contributing to this, the behaviours shown can no longer be tolerated in the workplace.

I am satisfied you spoke to colleagues and management inappropriately on multiple occasions, failed to follow reasonable management directions and drove the truck in an unsafe manner creating a risk for yourself and several colleagues. Further I'm satisfied your communications to Lara were excessive in the circumstances and inappropriate.⁴

[7] On considering relevant policies and a range of formal and informal warnings given to the Applicant, Mr Glynn advised the Applicant that his employment was terminated forthwith.

PRELIMINARY MATTERS

[8] Section 396 of the FW Act requires that, prior to considering the merits of an application, some preliminary matters need to be considered.

[9] I am satisfied (and it is not in dispute) that the application was made within the time prescribed by the FW Act; the Applicant is protected from unfair dismissal; the Small Business Fair Dismissal Code does not apply and the Applicant's employment was not terminated because of redundancy.

UNFAIR DISMISSAL

[10] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

[11] In addition to my findings above, I am also satisfied that the Applicant has been dismissed.

[12] In order to determine if the Applicant has been unfairly dismissed it is necessary to determine if his dismissal was harsh, unjust or unreasonable.

[13] Section 387 of the FW Act sets out those matters to be taken into account in deciding this matter. It states:

387 Criteria for considering harshness etc.

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

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

[14] I have considered each of these matters below.

(a) *Was there a valid reason for dismissal*

[15] In *Selvachandran v Peterson Plastics Pty Ltd*⁵ his Honour, Northrop J said:

In its context in subsection 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 subsection 170DE(1). At the same time the reason 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 each treated fairly...

[16] It is incumbent upon the Commission in a matter that involves misconduct to determine for itself, on an objective basis, if the conduct relied on for the dismissal did, in fact, occur.⁶ The test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct.⁷ The standard of proof is on the balance of probability.⁸

[17] There are five matters relied on by the Council as justifying the dismissal of the Applicant. I consider each of these below.

1. *The bicycle parts*

[18] Mr Russell Darling, Manager Operations, gave evidence that on 13 January 2020, he was advised that the Applicant was removing bicycle parts from a Council truck and placing them in his car. Mr Darling considered this a breach of Council procedures which state that waste cannot be taken by staff without permission. Mr Darling questioned the Applicant about the matter. The Applicant said that he had purchased the parts and had collected them from the seller at lunch time. Mr Darling decided to give the Applicant an opportunity to prove that the parts had been purchased. He asked the Applicant to provide evidence of the purchase such as a screenshot of the correspondence. The Applicant failed to do so. At a meeting on 15 January 2020 with the Applicant attended by Ms McNally, Senior People & Culture Business Partner, the Applicant again refused to provide the evidence sought.

[19] The Applicant said he explained how he came about the bicycle parts. He agreed, however, that he failed to provide the evidence of the purchase as sought by Mr Darling.

Finding

[20] I am satisfied on the evidence before me that the Applicant failed to provide Mr Darling with evidence that he had, in fact, purchased the bicycle parts he was seen removing from a Council truck and placing in his car. Further, I am satisfied that, in accordance with Council policy (which was not disputed), Mr Darling had a reasonable basis to request the Applicant provide the information sought.

2. *The footwear incident*

[21] Mr Darling gave evidence that on the morning of 30 January 2020 he met with the Applicant in relation to evidence about the purchase of the bicycle parts. In that meeting he noticed that the Applicant was not wearing required safety boots, even though he had not finished work for the day. Mr Darling “directed [the Applicant] to immediately go and put on his required safety boots, however, his response to me was adamant and, in a disrespectful and rude tone, he told me that he did not need to.”⁹ Mr Darling said that after he advised the Applicant that he was “being given a lawful direction and that there could be repercussions for disobeying”, the Applicant changed his footwear.¹⁰

[22] The Applicant gave evidence that he wore runners to work (on 30 January 2020). The Applicant said he did not say he would not change his footwear in his discussion with Mr Darling, he just argued about what others were doing. He did not think he was being rude. He does not recall Mr Darling telling him there may be repercussions if he did not comply with the direction to change his footwear.

[23] The Applicant said he had been battling with Mr Darling over safety wear. He said he had approached Human Resources as he did not consider it acceptable for managers to not wear protective clothing. The Applicant said he had “made a dozen complaints on Steve Watson not wearing the appropriate workwear, I mean, the 11th time, I know that they haven't spoken to Steve about it because he's continually breaking the law, isn't he? He's still not following code of conduct.”¹¹

Finding

[24] I am satisfied that the Applicant was not wearing the proper safety footwear to work on 30 January 2020 and that the direction given to him to change his footwear was a lawful and reasonable direction. It is hard to imagine that the requirement to wear the correct footwear in circumstances where the Applicant agreed that he was not doing so could not be reasonable or lawful. Further, I am satisfied that the Applicant was rude and disrespectful in his interaction with Mr Darling on this issue.

[25] Whilst the Applicant made a number of claims of managers failing to wear the correct safety clothing there was no evidence of this but, even if it is the case, this was no excuse for the Applicant refusing to do so and was no reason for the Applicant speaking to Mr Darling as stated.

[26] I am therefore satisfied that the Applicant engaged in the conduct alleged in relation to footwear.

3. *Interaction with Mr Terry McCarthy*

[27] The Applicant's evidence is that on 30 January 2020 he sought access to a CRM¹² from Mr Terry McCarthy, Acting Cleansing and Waste Recovery Supervisor. The Applicant said that:

with Terry McCarthy, I didn't feel like I was being abusive to him or talking to him in an inappropriate manner. I tried to have a talk with him about some work-related issues that we had and complaints for some store owners, and I wanted some information to clear things up and he wasn't very responsive or helpful in any way...And with Terry McCarthy, in the office where me and Terry were talking and I'm alleged to talk to Terry - it was in the office - and I was talking to him inappropriately, I've heard people using F words, C words frequently in the office in front of Russell and nothing really happened...¹³”

[28] The Applicant said that Mr Watson “butted in” to the conversation and the Applicant told Mr Watson it was none of his business.

[29] Mr McCarthy gave evidence that on 30 January 2020, the Applicant asked for details of a completed CRM. The Applicant was aggressive and rude to Mr McCarthy in this exchange. Mr McCarthy said he felt “belittled” by the way he was spoken to by the Applicant but that this was “not the first time that he had spoken to me in that manner.” Mr McCarthy told the Applicant that “the details of the CRM were confidential and were not shared with staff.” Mr McCarthy said that the Applicant did not accept this even though it was reiterated

by Ms Oqueli, Operations Infrastructure Coordinator, and Mr Watson who were present at the time. He said that the Applicant “rushed to speak to Russell Darling” about the issue.

[30] Mr McCarthy was asked to write a statement about the incident when it occurred which he attached to his witness statement in these proceedings.¹⁴ That statement says that the Applicant was behaving in a “highly agitated, aggressive, antagonistic...particularly demeaning manner”. Mr McCarthy expressed his frustration at not being able to deal with the Applicant’s “antics”.

Findings

[31] I accept Mr McCarthy’s contemporaneous statement as an accurate description of the interaction with the Applicant. Further, by the Applicant’s evidence it appears he used language that could be described as “colourful” at best and rude and inappropriate otherwise.

[32] I note that the Applicant does not dispute the facts of the situation as described by Mr McCarthy and, for this reason, I accept Mr McCarthy’s account of the incident and find that the Applicant did behave in an inappropriate manner, described as aggressive, antagonistic and highly agitated, with Mr McCarthy on 30 January 2020.

4. *The Steve Watson incident*

[33] This allegation concerns inappropriate conduct by the Applicant while he was driving a Council truck and his interactions with Mr Watson.

[34] The Applicant said that on 30 January 2020 he had finished his work run so drove to where his personal car was parked in the Council truck as his car had been “playing up”. The Applicant said he pulled up at his car then Mr Watson pulled up and, as Mr Watson was getting out of his car, the Applicant drove off in the Council truck.

[35] On 26 February 2020 the Applicant signed a statutory declaration in relation to the incident.¹⁵ In that declaration the Applicant says:

- He went to Wadham Street¹⁶ to check on his personal car. He parked the Council truck behind his car.
- He saw Mr Watson at the T-intersection of Wadham and Jellicoe Street. The Applicant did not get out of the truck but watched Mr Watson to “see what he was doing”. After 8-10 minutes Mr Watson turned right into Wadham Street and parked his car not quite parallel with the Applicant’s car [on the opposite side of the street].
- The Applicant saw Mr Watson getting out his car so drove off in the truck “avoiding any confrontation”.
- The Applicant turned right into Jellicoe Street and proceeded 20 metres up the road and then decided he should check his car. He reversed his truck back down Jellicoe Street and turned right into Wadham Street where his car was. When he did he noticed Mr Watson had done a U-turn and was parked on the opposite side of the road on the same side as the Applicant’s car “virtually on the corner”.

- The Applicant noticed Mr Watson about “1.5 metres in the middle of the road”. He did his best to avoid hitting Mr Watson and “fortunately...braked in time” so no contact was made.

[36] The Applicant said that Mr Watson “should be thanking me that I didn’t hit him”.¹⁷

[37] The Applicant was shown video evidence of the incident from cameras mounted on the Council truck he was driving. He said that he cannot remember if he got out of the truck to check his own car when he stopped in Wadham Road. He said that after he turned right into Jellicoe Street he thought Mr Watson might do something to his car like scratch it or “put a bomb in it” and that is why he reversed and turned back into Wadham Road.¹⁸ The Applicant did not consider he was travelling fast when he reversed down Jellico Street and stated he did not see Mr Watson when he turned into Wadham Road. He Applicant agreed that the video evidence recorded that the Council truck the Applicant was driving was then travelling at 18km/hr and the Applicant had to brake to avoid hitting Mr Watson. He said that when he stopped, Mr Watson told him to get out of the truck and let Mr Shaq Ali Al Noobi drive back to the depot, which he did.

[38] The Applicant had Mr Al Noobi, another Council employee, in the truck with him at the time of the incident with Mr Watson. The Applicant said that he could not recall Mr Al Noobi asking him to stop. The Applicant said that Mr Watson told him to get out of the truck and let Mr Al Noobi drive, so he did.

[39] Mr Watson was not called to give evidence. Ms McNally gave evidence that he has been absent from work since 30 January 2020 (the date of the incident) and remains in a “fragile state”. Ms McNally did, however, provide a copy of a contemporaneous written statement by Mr Watson of the incident.¹⁹

[40] In that statement Mr Watson says:

- Early in the morning of 30 January 2020 he was involved in the discussion with the Applicant in relation to the CRM. The Applicant would not allow Mr Watson to explain why he could not have the CRM.
- At about 11.20am Mr Watson was told that the Applicant’s car was parked in Wadham Road. Mr Watson went there and waited for the Council truck [driven by the Applicant] to arrive. The Applicant drove past Mr Watson and around the block and stopped about 40 metres away. Mr Watson started to drive towards the Council truck but the Applicant drove away. Mr Watson did a U-turn [in Wadham Road], saw the Applicant reversing and then driving back up Wadham Road.
- Mr Watson got out of his car and started to walk towards the truck. The Applicant then sped up and needed to brake hard to avoid hitting Mr Watson.
- Mr Watson asked the Applicant what he was doing in the street. The Applicant repeatedly said “I don’t have to talk to you, you don’t talk to me so I won’t talk to you.” The Applicant then said Mr Watson was not his boss.
- Mr Watson told the Applicant to return to the Council depot a number of times to which the Applicant answered “no” and repeated that Mr Watson was not his boss.

Mr Watson then asked Mr Al Noobi (referred to in the statement as “Shack”) to change over and go to the depot.

- At the depot the Applicant got out of the truck, gathered his bag and walked out of the gate. Mr Watson asked him to go to the office but the Applicant refused.
- Mr Watson went to the office with Shack [sic] [Al Noobi] and had Claudia meet them in the conference room where he outlined the information contained in the statement. He asked Shack for confirmation and he agreed that this was what had happened.

[41] Ms McNally gave evidence that on 30 January 2020 she was with Mr Darling when they learnt of the incident between the Applicant and Mr Watson. She said that late that day she and Mr Darling spoke to Mr Al Noobi as they knew he was with the Applicant. Ms McNally typed up an email note of the conversation that she sent to Mr Darling that day.²⁰ That note said:

Kimon [Stamoglou] driving towards Steve

Shaq – come 12:50pm wash the truck. Drive out of the yard and see Steve Watsons’s car and we drove round round round. Shaq asks Kimon what he’s doing.

Kimon drive past Steve car, Shaq says keep going. Steve walking near the truck. Shaq yells to stop. Kimon stops short of Steve, but only just.

Shaq says let’s go to the Depot. Expresses his concern for Kimon driving and request to take over. Shaq takes over driving.

Lara, ‘you requested to drive the truck because ?’ Shaq ‘I felt unsafe’

Shaq has asked that he no longer work with Kimon as he’s angry and Shaq feels unsafe.

Shaq spoke with concern in his voice and expressed that he had a family to go home to and that he just wanted to do the job and be safe.

[42] Ms McNally also gave evidence that at 9.50am on 30 January 2020 she received a text message from the Applicant that read:

I’m still waiting for an apology from Steve Watson about the allegations made that Beewar st bin was not emptied²¹

[43] She said that the text message made no sense to her but suggested that the Applicant was agitated.

[44] Mr Darling gave evidence in his written statement that:

On 30 January 2020, I also made a phone call to our Infrastructure Team Leader, Steve Watson (“Steve”), to instruct him to advise [the Applicant] what his work task would be for the following day. Steve’s response to me was that I would have to do it

myself and when I asked him why, he told me that he was having a breakdown and he hung up the phone. I was immediately concerned and I started ringing other staff in the Depot to enquire what was wrong with Steve. I was told there had been a serious safety incident between [the Applicant] and Steve involving a truck and that Steve was extremely shaken and had left work. I then met with Lara, as Human Resources Support, to advise her of what had happened.²²

[45] Mr Darling confirmed the discussion he and Ms McNally had with Mr Al Noobi.

[46] Mr Darling provided video evidence taken from the truck being driven by the Applicant at the time of the incident with Mr Watson. That evidence consists of 6 videos – 5 of which are taken from a forward looking camera in the truck and a sixth from a side camera on the driver’s side. The content of the videos was attested to by Mr Watson. The Applicant concurred with much of what the footage showed.

[47] Mr Darling said that the Applicant had little respect for Mr Watson and refused to communicate with him.

[48] Mr Al Noobi gave evidence. He stated that he cannot read or write English very well. He produced a statement of 12 February 2020 that was written with the assistance of another employee at the Council but Mr Al Noobi said he dictated what was to be written down. Mr Al Noobi says he understands fully what was in the statements he made and he relies on them.

[49] Mr Al Noobi said that when he was in the truck with the Applicant driving he told him “don’t do it” but he would not listen, he tried to help but the Applicant would not listen and that what he wanted to do was go to work and come home safe. He said he told the Applicant to leave Steve [Watson] alone but he would not listen.²³

Findings

[50] I have viewed the video tapes provided by the Council in this matter.

[51] The first video commences at 12.02pm. It shows the Council truck being driven by the Applicant travelling west on Jellicoe Street. Mr Darling said, and the Applicant agreed, that the truck drove past Mr Watson’s car parked on the left hand side of Jellicoe Street.

[52] The second video shows the truck at 12.03pm turning right into Oriel Road, then right into Banksia Street and then right into Wadham Road (essentially going around the block) so that it was now heading south on Wadham Road towards the T-intersection with Jellicoe Street. The car that can be seen at the end of Wadham Road in Jellicoe Street is Mr Watson’s car. It is agreed that Mr Watson was in his car.

[53] At 12.03.59pm the Applicant stops the truck in Wadham Road. The third and fourth videos, which run until 12.07pm show the truck still stopped. Whilst the Applicant said he cannot recall if he got out of the truck to check his car (which he had said was the purpose of driving to Wadham Road) I consider that Mr Watson’s car (or Mr Watson) was the Applicant’s main focus of attention once he arrived.

[54] Whilst the Applicant, in his evidence, said that he was “maybe looking for tools or something”²⁴ or “probably looking for my multimeter”²⁵ and that he “can’t remember if I

jumped out of the truck and checked my car”²⁶ he said that he knew Mr Watson was there and that his “attention was on Steve”²⁷ while he was stopped. Further, I note that in his signed affidavit the Applicant does not suggest he got out of the truck at all. I am therefore satisfied that the Applicant did not get out of the truck after stopping in Wadham Road but rather sat in the truck watching Mr Watson in his car.

[55] If the Applicant’s main purpose in driving to Wadham Road was his own car, which he said had an intermittent problem in the statutory declaration he signed, it is unclear why he did not attend to that issue. The only explicable reason he did not was because he became aware of Mr Watson’s car when he first drove down Jellicoe Street prior to going around the block to his car. It cannot be that the Applicant went to Wadham Road for the purpose of harassing Mr Watson (as the evidence does not support a conclusion that he knew in advance that Mr Watson would be there) but he clearly became distracted by Mr Watson’s presence and I consider that Mr Watson did become his focus. In any event I would note that when the Applicant first stopped the truck in Wadham Road there was no sign of his own car. It may be that he drove past it, but this does not explain why he stopped near Jellicoe Street except that his focus was very much on Mr Watson.

[56] This conclusion is supported by other matters involving Mr Watson that morning – the unexplained text message to Ms McNally in which the Applicant says he was still waiting for an apology from Mr Watson and the interaction with Mr Watson (and others) in relation to the CRM.

[57] In the fifth video Mr Watson’s car is seen turning into Wadham Road at 12.07.35pm and towards the Council truck. As Mr Watson pulls up the Applicant drives off and turns right into Jellicoe Street.

[58] This action on the video would appear to be contrary to what the Applicant put in his statutory declaration signed on 26 February 2020 where he said that Mr Watson drove into Wadham Street (sic) and parked parallel to the Applicant’s car. If this is what Mr Watson did, the Applicant could not have known as he drove off and turned right into Jellicoe Street before Mr Watson had stopped his car.

[59] At 12.07.54pm the Applicant reverses the truck up Jellicoe Street to the Wadham Road intersection and at 12.08.12pm turns right into Wadham Road and starts driving towards where Mr Watson is now parked. I accept that the video evidence shows that the Applicant was travelling at 18km/hr when he came up to Mr Watson’s car. I am satisfied that the Applicant had to brake heavily to avoid hitting Mr Watson. Whilst the Applicant says that he “didn’t see Steve in the middle of the road”²⁸ and that he only saw him in the last second, I find this difficult to align with what can be seen from the video.

[60] I am satisfied, by the footage on the sixth video taken from the side camera on the truck, that when the Applicant turned into Wadham Road after reversing, he was aware that Mr Watson was out of his car. I do not accept that there is a blind spot of such proportion in the truck that the Applicant failed to see Mr Watson from the time he started to turn right into Wadham Road until he was almost upon him. In this respect the speed with which the Applicant drove into Wadham Road – and hence the need to brake suddenly – was unnecessary and, I am satisfied, designed to intimidate Mr Watson.

[61] If I am incorrect on this, I am otherwise satisfied that the Applicant was driving at an unsafe speed in the residential street such that he had to brake heavily to avoid a serious incident. While the Applicant said he did not “think I was being unreasonable or dangerous in any manner, or putting anyone else's lives in danger in any manner,”²⁹ the fact that he had to brake hard to stop strongly suggests otherwise.

[62] Given the written statement of Mr Watson made on the day of the incident and the evidence of Ms McNally as to his health, I do not draw any adverse inference from the failure of the Council to call Mr Watson as a witness in these proceedings. However, what I do not know is why Mr Watson decided he should go to Jellicoe Street and Wadham Road and what he thought would be achieved that day, although I appreciate that both he and Mr McCarthy had expressed some frustration at the attitude and conduct of the Applicant.

[63] Regardless of the motivation of Mr Watson in seeking out the Applicant I am satisfied that the Applicant's actions were unwarranted and intimidating. That the Applicant feared Mr Watson might scratch his car or “put a bomb in it” (putting aside the irrationality of this reason) I take to be little more than *post facto* attempts by the Applicant to justify his actions.

[64] My findings in relation to the conduct of the Applicant are supported by the account of Mr Al Noobi as noted by Ms McNally in her email to Mr Darling on 30 January 2020.

[65] I am also satisfied, on the basis of the evidence of Mr Al Noobi and the statement of Mr Watson, that the Applicant did at first refuse the direction to let Mr Al Noobi drive and to return to the depot and that he refused to remain at the depot. Further, I accept that the actions of the Applicant were of concern to Mr Al Noobi who asked the Applicant to cease his actions but that the Applicant did not heed these entreaties.

5. *Excessive communication with Ms McNally*

[66] The Applicant agreed that on 30 January 2020 he sent 15 text messages and made 9 phone calls to Ms McNally. The Applicant said he did not consider the language in the text messages as disrespectful and did not consider that he was harassing her with the messages or phone calls.

[67] The Applicant said that he would have stopped calling and sending messages if Ms McNally had told him to.

[68] Ms McNally gave evidence that:

On 30 January 2020 between 12:26 p.m. and 5:14 p.m., I received 15 text messages and 9 phone calls from [the Applicant]. I was not intentionally ignoring [the Applicant]'s attempts to contact me, however, I was involved in conversation(s) with Russell and our staff and trying to ascertain our staff's safety and the welfare of Steve. I tried to call [the Applicant] at 2:43 p.m. without success and then had to leave work to collect my children...³⁰

[69] Ms McNally included in her written witness statement a transcript of the messages sent by the Applicant.³¹ These messages included:

Thu 30 Jane, 11:57am Hi Kara my car has been playing and I drove past to check up on it and Steve was there acting suspicious I do a u turn I almost hit him when he walked in front of the truck

He asks what are you doing in this street I said none of your business what are you doing here I basically ignored him and then he orders me in the office I ignored him and walked back to my car and driving home

In our last team meeting Russell said Steve's in charge of casuals and contractors why is he wasting councils time by acting like a creep in the backstreets of Bellfield

Why dose y somebody review him 40years of great service

...

Thu, 30 Jan, 2:10pm Shaq just rang me and said Steve told him he's got a casual with him not me.

I haven't been told anything. This is the communication I get, Russell stood me down on the grounds that I didn't communicate with Steve and didn't open the truck door upon Steve's request

I gave terry a list of doors that aren't open/closing properly 3 weeks have gone past no reply I spoke to terry and asked what's going on he was being uncooperative and giving me answer like maybe when I asked him if Kelvin got a copy of the List.

I then ask Kelvin if he has a copy of the list he's response is it's under control I kept persisting same response.

This is bullshit and you think I'm going to listen to Steve Watson ?

HAHAHAHAHA I'm prepared to put my job on the line and continue to ignore this fool

Can you please tell me what time I'm starting tomorrow

...

Thu, 30 Jan, 2:32pm I tried calling you and I apologise for all this shit All I wanted is you're opinion if it's stressful not knowing if you start 5/7.30am

Thu, 30 Jan, 2:43pm I just missed your call was in backyard

...

Thu, 30 Jan, 3:26pm I don't like your operation in handling this situation and past previous ones.

All these years this Steve has told me I have problems but nononono you help the problem continue to get bigger and for 40 yrs he's being getting away with it

Do you know Steve tried to change Gus's statement and put words in his mouth

...

Thu, 30 Jan, 3:30pm I don't want to put people jeopardy or make them feel uneasy at work but if you are going to stand me down and play your games protecting each other I'm going to put a complaint through and I want answers

My complaints you don't follow through I'm working on then you said but your quick on this batch

Yeh your only doing your job huh?

Picking and choosing who to administer actions

Yep no worries Lara thank you very much Will see if I'm still here you might address my complaints one day

...

Thu, 30 Jan, 4:53pm I would like to gain access to Steve's vehicle GPS system and how long he was there at my car and how long he was driving around to find it

...

Thu, 30 Jan, 5:09pm Don't you see this as harassment ? Or perhaps my barrage of texts and phone calls is being harassing to yourself ?

[sic]

[70] At 1.56pm Ms McNally texted the Applicant and advised that she had asked Mr Darling to look into to the matters raised by him.

[71] A 5.13pm Ms McNally texted the Applicant and advised she was home with her family as she finished work at 3.00 pm. She advised she was not at work the next day. the Applicant replied "I will gladly leave you alone if you are with your family".

[72] The Applicant also made 9 telephone calls to Ms McNally commencing at 11.57 am. The Applicant did not leave a message with any of these calls.

[73] The time stamp on the second text message of the day from the Applicant to Ms McNally (and the first in the excerpt of text messages above) is inexplicable. This is the first text message from the Applicant following the incident. It is time stamped as at 11.57am but the text message could not have been sent until after the incident involving the Applicant, Mr Watson and the truck as it describes aspects of that event. Yet the incident occurred just after noon on the basis of the time stamp on the video footage taken from the truck being driven by the Applicant. This discrepancy was not explained but, given the Applicant's agreement that he did send the messages and the video evidence from the truck is true in the incident it shows, I do not consider this time stamp difference an impediment to considering the number and content of those messages.

[74] Ms McNally said that she found the tone of the text messages aggressive and they made her feel uneasy.

Findings

[75] I am satisfied that the Applicant sent an unnecessarily large number of text messages to Ms McNally on afternoon of 30 January 2020, after the incident with Mr Watson. Whilst I appreciate that Ms McNally tried to call the Applicant prior to leaving work, the evidence does not disclose if she left a message or gave any instruction to the Applicant although he did reply by text that he had missed her call.

[76] There is an apparent sense of growing frustration in the text messages from the Applicant to Ms McNally on 30 January 2020. Ms McNally recognised that the Applicant

appeared agitated early in the day when he sent her a text message about an apology from Mr Watson and her sense would not have changed when she saw the string of text messages arriving from the Applicant in the afternoon.

[77] The Applicant's text messages need to be seen in light of the complaint/request he made to Ms McNally on 15 January 2020 where he:

- Requested a meeting with Ms McNally;
- Asked to have previous disciplinary letters "re-evaluated";
- Requested that the capacity of some managers be reviewed including 'Claudio' and 'John Padulus';
- Asked that complaints he made of others be investigated;
- Complained of managers invalidly accessing GPS data;
- Requested to be placed on a computer course he wished to undertake;
- Asked to have some leave compensated;
- Wanted to be placed on the call out roster; and
- Requested access to GPS data on "everyone".³²

[78] On the same day the Applicant sent a text message to Ms McNally in which he said "thanks very much...after all the shit I go through work the most important thing Russell and yourself think is me providing you with purchase proof. Now I am 100% certain you and the managers are definitely not on my team".³³ I take the reference to proof of purchase to be in relation to the bicycle parts matter.

[79] Clearly the Applicant had a growing frustration in relation to matters at work and an inequality between how he saw himself and others treated. The Applicant's growing frustration was manifest in all of the incidents on 30 January 2020 – the footwear incident, the CRM access matter and his response when Mr Watson spoke to him in Wadham Road. This frustration however does not excuse the number and tone of the text messages he sent to Ms McNally that day. The Applicant had the opportunity to stay at work and meet with his managers about the incident with Mr Watson. He chose not to although clearly, in sending the text message of around noon to Ms McNally, he was aware that he needed to explain his actions.

[80] The Applicant does not dispute that he sent the text messages but says that, had he been asked to stop, he would have done so. Unfortunately that is not the point. He should not have had to have been told to stop – common sense should tell him that it was too many messages and that the tone of them was inappropriate. The content of the messages was disrespectful and harassing. Suggesting that he didn't like the "operation" run by Ms McNally, that it was all "bullshit", that she was "playing games" was inexcusable.

[81] I am satisfied that the Applicant did send an excessive number of text messages to Ms McNally on 30 January 2020 in addition to making a substantial number of phone call where he did not leave a message. Further, I am satisfied that the calls and messages were designed to harass Ms McNally and that the Applicant was aware of this effect as evidenced in his second last text message when he said "...perhaps my barrage of texts and phone calls is being harassing to yourself".

Finding as to valid reason

[82] The requests of management for the Applicant to provide proof of purchase or transaction in relation to the bicycle parts was reasonable; his argumentative response when asked to put on the correct footwear was unnecessary; his refusal to engage on a reasonable basis in relation to the CRM and his manner of addressing his managers was disrespectful; his conduct in the truck was dangerous and his text messages to Ms McNally were disrespectful and intimidating. Apart from an animosity to Mr Watson and his managers in general, the Applicant provides no explanation for his conduct.

[83] I am satisfied, in these circumstances, that the conduct I have found occurred provides a valid reason for the dismissal of the Applicant. The Applicant's conduct has been reckless, rude, harassing, intemperate and entirely inappropriate.

(b) was the person advised of that reason and (c) was the person given an opportunity to respond to that reason

[84] I consider both of these matters together.

[85] The Applicant was stood down in the afternoon of 30 January 2020. That this occurred may partly explain the text messages to Ms McNally. The stand down was formalised in an email to the Applicant later that day.

[86] A letter of allegations was provided to the Applicant dated 10 February 2020.³⁴ He was invited to a meeting on 12 February 2020 to provide his response. The letter of allegations outlined each of the matters of concern of the Council. Those allegations formed the reason for dismissal.

[87] Following the meeting of 12 February 2020 a "show cause" letter was provided to the Applicant on 21 February 2020.³⁵ That letter set out the response of the Applicant to each of the allegations and stated that the Applicant's actions were not in accordance with the expectations of the Council's Code of Conduct or Bullying and Harassment Policy.

[88] The Applicant was advised that the Council was considering terminating his employment and was invited to provide "any reason or further information" he would like considered as to why the Council should not terminate his employment.

[89] The Applicant's union representative provided an impassioned but considered submission³⁶ as to why the Applicant's employment should not be terminated and why he should be given one more chance.

[90] On 2 March 2020 the Applicant was advised that his employment would be terminated.³⁷ It is apparent from the termination letter that the Council did consider those matters raised by the Applicant as to why his employment should not be terminated.

[91] I am therefore satisfied that the Applicant was advised of the reason for dismissal and given an opportunity to respond to that reason prior to the decision to dismiss him from his employment being made.

(d) support person

[92] The letter of allegations of 10 February 2020 in which the Applicant was invited to a meeting with the Council in relation to the allegations invited the Applicant to bring a support person with him. The Council also considered the Applicant's union's submission on his behalf as to why his employment should not be terminated.

[93] I am satisfied that the Applicant was not denied access to a support person in any sense.

(e) poor performance

[94] The Applicant's employment was not terminated for poor performance. This is therefore not a necessary consideration in order to determine if the dismissal was harsh, unjust or unreasonable.

(f) the size of the employer's business and (g) and access to human resource expertise

[95] I find no issue with the procedure adopted by the Council in effecting the decision to dismiss the Applicant. The process was fair, transparent and provided the Applicant with every opportunity to influence the outcome.

(e) other matters

[96] I have taken into account the apparent animosity displayed by the Applicant to Mr Watson. The deterioration of that relationship seems to go back some years but its cause is not clear.

[97] In one of the text messages to Ms McNally on 30 January 2020 the Applicant says:

I haven't been told anything. This is the communication I get, Russell stood me down on the grounds that I didn't communicate with Steve and didn't open the truck door upon Steve's request
I gave terry a list of doors that aren't open/closing properly 3 weeks have gone past no reply I spoke to terry and asked what's going on he was being uncooperative and giving me answer like maybe when I asked him if Kelvin got a copy of the List.
I then ask Kelvin if he has a copy of the list he's response is it's under control I kept persisting same response.
This is bullshit and you think I'm going to listen to Steve Watson ?
HAHAHAHAHA I'm prepared to put my job on the line and continue to ignore this fool [sic]

[98] The comment that Mr Darling stood him down on the grounds that he did not communicate with Mr Watson related to an incident some weeks earlier (in which I accept the Applicant was not actually stood down although the possibility of this was raised with him).

[99] In the Applicant's evidence he said that Mr Watson had been "very aggressive" in the past, that he has complained about Mr Watson many times, that Mr Watson had treated him really badly, doesn't like him and lies. The Applicant said that it is not hard to get into an argument with Mr Watson, that he had many problems with him over the years and that Mr Watson should be thankful he had not hit him in the incident of 30 January 2020.

[100] As I observed above it is unclear why Mr Watson did go to where the Applicant's car was parked on 30 January 2020. The Applicant was due back at the depot. Any work related matters could have been addressed at this time.

[101] The Applicant agreed in his written submission that he did not have a good relationship with management but says he has been "constantly targeted and racist terms have been launched" at him. He acknowledged that he bites back but thinks that he has no choice. The Applicant said he had made numerous complaints to HR but they have not been vigorously investigated and the response has been that it does not appear to be a breach of the Code of Conduct. The Applicant does not feel that the Code of Conduct is equally applied.

[102] The Applicant received formal warnings on 21 February 2019 and 30 October 2019, verbal warning on 22 August 2017, and formal counselling on 15 March 2018 and 18 July 2018.³⁸ An earlier formal warning was given on 2 June 2014. In addition there have been multiple informal discussions with him about his behaviour in the workplace. Ms McNally says, and I accept, that there have been issues with the Applicant's conduct and performance during the course of his employment and that he has been given opportunities to improve.

[103] In his response to the show cause letter³⁹ the Applicant's union representative said of the Applicant:

These traits [of the Applicant] manifest through impairments in personality functionality associate[d] with borderline personality disorder. Impoverished self image, excessive self criticism, feeling of emptiness, dissociative states when under pressure or stress. He also demonstrates a compromised ability to recognise the feeling and needs of others. His perceptions of others is selectively biased, and his relationships (we're talking professional work relationships) can be unstable and conflicted, and he is idealistic, and hostile. All these traits can be informative in understanding the behaviour in the substantiated allegations.

[104] The Applicant has not been able to secure employment since his dismissal. He expressed that he wants his job back and to be treated fairly.

Conclusion as to harsh, unjust or unreasonable

[105] I acknowledge the impact of the dismissal on the Applicant. He has worked at the Council for many years. However I am satisfied that, in the incident with Mr Watson, the Applicant put Mr Watson in danger. The Applicant said that he "just need[ed] some sympathy about how I've been dealt with in the past...and how management have gotten away with very similar sort of offences." Whilst I accept that this may be all the Applicant wanted, his conduct of 30 January 2020 cannot be absolved by a bit of sympathy. The impact of the incident on Mr Watson should not be underestimated. He has not returned to work and Ms McNally says that it is unlikely that he will.

[106] I am therefore satisfied that the incident with Mr Watson and the Council truck, in addition to the other matters I have found establish a valid reason for dismissal, are such that the dismissal of the Applicant was not harsh, unjust or unreasonable. The Applicant set a destructive path for himself. I am satisfied that he has been shown support by the Council over many years. He has, however, by his actions of 30 January 2020 in particular, failed to repay this support.

CONCLUSION

[107] I therefore find that the Applicant was not unfairly dismissed. His application for unfair dismissal is therefore dismissed. An order⁴⁰ to this effect will be issued in conjunction with this decision.



COMMISSIONER

Appearances:

K. Stamoglou on his own behalf.

G. Katz for the Respondent.

Hearing details:

2020.

Melbourne by video conference.

August 19.

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Endnotes:

¹ Exhibit R2, attachment RD-3.

² Exhibit R2, attachment RD-4.

³ Exhibit R2, attachment RD-5.

⁴ Exhibit R6, attachment GG-2.

⁵ [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at p. 373].

⁶ *Edwards v Justice Giudice* [1999] FCA 1836.

⁷ *King v Freshmore (Vic) Pty Ltd*, 17 March 2000, Print S4213.

⁸ *Briginshaw v Briginshaw* [1938] HCA 34.

⁹ Exhibit R2, paragraph 7.

¹⁰ *Ibid.*

¹¹ Transcript PN129. It was not apparent if all of these complaints in relation to Mr Watson were about safety clothing.

¹² Job request arising from a request of a council resident/ratepayer.

¹³ Transcript PN82.

¹⁴ Exhibit R1, attachment TM-1.

¹⁵ See attachment to “Applicant’s evidence” as filed by the Applicant.

¹⁶ The correct name is Wadham Road. The Applicant referred to it as Wadham Street.

¹⁷ Transcript PN409.

¹⁸ Transcript PN99.

Endnotes:

¹⁹ Exhibit R5, attachment LM-5.

²⁰ Exhibit R5, attachment LM-3.

²¹ Exhibit R5, attachment LM-4.

²² Exhibit R2, paragraph 8.

²³ Transcript PN779-788.

²⁴ Transcript PN306

²⁵ Transcript PN308.

²⁶ Transcript PN312

²⁷ Transcript PN301

²⁸ Transcript PN386

²⁹ Transcript PN378

³⁰ Exhibit R5, paragraph 9.

³¹ Exhibit R5, attachment LM-4.

³² Exhibit R5, attachment LM-1.

³³ Exhibit R5, attachment LM-2.

³⁴ Exhibit R2, attachment RD-3.

³⁵ Exhibit R2, attachment RD-4. There was some confusion as to the date of this letter there being two versions, one dated 20 February 2020 and another dated 21 February 2020. The content of the letters is the same and it is the letter of 21 February 2020 that was received by Mr Stamoglou.

³⁶ Exhibit R2, attachment RD-5.

³⁷ Exhibit R6, attachment GG-2.

³⁸ Exhibit R2, paragraph 3.

³⁹ Exhibit R2, attachment RD-5.

⁴⁰ PR722469.