DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Wayne Chambers
v
Toll Transport Pty Ltd
(U2019/9938)

DEPUTY PRESIDENT BOYCE SYDNEY, 6 NOVEMBER 2020

Application for an unfair dismissal remedy — workplace unions delegates dismissed for 'serious misconduct' for fighting — union delegates travelled from Sydney to Melbourne to attend union meetings — fighting occurred post the cessation of union meetings at a hotel — union delegates on paid union delegate's leave — employer paid for airfares, accommodation, and meals — fighting did not occur 'at work' — employee conduct did not have sufficient connection with work — no valid reason for dismissal — reinstatement, lost wages and continuity of employment an appropriate remedy.

[1] This decision concerns an unfair dismissal application made by Mr Wayne Chambers against Toll Transport Pty Ltd (**Toll**).

[2] The matter was heard together with the unfair dismissal application made by Mr Stephen Newton in *Stephen Newton v Toll Transport Pty Ltd* (U2019/9520), with evidence in one proceeding being evidence in the other. Where I refer to the "Applicants" in this decision, I am referring to both Mr Chambers and Mr Newton.

[3] Both of the Applicants were:

(a) employed as Truck Drivers (throughout their employment) with Toll; and

(b) at the time of their dismissals on 23 August 2019, delegates of Transport Workers' Union of Australia (New South Wales Branch) (**TWU**) (in respect of the relevant division of Toll).

[4] Mr Chambers asserts that his dismissal was "unfair" within the meaning of Part 3-2 of the *Fair Work Act 2009* (**Act**). He seeks the primary remedy of reinstatement, or in the alternative, compensation.

[5] Mr Chambers was dismissed for reasons of alleged "serious misconduct" in relation to a fight (being both a verbal and physical altercation) between Mr Newton and himself at the Seasons Botanic Gardens Hotel (**Hotel**) in St Kilda, Victoria, on 30 May 2019, at around 10.25pm (**Fight**). Mr Newton was also terminated for alleged serious misconduct in relation

to his role in the Fight (as well as his role in another verbal altercation with another Toll TWU delegate on 9 April 2019).

[6] In summary, Mr Chambers does not dispute that he engaged in the Fight. However, he submits that there is no "valid reason" for his dismissal because he did not engage in the Fight at work. In the absence of a valid reason, Mr Chambers submits that his dismissal was harsh, unjust, and/or unreasonable.

[7] In response, Toll says that the dismissal of Mr Chambers was not unfair because there was a valid reason for his dismissal in the facts and circumstances of this case.

[8] The parties are also in dispute as to whether Toll afforded Mr Chambers procedural fairness in effecting his dismissal.

Permission to be legally represented granted to all parties

[9] At the hearing, Mr M *Gibian* of Senior Counsel, instructed by Mr G *Webb* of the TWU appeared for Mr Newton. Mr P *Boncardo* of Counsel, instructed by Ms L *de Plater* of the TWU, appeared for Mr Chambers. Mr B *Rauf*, instructed by Ms E *Strachan* of Herbert Smith Freehills, appeared for Toll.

[10] I granted permission for all parties to be legally represented due to the complexity of the legal issues arising in the proceedings, and the likely issues concerning witness credibility (especially as between Mr Newton and Mr Chambers).

[11] In summary, I determined that pursuant to s.596 of the Act, it would be more efficient for the Commission to have the assistance of legal representation on behalf of the parties in conducting the hearing of this matter. Permission for the parties to be respectively legally represented was not opposed.

Facts not in contention

[12] Mr Chambers is 56 years of age. At the time of his dismissal, Mr Chambers had been employed by Toll for just under eight years.

[13] Mr Chambers was based at the Toll Bungarribee depot in New South Wales.[1] Apart from a "formal verbal [written] warning" issued to Mr Chambers on 12 January 2015 (for travelling seven kilometres over the speed limit for a period of four seconds on 1 December 2014), Mr Chambers has an unblemished record of employment with Toll.[2] The warning is not relied upon by Toll as a reason for dismissing Mr Chambers from his employment.

[14] At or around the time of the commencement of his employment, and/or during the course of that employment, Mr Chambers agreed to comply with Tolls policies and

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[1] Exhibit R5, paragraph [41].

[2] Exhibit R5, paragraphs [15]-[16], Annexure PS-11 (Formal, Verbal Warning, 12 January 2015, Ref Number 15-V-0003, issued by Manager, Mr David Mulquiny to Mr Wayne Chambers (as per 2007 Toll Linehall EBA, section 27)). I note that the formal details as to this warning are blank. See also Exhibit C2, at paragraph [2.8].

procedures (as amended from time to time), pursuant to express terms to that effect contained under his contract of employment and job description.[3]

[15] The terms of the *Toll – TWU Enterprise Agreement 2017-2020* (**Agreement**), also set out obligations, responsibilities, and standards for relevant employees (and TWU delegates) to whom the Agreement applies.[4] The Agreement relevantly applied to Mr Chambers whilst employed by Toll.

[16] On 30 May 2019, Mr Chambers and Mr Newton separately flew to Melbourne to attend two days of TWU meetings, being a Toll TWU sub-committee meeting on Thursday, 30 May 2019, and a TWU National Delegates meeting on Friday, 31 May 2019 (collectively, **TWU Meetings**). Both Mr Newton and Mr Chambers stayed in Melbourne overnight.

[17] The TWU Meetings were arranged and convened by the TWU, and were held at the TWU's offices in Port Melbourne (being TWU House, Rouse Street, Port Melbourne).

[18] The first day of the TWU Meetings (on 30 May 2019) commenced at 10.00am, and formally concluded at 4.00pm. The TWU Meetings reconvened at 8.00am the following day (31 May 2019), and formally concluded at 3.00pm.[5] The TWU Meetings were attended by Toll TWU delegates, albeit a few Toll managers and Toll industrial relations advisers attended some of the TWU meetings.[6]

[19] Mr Chambers did not attend the full day of TWU meetings on 31 May 2019 because he was directed to return to Sydney by Toll (after Toll management had become aware of the Fight having taken place).[7] Mr Newton did not attend due to his unfitness to do so arising from injuries sustained by him during the Fight.

[20] The TWU Meetings involved discussions around agenda items concerning Toll policies, standards, and workplace initiatives, as well as Toll inductions, owner drivers, and outside hire. Discussions also concerned the "Sydney Consolidation Program" — that is, the moving of Toll's Sydney operations from Bankstown to Banksmeadow and Bungarribee.[8] The purpose of the TWU Meetings was to enable the sharing of information and discussions in respect of these agenda items between the TWU, some Toll management, and nominated TWU Toll delegates.

[21] Whilst attending the TWU meetings, Mr Chambers was on paid "Delegates' Leave" as provided for under cl.49 of the Agreement. Clause 49 relevantly reads:

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[3] Exhibit R3; Exhibit R5, paragraph [12]-[13], p.3 of Annexure PS-3; Annexures PS-5 ("Toll Workplace Behaviors Policy"), PS-6 ("Toll Standard"); PS-7 ("Toll Code"); PS-8 ("Toll Serious Misconduct Policy"); PS-3, Attachment 2 to Agreement (Toll Drugs and Alcohol Policy); Transcript, PN1650-PN1668, and PN1706-PN1712; Exhibit C1, Annexures WC-2 and WC-3.

[4] See clauses 9, 16, 19, and 37(b) of the Agreement.

[5] Exhibits C4 and C5. See also emails from Katrina De Lange, dated 20 June 2019 at 12.18pm and 11.57am containing the Agendas for the TWU meetings on 30 and 31 May 2019 (indicting Toll was aware of the TWU meeting agendas).

[6] Exhibit R7, at [15].

[7] Exhibit R8, Annexures RL-2 and RL-3.

[8] Exhibit R7, at [15].

"**49. Union Delegates**

…

49.2 Delegates' rights and responsibilities

…

(c) Union delegates also have responsibilities (as do all persons engaged by Toll), which include:

(i) acting in manner consistent with and appropriate to their role;

(ii) raising workplace issues in a timely fashion and working co-operatively to resolve issues;

(iii) dealing appropriately with all Transport Workers; and

(iv) using equipment made available in a manner consistent with Toll policies, provided that this commitment will not preclude a delegate from exercising his or her representational role in an appropriate manner.

(d) …

49.3 Delegates' leave

(a) Toll will provide Union delegates with paid leave of up to 10 days per annum to attend Union delegates' meetings, Union training or the annual Union delegates conference or other Union campaign activity which is consistent with this Agreement, provided that this commitment will not preclude the Union from exercising its organisational objectives in an appropriate manner.

(b) In addition to the leave referred to in clause 49.3(a), Toll will make available a total pool of 100 days paid leave, nationally, to be used by delegates to carry out their functions, including discharging the responsibilities of any positions they hold with the Union.

(c) To ensure the smooth running of Toll operations, Union delegates will be released by Toll for paid leave on the following basis:

(i) for yards with 20 or fewer Transport Workers - 1 delegate;

(ii) for yards with more than 21 Transport Workers but fewer than 200 Transport Workers - 2 delegates;

(iii) for yards with greater than 200 Transport Workers - 3 delegates.

(d) The limitations in clause 49.3(c) will not apply in respect of the Union's annual conference or for enterprise agreement report back meetings connected with the negotiations for the agreement to replace this Agreement.

(e) Prior to Toll agreeing to release a delegate, the Union will provide Toll with no fewer than 7 days' notice in writing of such a request for the release of delegates.

…

(h) Delegates who take leave under this clause will be paid for each day of the leave the earnings that they would have received had the day been worked.

…"

(my emphasis)

[22] Neither party asserted there had been non-compliance with cl.49.3 of the Agreement in respect of the Delegates' Leave taken by Mr Chambers on 30 and 31 May 2019 to attend the TWU meetings (*c.f.* cl.49.3(a), (c), and (e) of the Agreement), or that such leave was not otherwise authorised or approved by Toll.

[23] Toll covered the cost of the following expenses for Mr Chambers:

(a) return airfares between Sydney and Melbourne for Mr Chambers (and other Toll TWU delegates) to attend the TWU Meetings;

(b) Mr Chambers' mode of transportation from Melbourne airport to the TWU offices, and in and around Melbourne; and

(c) the cost of Mr Chambers' meals whilst in Melbourne, being dinner on 30 May 2019, and breakfast on 31 May 2019.[9]

Further, Toll prepared and provided Mr Chambers with a travel itinerary as Toll had booked and paid for Mr Chambers accommodation and travel.[10] Toll's management of Toll TWU delegates' travel and accommodation, including that of Mr Chambers, was a private arrangement between Toll and the TWU (i.e. there is nothing in the Agreement requiring this courtesy be provided).[11]

[24] Mr Chambers and Mr Newton were both in casual clothing attire (i.e. not Toll uniforms) prior to, and at the time of, the Fight.

[25] Neither Toll nor the TWU organised any dinners or other social functions involving Mr Chambers, Mr Newton, or other Toll TWU delegates whilst they were in Melbourne. The

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[9] Exhibit C2, paragraph [2.9]; Exhibit R5, paragraphs [18], [27]; Exhibit R7, paragraph [66]. Although see Exhibit R8, Annexure RL-19, bottom of p.121 to top of p.122 (Transcript of interview with Paul Newton).

[10] Transcript, 4 February 2020, PN733.

[11] There is no evidence in these proceedings as to the exact nature and extent of this private arrangement between the TWU and Toll.

only events organised were the TWU Meetings, which were organised by the TWU, and concluded between 3:00pm and 4:00pm each day.[12]

[26] There is neither CCTV footage of, nor any witnesses to, the Fight.[13]

[27] Victoria Police Officers attended the Hotel shortly after the Fight, at around 11.00pm on 30 May 2019. Mr Chambers and Mr Newton were separately interviewed by those officers. No charges were, or have since, been laid against either of the Applicants, nor have either of them sought or otherwise pressed charges or complaints against each other. Police are not aware of any witnesses to the Fight.[14] There has been no indication from the Police that they propose to pursue the Fight any further.[15]

[28] Mr Newton suffered several injuries as a result of the Fight, being:

(a) a laceration wound and bruising to the back of his head, which was likely caused by him hitting the back of his head on the ground, when he stumbled and fell backwards onto his buttocks, and then fell further backwoods (due to momentum) hitting his head on the concrete pavement/driveway;

(b) a split lip;

(c) a cut to his left cheek; and

(d) bruising to his lower right eyelid.[16]

[29] WorkCover medical certificates were also produced in respect of Mr Newton, referring to temporary post-concussion dysfunction.[17] This condition was diagnosed on 6 June 2019 (seven days after the Fight took place).[18]

[30] Mr Newton immediately commenced a period of personal "sick" leave the day following the fight (i.e. from 31 May 2019).[19] The medical examination of Mr Newton the

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[12] Although I note that the TWU paid for Mr Newton's dinner, as well as some other TWU Toll delegates at the Hotel restaurant on 30 May 2019: Exhibit R4, p.16 (point 0.9 of page) of Annexure PN-1. This appears to be a payment made or authorised by the TWU Organiser (Mr Grant Roger) himself (that is, as opposed to the TWU organising the dinner as part of or in connection with the TWU meetings).

[13] Albeit, Mr Paul Newton gave evidence that he witnessed, from the window of his Hotel room, Mr Chambers sitting on Mr Chambers and striking him once to the face (Exhibit R4).

[14] Exhibit R-8, Annexure RL-6.

[15] Exhibit R8, Annexure RL-6, p.18.

[16] Exhibit N4, Annexure SN-09; Exhibit R8, Annexure RL-9. Whilst Mr Newton asserts he had a broken nose (Exhibit N3, at [33]), there is no medical evidence to this effect (Exhibit N4, Annexure SN-09).

[17] Exhibit N4, Annexure SN-10 and SN-12.

[18] Exhibit N4, Annexure SN-09.

[19] Exhibit R7, at [36]-[37]; Exhibit N4, Annexures SN-09 and SN-10.

day following the Fight identified that he was not concussed (at that time) as a result of the Fight.[20]

[31] Mr Chambers suffered a small cut to his left hand, which occurred when he fell and cut that hand on broken glass during the Fight, being glass from the beer bottle that smashed on the ground immediately prior to him falling.

[32] Four persons came to render assistance to Mr Newton when the Fight concluded or shortly thereafter. Those persons were:

(a) Mr Paul Newton (Toll TWU NSW delegate (Owner Driver and Toll Contract Carrier, based at Banksmeadow), no relation to Mr Stephen Newton);[21]

(b) Ms Margaret Harvey (Toll TWU NSW delegate);

(c) Mr John Rowe (Toll TWU NSW delegate); and

(d) Mr Guillaume Maze (Toll TWU NSW delegate).[22]

[33] None of these individuals witnessed the Fight, although Mr Paul Newton states that he witnessed Mr Chambers sitting on top of Mr Newton and striking him once in the face. Mr Paul Newton says he made this observation from the window of his Hotel room, which looked down upon part of the Hotel driveway (albeit this view was partly obstructed by a structural pole).

[34] The Applicants were stood down from work with pay pending an investigation into the Fight. Mr Chambers was stood down on 31 May 2019. Mr Newton was stood down on 12 June 2019.[23] Mr Newton was stood down later than Mr Chambers because Toll management initially believed, based upon statements made to them by Mr Newton, that Mr Chambers had been the sole antagonist of the Fight, had likely glassed Mr Newton, and/or had essentially set upon Mr Newton for no apparent reason (that is, Mr Chambers allegedly "king hit" or "coward punched" Mr Newton).[24]

[35] Investigation interviews were held with Mr Chambers, Mr Newton, and other relevant persons,[25] pursuant to which a detailed Investigation Report of the Fight was produced to Toll.[26]

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[20] Transcript, 4 February 2020, PN493.

[21] Exhibit R4 – no relation to Mr Stephen Newton, p.2 of Exhibit R4 (halfway down first page of record of interview on 12 June 2019).

[22] Those who were staying at the Hotel on 30 May 2019 were Grant Hosking (Linehaul Driver and Toll TWU delegate), Mr Paul Newton, Mr Stephen Newton, Mr Wayne Chambers, and Ms Margaret Harvey: Exhibit N7, p.17 (email from Jason Le Busque, 31 May 2019 (3.54pm).

[23] Exhibit C1, Email from Paul Smith, 31 May 2019 (1.26PM) confirming stand-down of Mr Chambers. Exhibit R7, paragraphs [37]-[38], Annexure MR-14.

[24] Exhibit N7, pp.19-20, email from Michael Rugendyke, 31 May 2019 (12.03pm). Exhibit R9, p.2 of Investigation Report.

[25] Exhibit C1, Annexure WC5; Exhibit N3, paragraph [40].

[26] Exhibit C1, Annexure WC14; Exhibit R9.

[36] The Applicants were issued with "Show Cause" letters,[27] and attended disciplinary Show Cause interviews with Toll management representatives (where they verbally responded to the allegations made against them).[28] Both Mr Chambers and Mr Newton also provided written responses to the Show Cause letters.[29]

[37] On 23 August 2019, Mr Chambers and Mr Newton were issued termination letters, in which Toll gave notice to Mr Chambers and Mr Newton that they were each dismissed with immediate effect for reasons of serious misconduct.[30]

[38] The Applicants were each paid five weeks' in lieu of notice (despite their terminations being for reasons of purported "serious misconduct").

Investigation Report regarding the Fight

[39] The Fight was investigated by Mr Raymond Lambie (Group Security Manager, Toll Group). During the investigation, Mr Lambie became aware that Mr Newton had also been involved in an altercation with another Toll employee, who was also a TWU delegate, at the TWU Parramatta Conference on 9 April 2019, and which subsequently formed part of the overall investigation.

[40] Mr Lambie produced an Investigation Report dated 7 July 2019, in which he made certain findings of fact, provided observations, and made some conclusions and recommendations.[31]

[41] In summary, the Investigation Report made the following findings, observations and/or recommendations:

> (a) There appears to be a factional split between TWU delegates, concerning two politically aligned camps of delegates. This made evidence for the investigation difficult to gather and assess, especially where there were no independent witnesses to the Fight. "Information provided by a [unidentified] "union" source has identified that they are aware of the poisonous Machiavellian nature of the power struggle within the Toll delegate cohort".
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> (b) There is some corroborative information that Mr Newton was a willing participant in the Fight at some point in time. Tellingly, Mr Newton's claim that he removed his jumper shortly prior to the Fight in preparation to go to bed is inconsistent with the fact that Mr Newton wore his jumper for most of the evening inside the warm air-conditioned Hotel (noting that the air temperature outside the Hotel was around 10 degrees Celsius at the time of the Fight). Mr Newton taking his jumper off shortly prior to the Fight is more consistent with Mr Chamber's version of events (i.e. that Mr Newton removed his jumper in preparation to challenge Mr Chambers to a fight).

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[27] Exhibit C1, Annexure WC6; Exhibit N3, paragraph [42].
[28] Exhibit C1, Annexure WC7.
[29] Exhibit C1, Annexure WC8; Exhibit N3, paragraph [43].
[30] Exhibit C1, Annexure WC9; Exhibit N3, paragraph [44].
[31] Exhibit R8, Annexure RL-25 (see also Exhibit R9).

(c) Some of Mr Newton's responses provided by him at the second investigation interview identify that Mr Chambers version of events concerning the Fight cannot be discounted.

(d) Mr Newton "as the perceived victim in [the Fight]" declined to pursue criminal charges against Mr Chambers, "where he would be required to provide sworn evidence in any proceedings".

(e) Mr Chambers assaulted Mr Newton. That assault "cannot be considered defensive'". Mr Chambers engaged in serious misconduct, and it was recommended that he be dismissed. Any allegation that Mr Chambers "glassed" Mr Newtown as part of, or during, the Fight is specially rejected.

(f) Mr Newton engaged in serious misconduct in respect of his role in the Fight, and in respect of his behaviour and conduct at the TWU Parramatta Conference, and it is recommended that he be dismissed. In saying this, I note that the Investigation Report refers to the conduct of Mr Newton at the TWU Parramatta Conference, but makes no formal findings of fact or conclusions in relation to that conduct (I have worked on the basis that Mr Mitchell's version of the altercation between himself and Mr Newton on 9 April 2019 was essentially accepted in the Investigation Report, and was equally accepted by Toll management in making their decision to dismiss Mr Newton).

[42] I note that the Investigation Report contains various records of interview from other persons or employees of Toll. For the purpose of this decision, I do not treat such records of interview as evidence for the purposes of making findings in this decision. The content of these records of interview are littered with hearsay, opinion and conclusion. Mr Paul Newton was called by Toll as a witness in these proceedings, and verified his record of interview during the investigation.[32] However, much of his evidence is hearsay, opinion and/or inconsistent with the timeline of events.[33] He states that Mr Chambers was giving him a blank stare (or 'stink eye') in the restaurant area prior to the Fight,[34] and appears to infer that somehow the Fight was or might have been premediated by Mr Chambers. I cannot accept Mr Paul Newton's evidence as reliable, or at least to the extent that I might make any findings in this decision upon such evidence.

Toll's decision to terminate the Applicants

[43] The decision to dismiss Mr Chambers was made by Mr Paul Smith (Toll General Manager Operations).[35] The decision to dismiss Mr Newton was made by Mr Michael Rugendyke (Toll General Manager NSW/ACT Express Parcels).[36] Mr Michael Byrne (Toll, Managing Director) strongly concurred with the decision to terminate the Applicants.[37]

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[32] Exhibit R4.

[33] See, for example, Exhibit R4, p.26 (p.25 of record of interview, at point 0.8 of page).

[34] Exhibit R4, p.17 (p.16 of record of interview); Exhibit R9, first page, last line of second last paragraph on that page.

[35] Exhibit R5, paragraphs [34]-[36], [38], [50] (dot point 3).

[36] Exhibit R7, paragraphs [43]-[45]; [53]-[56].

[37] Exhibit N3, Annexures SN-03.

[44] Each of the decisions to terminate Mr Chambers and Mr Newton were based upon:

(a) the dismissal recommendations contained in the Investigation Report;

(b) the view that the Applicants had engaged in serious misconduct;

(c) the view that the Applicants were both being less than candid in their interviews and statements concerning the Fight (that is, as to what happened to start the Fight, what was said in the lead up to the Fight, and what occurred during the Fight);

(d) the fact that the outcome of the Fight could have been much worse for all involved (i.e. Mr Newton stumbled and fell during the Fight and hit the back of his head on concrete, which may have resulted in permanent brain injury, or death); and

(e) the need for cultural and behavioural change in the organisation (i.e. fighting behaviour cannot be tolerated, or be seen to be tolerated, by Toll).

[45] The decision to terminate Mr Newton was also based upon the view that he had engaged in inappropriate, aggressive and threatening behaviour towards Mr Mitchell at the TWU Parramatta Conference on 9 April 2019.[38]

The Fight on 30 May 2019 between Mr Newton and Mr Chambers

[46] Both Mr Newton and Mr Chambers gave conflicting evidence as to who provoked or started the Fight, and what occurred during the Fight. As previously stated, there were no other witnesses to the Fight.

[47] Having considered the witness statements of Mr Chambers and Mr Newton, their answers in cross-examination,[39] and observed each of the Applicants giving evidence during the hearing, I strongly prefer the evidence of Mr Chambers in relation to the Fight. Mr Chambers provided direct and responsive answers during cross-examination, and made concessions contrary to his own interests (e.g. as to the applications of Toll's Code, standards and policies, outside of the workplace). I have not found any significant inconsistencies between the answers he provided to Toll during its investigations, and the answers he provided in cross-examination. His body language was open, and he did not flinch when answering cross-examination questions. He appeared to me to be genuine in his efforts to answer the actual questions that were put to him.

[48] In my view, much of Mr Newton's evidence as to the Fight was either self-serving or implausible, in that many of his answers, and his demeanour when providing such answers, gave me the impression that he was attempting to either:

(a) shift blame or responsibility for his role in the Fight;

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[38] Toll's Final Submissions, Newton, 27 April 2020, at [4.2].

[39] Transcript PN734 to PN898; PN1135 to 1141; PN1229 to PN1234; PN1260 to PN1355; PN1838 to 2207; PN2431 to PN2656.

(b) cast Mr Chambers as the antagonist of the Fight, without proper regard to, or honest account of, his own actions;

(c) portray himself as a victim in the Fight;

(d) diminish the overall seriousness of the Fight; and/or

(e) muddy the waters as to the facts to attempt to create an outcome on the evidence where positive findings of fact contrary to Mr Newton's interests are unable to be made.

[49] Mr Newton's evidence before the Commission was, in my view, merely a continuation of the same behaviours exhibited by Mr Newton immediately post the Fight, whereby he:

(a) initially and falsely asserted to Toll and other employees that he had been, or might likely have been, "glassed" by Mr Chambers during the Fight;

(b) had totally lost consciousness or "blacked-out" during the Fight; and/or

(c) had been "beaten up" (or "king hit" or "coward punched", as it is otherwise known) by Mr Chambers for no apparent reason.[40]

[50] Mr Newton's foregoing assertions against Mr Chambers are, in my view, sinister conduct that can never be justified. I infer that a core purpose for Mr Newton in making such false assertions against Mr Chambers was not only to attempt to save his job by impugning and damaging the character and reputation of Mr Chambers with Toll, and within the Toll workforce, but to also suggest to other colleagues that whilst Mr Newton had "lost" the Fight, it was never a "fair" fight to begin with.[41]

[51] In making the foregoing observations and conclusions in paragraphs [48] to [50] above, I also note, concur with, and rely upon, the summary (and portrayal) of Mr Newton's evidence as contained in Toll's closing submissions.[42]

[52] Having regard to the evidence before me, my findings in relation to the Fight between Mr Chambers and Mr Newton are as follows:

(a) The Applicants stepped outside the Hotel foyer/reception and bar/restaurant area, to the Hotel driveway, for a private discussion. The Applicants' reason for doing so was to accommodate Mr Newton's desire for a cigarette before he turned in for the night. Mr Chambers carried his unfinished bottle of beer outside with him. There is no suggestion on the evidence that Mr Chambers sought to entice or otherwise prompt Mr Newton to leave the Hotel's internal restaurant or foyer area in order to be with Mr Newton in a secluded location. As I understand it, Mr Chambers is a non-smoker.

(b) The discussion between the Applicants on the Hotel driveway broadly concerned work related and/or union delegate matters. One topic of discussion

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[40] Exhibit R9; compare Exhibit C2, at [3.5] and [3.9].
[41] Transcript, 4 February 2020, PN770-PN786; PN794-PN795; PN836-PN898; PN908.
[42] Toll's Final Submissions, Newton, 27 April 2020, at [4.8] to [4.20].

concerned two different "yard agreements" that covered the linehaul section of Toll's business (and the perception that there are differing degrees of fairness between these yard agreements in respect of the differential terms and conditions of employment contained therein).

(c) The Applicants had been consuming alcoholic beverages over the course of the afternoon (post 4.00pm) and evening. I am unable to ascertain on the evidence whether, or to what extent, either of the Applicants were intoxicated. In my view, little turns on this. The evidence simply reveals that the Applicants had each consumed several alcoholic beverages, but neither were wholly inebriated, or intoxicated to the extent that they were visibly incoherent or otherwise dysfunctional. Toll does not suggest that the alcohol consumption by the Applicants was contrary to Toll's Drugs and Alcohol policy.

(d) During discussions with Mr Chambers, Mr Newton became agitated that the purpose of Mr Chambers raising the different terms and conditions under the two yard agreements was to consolidate the yard agreements, meaning that the terms and conditions under the more beneficial yard agreement may be lost or reduced (as I understand it, the more beneficial yard agreement applies to the work area or section to which Mr Newton is the TWU delegate).

(e) Despite Mr Chambers attempting to placate Mr Newton that his purpose in raising the yard agreement issue was to determine whether Mr Newton would be open to endorsing or supporting the bringing of both of the yard agreements into line with the more beneficial yard agreement, Mr Newton did not accept Mr Chambers assurances in this regard. Instead, Mr Newton said to Mr Chambers, "Fuck you". Mr Chambers duly responded, "Fuck you too".

(f) Shortly following the foregoing exchange, Mr Newton removed his jumper and took a boxing stance, raising his fists, and openly challenged Mr Chambers to a fist fight. He stated to Mr Chambers, "Come on, come on", and pushed Mr Chambers in the chest. Essentially, Mr Newton was now goading for a fight with Mr Chambers.

(g) Despite Mr Chambers stating to Mr Newton, "Are you for real?", Mr Newton again pushed Mr Chambers, and acted aggressively towards him.

(h) Shortly after this push Mr Chambers stated to Mr Newton, "You [are] fucking for real". At this point, Mr Newton set upon Mr Chambers, throwing punches wildly at him. Mr Chambers bent down, placed his hands and forearms around his own head to protect his face, and pulled his arms and elbows into his body to protect his ribs and stomach. Mr Newton kept punching at Mr Chambers whilst Mr Chambers held this position.

(i) At some point during the foray, Mr Chambers stepped back, and away from Mr Newton. When he fully stood up, Mr Newton immediately came at him again. Mr Chambers then threw one punch at Mr Newton with his right fist. The punch connected with the side of Mr Newton's face, and Mr Newton stumbled backwards, fell onto the driveway on his buttocks, and then fell further backwards, hitting the back of his head on the concrete driveway/pavement.

(j) Whilst lying on the pavement, Mr Newton stated to Mr Chambers, "If I get up, I'm gonna kill ya, I'm gonna kill ya". Standing over Mr Newton, Mr Chambers replied, while looking down upon Mr Newton, "Don't get up, don't get up".

(k) Mr Newton then attempted to get up. His head and shoulders were off the ground, and he was thrashing his legs about in an aggressive manner. Mr Newton's legs became entangled into the legs of Mr Chambers, which caused Mr Chambers to fall over. As Mr Chambers fell, he threw the beer bottle he was still holding in his left hand to the side (to get it out of the way of his fall). The beer bottle broke on the driveway, and glass scattered. Mr Chambers left hand landed on a piece of broken glass, which cut his left hand open.

(l) At this point, Mr Newton again stated to Mr Chambers, "I'm gonna kill ya. I'm gonna kill ya".

(m) As both of the Applicants were now on the ground, and Mr Newton was still attempting to get up in an aggressive manner and verbally threatening Mr Chambers, Mr Chambers pushed Mr Newton back to the ground and stated, "Are you going to stop? Are you going to stop?". Mr Newton repeatedly replied, "I'm gonna kill ya".

(n) Mr Newton continued to make threatening statements whilst Mr Chambers pinned him to the ground. Further, Mr Newton would not tire, and kept attempting to move his arms around to hit Mr Chambers (again, repeatedly stating to Mr Chambers, "I'm gonna kill ya").

(o) In an attempt to quell Mr Newton's on-going resistance and/or to get him to cease his verbal and physical aggression, Mr Chambers again punched (or slapped, or slap-punched) Mr Newton across the face.

(p) After this second contact or strike, Mr Newton immediately stated, "I'll stop. I'll stop", and ceased thrashing about. Mr Chambers then released Mr Newton and walked back to the Hotel foyer. No one had to pull Mr Chambers off Mr Newton. The fight ended upon Mr Newton making it clear that he was surrendering or giving up.

[53] In making the foregoing findings as to what occurred during the Fight, I specifically point out that:

(a) I reject Mr Newton's evidence that he removed his jumper, shortly before the commencement of the Fight, because he was going inside to his Hotel room to retire to bed. Rather, I find that Mr Newton removed his jumper as a prelude to seeking to have a physical altercation with Mr Chambers.[43]

[43] Transcript, 4 February 2020, PN754; PN910; 5 February 2020, PN1139-PN1141; Exhibit R8, Annexure RL-19, bottom of p.113 to top of p.114 (Transcript of interview with Paul Newton): "A message came through what we [Stephen Newton, Paul Newton, Margaret Harvey and Grant Roger] were going to do for dinner and that came from Grant Roger and Margaret we were to meet in the Botanic Gardens [the Hotel Paul and Stephen Newton were staying at (apart from Grant Roger)], rather than go out, cos it was cold, it wasn't

(b) I reject Mr Newton's evidence that Mr Chambers initiated or provoked the Fight.[44]

(c) I reject Mr Newton's evidence that Mr Chambers was the main aggressor during the Fight.[45]

(d) I reject Mr Newton's preliminary assertions that Mr Chambers punched Mr Newton for no reason, and/or that Mr Chambers "coward punched" or "king hit" Mr Newton.[46]

(e) I reject Mr Newton's preliminary assertions that Mr Chambers hit Mr Newton with his beer bottle, or otherwise "glassed", or attempted to "glass", Mr Newton at any point in time.[47]

(f) I reject Mr Newton's evidence that he passed out, blacked-out, or otherwise became unconscious at any point during the Fight.[48]

(g) I reject the assertion that Mr Chambers used excessive force against Mr Newton in attempting to have Mr Newton cease his verbal threats and physical aggression towards Mr Chambers. To that end, I note the following:

(i) My findings on the evidence are that after Mr Newton fell to the ground, he did not pass-out, black-out, or otherwise lose consciousness,[49] but continued to threaten Mr Chambers with further physical violence (repeatedly stating, "I'm gonna kill ya"), and behaved in a fashion consistent with the fulfilment of such threats (throwing his arms and legs about and attempting to stand up and/or hit Mr Chambers). In the face of such threats, one can either walk or run away, or stay and attempt to deal with (or neutralise) the threat. One does not know what survival choice one will make until they are confronted by such a situation.

(ii) Noting that Mr Chambers is a big or large-set man, a decision to run away may not have been a wise choice, or otherwise ended the confrontation. There was every chance Mr Newton may have decided to chase him, given how aggressively Mr Newton had been behaving.

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pleasant". See also Exhibit R4, p.26 (p.25 of record of interview): "RL: Cold night in Melbourne?" PN: Freezing".

[44] Transcript, 4 February 2020, PN740-PN741; PN749; PN777; PN785-PN786; PN816; PN836-PN898.

[45] Transcript, 4 February 2020, PN740-PN741; PN 823.

[46] Transcript, 4 February 2020, PN752; PN794; PN801; PN815; Exhibit N3, paragraph [32].

[47] Transcript, 4 February 2020, PN908.

[48] Exhibit N3, paragraph [32], Annexure SN-01(Part G of Investigation Report), pp.12 of Exhibit N3.

[49] Transcript, 4 February 2020, PN756-PN757; PN762; See also Exhibit R8, Annexure RL-15 (3rd and 6th paragraphs of p.94 of Exhibit R8).

(iii) Whether or not a slap, or a further punch, was required to neutralise Mr Newton or have him agree to otherwise desist with his behaviour, is not a choice I consider Mr Chambers should be criticised for making in the circumstances of the Fight. Whether Mr Chambers actions were strictly in self-defence, or a heat of the moment practical approach to eradicate the threat confronting him at the time, I do not consider such actions to be an unreasonable, or beyond the realms of proportionate self-defence, in the circumstances. I say more about the issue of self-defence below.

Relevant law

[54] Section 385 of the Act qualifies a claim for unfair dismissal:

"**385 What is an unfair dismissal**

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

(a) the person has been dismissed; and

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

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

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

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

[55] The parties are not in dispute that Mr Chambers was "dismissed" on 23 August 2019 within the meaning of ss.385(a) and 386 of the Act. Sections 385(c) or (d) of the Act are not enlivened in this matter. Hence, the only question before me to determine is whether the Mr Chambers' dismissal was "hash, unjust, or unreasonable".[50]

[56] Section 387 of the Act provides what matters must be considered in determining whether a dismissal was harsh, unjust or unreasonable:

"**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

[50] *c.f.* ss.385(b) and 387 of the Act.

(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".

[57] I turn to consider these factors.

Was there a valid reason for the dismissal related to Mr Chambers' capacity or conduct?

General principles

[58] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded", and should not be "capricious, fanciful, spiteful or prejudiced".[51] Further, the Commission will not stand in the shoes of an employer and determine what the Commission would do if it was in the position of the employer.[52]

[59] Where a dismissal relates to an employee's conduct, the reason for dismissal might be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur, or it did occur, but did not justify termination.[53] The question of whether alleged conduct took place, and what it involved, is to be determined by the Commission on the basis of the evidence in the proceedings before it (on the balance of probabilities).[54]

[60] Further, to constitute a valid reason for dismissal, the Commission must assess whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct. In finding that there was a valid reason for dismissal, the Commission is not limited to the reason relied on by the employer.[55]

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[51] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333; (2000) IR 371 at 373.
[52] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
[53] *Edwards v Justice Giudice* (1999) 94 FCR 561; (1999) 169 ALR 89; [1999] FCA 1836 at [7].
[54] *King v Freshmore (Vic) Pty Ltd* Print S4213 [2000] AIRC 1019 at [23] to [24].
[55] *Bista v Glad Group Pty Ltd* [2016] FWC 3009.

[61] As to an employer's investigation, it has been observed that employers are not required to have the investigative skills of police or legal investigators, but are expected to take reasonable steps to investigate allegations, and give employees an opportunity to respond. Further, the Commission is required to be satisfied that the conduct occurred (i.e. it is not a question of reasonable belief).[56]

[62] Where the conduct in question concerns fighting, the attitude of the Commission (generally) will tend to be that, in the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable. The extenuating circumstances may, and often do, concern the circumstances in which a fight occurred, as well as other considerations, such as the length of service of the employee, including their work record, and whether he or she was in a supervisory position. As to the circumstances of a fight, relevant considerations include whether the dismissed employee was provoked, and whether he or she was acting in self-defence.[57]

Mr Chambers' submissions

[63] Mr Chambers submits that the impugned conduct (i.e. the Fight) relied upon by the Toll to dismiss Mr Chambers occurred outside of work. Further to that point, Mr Chambers' submits:[58]

> (a) The Fight occurred whilst he was on paid leave to perform union-related duties.
>
> (b) He was neither at work, nor performing work-related duties, when the Fight occurred, but was in fact "thousands of kilometers away", and was not wearing any clothing that identified him as an employee of Toll.
>
> (c) The Fight occurred during Mr Chambers' and Mr Newton's "private time".
>
> (d) There is no enduring animosity between Mr Newton and Mr Chambers, and the two "rarely" work together anyway.
>
> (e) In these circumstances, it cannot sensibly be suggested that the Fight was objectively likely to seriously damage the employment relationship between Mr Chambers and Toll. The Fight was incapable of impacting upon Toll's interests. What occurred had nothing to do with Mr Chambers' duties as an employee. Viewed objectively, the out of hours conduct was not a rejection or repudiation of the employment contract.
>
> (f) Further to the submission at (e), Toll has, by its conduct, admitted that the Fight did not fall within the remit of the employment relationship. Mr Newton made a WorkCover claim in relation to the injuries he sustained in the Fight. Toll rejected this claim on the premise that the injuries said to have been sustained by Mr Newton did not occur during his employment. This rejection constitutes an admission against

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[56] *AWU-FIME v QLD Alumina Limited* (1995) 62 IR 385 at 391, as referred to in *Drake v BHP Coal Pty Ltd; Bird v BHP Coal Pty Ltd* [2019] FWC 7444 at [18].

[57] *WU-FIME v Queensland Alumina Limited* (1995) 62 IR 385 at 391 (Moore J).

[58] Applicants submissions at paragraphs 8 to 14.

interest by Toll in these proceedings. Moreover, it triggers the principle of approbation and reprobation which operates to preclude Toll from contending that the conduct (i.e. the Fight) had a sufficient nexus to Mr Chambers' (and Mr Newton's) employment.[59] Toll exercised a right to reject Mr Newton's WorkCover claim by asserting that the Fight occurred outside the sphere of his employment. It cannot now be heard to say that the Fight was related to, or connected with, Mr Chambers' employment.

(g) In the alternative, and should the Commission determine that the Fight had a relevant nexus to Mr Chambers' employment, there was, in any event, no valid reason for Mr Chambers' dismissal. Where a dismissal is founded upon an incident involving a fight between employees, assessment of whether there is a valid reason for dismissal requires the Commission to have regard to all the circumstances in which the fight occurred, including whether the dismissed employee was provoked or acting in self-defence.[60] Mr Chambers believed that the conduct he engaged in was necessary in his own self-defence. His conduct was a reasonable response to the circumstances as he perceived them. His conduct was, in the circumstances, entirely lawful. Hence, there was no valid reason for Mr Chambers' dismissal even if the conduct (i.e. the Fight) was legitimately a concern of Toll.

Toll's submissions

[64] Toll submits that the evidence clearly demonstrates there was a valid reason for its decision to terminate Mr Chambers' employment. In support of this position, Toll submits:

(a) Mr Chambers' conduct amounted to serious misconduct.

(b) At the time of the Fight, the Applicants knew that violence was not tolerated or accepted by Toll, and knew that the meaning of workplace extends "where the company has sanctioned attendance of employees to social functions organised by other external parties".

(d) At the time of the Fight, the Applicants knew or ought to have known that "Serious Misconduct may occur on-site and off-site", and that Serious Misconduct includes "criminal behaviour or offending as defined by the laws of the country (jurisdiction) in which the employee is located, or a breach of the 'Toll Group Code of Practice', or any other Toll Group Policy, Regional Policy or Standards, as published on the Toll Intranet website, that is assessed as posing a serious and significant threat to the reputation and brand of Toll Group".

(e) Mr Chambers has previously been issued a verbal warning.[61] Further, when concerns were raised with Mr Chambers regarding his behaviour (including throughout the investigation and disciplinary processes that led to his dismissal), Mr Chambers consistently maintained, and continues to maintain in these proceedings, that he acted in self-defence.

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[59] See: *Commonwealth v Verwayen* (1990) 170 CLR 394 at 421 (Brennan J).
[60] *Tenix Defence Systems Pty Ltd v Fearnley* Print S6238 at [25].
[61] See paragraph [13] of this decision.

[65] Further, as to whether a valid reason can be founded upon "out of hours conduct", Toll submits:

> (a) The purpose for the Applicants' travel on the morning of Thursday, 30 May 2019 was to attend the TWU meetings, which were attended by Toll's employees only, some of which were members of Toll's management.
>
> (b) The very absence from work by the Applicants, whilst being paid as if at work, was in accordance with cl.49.3 of the Agreement. In other words, the Delegate's Leave which had been sanctioned by Toll (for the purposes of the Applicants' attendance at the TWU meetings), was directly connected with the Applicants' employment, including their employment entitlements under the Agreement.
>
> (c) The Applicants' flights and accommodation to Melbourne were arranged and paid for by Toll.
>
> (d) The Applicants' transport, and their meal (dinner) immediately prior to the Fight was paid for by Toll, as was their breakfast on 31 May 2019.
>
> (e) The Fight occurred out of the front of the Hotel at which overnight accommodation for the Applicants, and other Toll TWU delegates, was being paid for by Toll.
>
> (f) The Fight arose from a conversation concerning work.
>
> (g) Mr Chambers' conduct caused another employee to suffer physically as a result of his actions during the Fight, which may, or may still, have created exposure to Toll. Similarly, Mr Newton was subsequently unable to attend for his rostered shifts, and was absent on paid sick leave, directly arising from the Fight.
>
> (h) The Fight directly affected a number of Toll's employees and the relationship that existed between various employees who work together for Toll, either because they were staying at the Hotel on the night of the Fight, or had to participate in the investigation process. Toll is also re-considering its involvement in arranging accommodation for TWU delegates.
>
> (i) The Fight had the potential to, and indeed may actually have, adversely affected Toll's reputation.
>
> (j) The Fight was incompatible with the Applicants' duties at Toll, where they were largely unsupervised.

Mr Chambers' reply submissions

[66] Mr Chambers made the follow submissions in reply:

> (a) Toll's contention that it was able to regulate Mr Chambers' "out of hours" conduct because he was on Delegates' Leave is without merit. In assessing whether an employer is able to regulate conduct that takes place when an employee is not required to work, and is not performing work, the nature and terms of the employee's

employment, and the circumstances in which the work done by the employee occurs, are important factors.[62] Mr Chambers submits relevant factors include:

i. Delegates' Leave is defined by the Agreement to be "paid time off" to represent the interests of employees of Toll who are members of the TWU. Delegates Leave, much like annual, personal, compassionate and other classes of leave, is an entitlement conferred on employees to be absent from work. It is therefore "time off work" and thus time outside the scope of employment. Whilst on such leave, delegates are not working for Toll. Instead, they are engaged in private, union focused activities. The fact that the leave is paid is neither "here nor there"; and

ii. Toll is obliged to sanction Delegates' Leave. There is nothing in the Agreement that permits Toll to direct that such leave be taken, or to direct employees to do or not do certain activities whilst they are on Delegates' Leave.

(b) Regarding the applicability of Toll's policies (i.e. the Toll Code and related standards), Toll's reliance upon same is misplaced. *Firstly*, the policies do not say anything about employee behaviour whilst they are on leave. *Secondly*, the policies do not say anything about employee behaviour whilst on Delegates' Leave. *Thirdly*, the polices deal with how employees are to interact with one another "at the workplace", extending to "where [Toll] has sanctioned attendance of employees [at] social functions organised by other external parties". The policies are not capable of applying to the circumstances of Mr Chambers because he was not at work. Toll neither organised, nor sanctioned, the function that the Applicants were attending. *Finally*, the "Serious Misconduct Policy" is geographically and temporally limited. The limits of that policy fall outside the conduct alleged to have occurred on 30 May 2019 (i.e. the Fight).

(c) The fact that Toll paid for the Applicants' airplane tickets, cab fares, accommodation and meals does not sufficiently connect the Fight to the Applicants' employment with Toll. Neither does Toll's assertion that the alleged physical altercation resulted from a work-related discussion. Toll has engaged in "but for" style reasoning (i.e. but for Toll paying for the trip, the incident would not have occurred, and so the requisite connection is made out). This is not the test at law.

(d) There is no evidence that other employees were affected by the Fight, or that Toll's reputation has been adversely affected.

(e) Toll's assertion that the Fight impacts upon Mr Chambers' duties because he works unsupervised is facile, unsupported by evidence, and is otherwise a bald, unparticularised and baseless assertion.

Relevant law as to valid reason founded on out of hours conduct

[62] See: *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 at 293-294 (Dixon J); *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 537 (Barwick CJ); *Comcare v PVYW* [2013] HCA 41 at [43] (French CJ; Hayne, Crennnan and Kiefel JJ).

[67] In *Rose v Telstra Corporation Limited* (***Rose***),[63] Vice President Ross (as his Honour then was) identified the alternative circumstances in which "out of hours" conduct can constitute a valid reason for dismissal:

> "It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:
>
> - viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
> - it damages the employer's interests; or
> - it is incompatible with the employee's duty as an employee.
>
> In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.
>
> Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct".[64]

[68] *Rose* has been cited and applied in many decisions of this Commission. Its facts concerned a physical altercation in a hotel room between two employees of Telstra. Telstra arranged for Mr Rose to be in Armadale for work, and paid him an overnight allowance. On the night the relevant incident occurred, the employees went to dinner and then a nightclub after work, where they consumed alcohol, before returning to a private hotel room later in the evening. It was in this hotel room where the physical altercation between the employees occurred. During that fight, Mr Rose was cut across the chest that rendered him unfit for work. At the time the fight occurred, neither employee was wearing clothing that identified them as Telstra employees, nor were they "on call" (albeit Mr Rose was due to commence work the following day). Mr Rose was terminated for his involvement in the fight. However, it was found that Mr Rose's involvement in the fight lacked the required connection with his employment with Telstra (even though he was being paid a living away from home allowance per day). Further, there was no evidence to support the conclusion that Mr Rose's conduct tarnished the public reputation of Telstra. In the absence of a valid reason, Vice President Ross found the dismissal of Mr Rose to be unfair.

[69] Further to *Rose*, Mr Chambers relies upon *Keenan v Leighton Boral Amey NSW Pty Ltd* (***Keenan***).[65] The facts and reasoning of *Keenan* warrant elucidation. An employee had attended a Christmas function organised by his employer, during which he became heavily intoxicated. Later in the evening, and following the conclusion of Christmas function, the employee and his colleagues relocated to another venue. From that time onwards, the employee engaged in several oafish, boorish acts, including the use of offensive language,

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[63] [1998] AIRC 1592.

[64] Ibid. See also: *Appeal by Dobson* [2013] FWCFB 10037 at [20]; *Hughes v Momentum Wealth Pty Ltd* [2017] FWCFB 759 at [20]; *Gosek v Illawarra Coal Holdings Pty Limited 2* [2017] FWC 4574, *Keenan v Boral Amey NSW Pty Ltd* [2015] FWC 3156

[65] [2015] FWC 3156.

attempting to inappropriately touch a female colleague, and kiss another female colleague without her consent.

[70] The employer terminated the employee for this conduct, arguing that such behavior would fall afoul of the *Sex Discrimination Act 1984*. As the employer could be vicariously liable for that behavior, the employer submitted that such a connection gave rise to a valid reason for dismissal. However, Vice President Hatcher disagreed with that position. The Vice President reasoned as follows:

> "I do not consider that conduct … can be said to be in connection with Mr Keenan's employment. The social interaction which occurred there was not in any sense organised, authorised, proposed or induced by [the employer]. Those who gathered there did so entirely of their own volition. It was in a public place. There was nothing in [the employer]'s Code of Conduct or relevant policies which suggested that they had any application to social activities of this nature … the conduct in the upstairs bar was merely incidental to [the employee's] employment.
>
> It follows from that conclusion that [the employee's] sexually harassing behavior … was not rendered unlawful by s.28B of the [*Sex Discrimination Act 1984*], and it was not conduct for which [the employer] was vicariously liable. It cannot for that reason constitute a valid reason for dismissal, even though that conduct, as I have found, fell within the statutory definition of sexual harassment.1
>
> Leaving aside the application of the [*Sex Discrimination Act 1984*], I do not consider that what occurred at the upstairs bar constituted conduct within the scope of [the employee's] employment which could legitimately constitute a valid reason for dismissal in accordance with the principles stated in *Rose v Telstra* … [I]t was conduct which occurred in essentially a private social setting, albeit involving persons sharing a common employer who had just attended an official Christmas function, it was not conduct which could be regarded as indicative of a rejection or repudiation of Mr Keenan's employment contract".[66]

[71] A contrasting case to *Keenan* is *Drake v BHP Coal Pty Ltd; Bird v BHP Coal Pty Ltd* (***Drake; Bird v BHP***),[67] which Toll seeks to rely upon. Again, the factual circumstances warrant consideration. Two employees were terminated because they had been involved in a physical alteration at a Christmas function organised, in part, by their employer. Despite the employees' position that they were under the belief the event had been privately organised by their colleague, the employer contributed to the purchase of food and alcohol, and otherwise sanctioned the event.

[72] In these circumstances, Deputy President Ashbury found that there was a sufficient connection between the conduct of the employees and their employment, so much so as to give rise to a valid reason for dismissal. The Deputy President reasoned:

> "I am also of the view that the fact that 90 people including 60 employees of [the employer] and their families were gathered in one venue with a common purpose of celebrating Christmas, is sufficient to establish that the event was work related … If 30

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[66] Ibid at [101] to [103].
[67] [2019] FWC 7444.

> – 40 employees of [the employer] were gathered in a venue for drinks, united by the fact that they work in accordance with the same roster for the same company, and some of those employees had an altercation with another employee of [the employer] or a member of the public, those employees should not assume that their conduct will be considered out of hours conduct that is not related to work and to which [the employer's] policies do not apply.
>
> Where an employee physically assaults a work colleague in a public place in the presence of other work colleagues, the assault may be conduct that is likely to cause serious damage to the relationship between the employer and the employee. It may also breach company policies or procedures … Other employees … should not be put in a position where they witness an assault or are caught in the middle of it. … [I]t is likely that where a large group of its employees gather in a public venue and consume alcohol and some of that group have a physical altercation, that [the employer's] interests will be damaged. The likelihood of such damage increases where there are members of the public who are not employed by [the employer] who are present at the relevant time".

Consideration

[73] I agree with and adopt the principles laid down in *Rose*. To that end, I must determine whether the conduct complained of bears a sufficient connection to Mr Chamber's employment with Toll, and whether the conduct complained *vis* the Fight is be considered of such gravity or importance as to indicate a rejection or repudiation of continued employment by Mr Chambers.

[74] In short, but as further explained following, I have concluded that there is no evidence before me that sufficiently tethers the circumstances of the Fight to Mr Chamber's employment with Toll (let alone demonstrates a rejection or repudiation by him of his employment).

[75] The following factors have led me to the foregoing conclusion:

> (a) On 30 and 31 May 2019, the Applicants were on leave, and away from the Toll workplace. They were neither at work nor on-call. Although they were on Delegates' Leave, being paid leave provided for under the Agreement (and otherwise authorised by Toll), this fact cannot directly, or by way of implication, in the circumstances of this case, alter the ordinary position that 'leave is leave' (i.e. being time when an employee is not 'at work'). In this case, the Applicants were on leave in respect of their roles as TWU delegates, attending upon meetings organised by the TWU and not by Toll. They were selected by the TWU to attend such meetings,[68] and were not required or directed by Toll to attend such meetings or take Delegate's Leave. Whilst it is trite that a TWU delegate at Toll is also an employee of Toll, the fact that a TWU delegate wears two hats at the same time does not mean that they must *always* wear those hats together. Further, this is not a case where the Applicants were attending TWU meetings at a Toll workplace, or before, during, or after a rostered shift. Nor is this a case where the Applicants were attending an enterprise agreement negotiation, or a disciplinary meeting as a representative or support person for another TWU

[68] Exhibit R8, Annexure RL-19 (bottom of p.120 of Exhibit R8).

member. The TWU meetings were being conducted, once the Applicants were on Delegate's leave, outside of the Applicants' working hours.

(b) Further to (a), even if I am found to be wrong and the Applicants' were at work whilst on Delegate's Leave, any assertion that the Applicants were at work, at its highest, could only extend to the hours of the TWU meetings themselves (noting that there was no work, union or social gathering (or alike) organised by the TWU or Toll post the cessation of the TWU meetings on 30 or 31 May 2019). I am not aware of any basis that I am able to find that post the cessation of the TWU Meetings, the Applicants were other than on their own free time (being time that the Applicants were neither in their capacity as an employee of Toll, or a Toll TWU delegate). Whatever the Applicants got up to, or wanted to get up to, during their "free time", was a matter for them. Hence, even if it was accepted that the Applicants were at work up until the conclusion of the TWU meetings at 4:00pm on 30 May 2019, there was an interval of "free" or "personal" time between 4:00pm that day, and the recommencement of the TWU Meetings at 8:00am the following day.[69]

(c) For completeness, I reject Toll's submission that a sufficient connection to the workplace was somehow enlivened because the Applicants were discussing work related matters in the lead up to the Fight commencing. To adopt this line of reasoning would be to fall into *reductio ad absurdum*. A simple rhetorical proposition puts the argument to bed in short thrift: Would Toll *always* be willing to recognise a sufficient connection to a person's employment *just* because an employee discussed work-related matters outside of rostered hours? The answer must surely be no.

(d) The fact that Toll paid for and/or organised the Applicants airfares, other transportation, accommodation and meals, does not alter my findings in (a) to (c) above. Toll did so, it appears, of its own volition. I have not been directed to any term of the Agreement, or other policy document, that would require Toll to make such payments or arrangements. Further, there is no evidence to suggest that the Applicants would not have attended the TWU meetings anyway (i.e. had Toll not agreed to pay for their airfares, other transportation, accommodation and meals). The Applicants needed to get to Melbourne and the TWU offices in Port Melbourne, they needed accommodation somewhere, and they needed to eat dinner. In the circumstances of this case, whether such matters were arranged and/or paid for by Toll, the TWU, or the Applicants themselves, is not, in my view, a factor that weighs towards a finding that the Applicants were at work at the time of the Fight. In saying this, it is important to clarify that whilst Toll paid for the Applicants' dinners on 30 May 2019, it do not dictate or arrange where such dinners were to occur. The fact that Mr Chambers chose to eat at the Hotel he was staying at, being the same Hotel that Mr Newton was staying and ate at, is little more than coincidence on the evidence.[70]

(e) Toll has submitted that the terms of the Agreement (in relation to TWU delegates), and/or the terms of its policies and procedures, have been breached by the

[69] Transcript, PN1812-1821, especially the question in cross-examination "... so just to be clear, so you've finished your activities [at the TWU meetings] and come back to the Hotel which – where Toll has booked for you to stay, in the evening? --- That's correct".

[70] Mr Chambers and Mr Newton did not eat together. Mr Chambers ate his dinner alone, being sometime after Mr Newton had finished his dinner in the company of others.

Applicants as a result of the Fight. In relation to cl.49 of the Agreement, I do not consider the Applicants breached its terms. *Firstly*, the Applicants did not engage in the Fight during working time. *Secondly*, the Applicants were in their own "free time" at the time they engaged in the Fight (i.e. neither of the Applicants, at the time of the Fight, were in their capacity as an employee of Toll, or a Toll TWU delegate). *Thirdly*, it follows that neither of the Applicants were performing any functions, responsibilities or duties, by reference to the terms of the Agreement, when the Fight occurred. *Fourthly*, I do not consider that a fair reading or construction of the terms of Toll's policies and procedures extends to, or encompasses, the regulation of an employee's, or TWU delegate's, "free time". Further, although I do not construct such policies such a way, if they are to be constructed in such way, I do not consider them to be reasonable to the extent that they would give rise to a sound, defensible or well-founded reason for dismissal in the circumstances of this case.

(f) Toll submits that because Mr Chambers inflicted injuries to Mr Newton that resulted in him being unfit for work, I should find that a sufficient connection to the work exists. The difficulty with this submission is that Newton's injuries arose outside of the workplace. In my view, it follows that such injuries, or the infliction of same, do not in and of themselves give rise to a sufficient connection to the Applicants' employment.

[76] Having concluded that the Applicants were not at work at the time of the Fight, I also conclude that the Fight was not of such gravity or importance as to indicate a rejection or repudiation by Mr Chambers of his contract of employment with Toll. In this regard:

(a) There is nothing on the evidence to suggest that Toll's reputation or interests have been damaged. Of course, I accept generally that employees engaging in fighting at work will not assist an employer's reputation. However, the Fight did not occur at work. I agree with Mr Chambers' submissions that there is no evidence that Toll's interests have been adversely affected as a matter of fact. Indeed, there is no suggestion that members of the public, or even other TWU Toll delegates, looked upon the Fight and associated it with Toll.

(b) The fact that other employees became aware of the Fight after it had occurred does not, in my view, enable me to make a positive finding that this 'awareness' individually, or combined with the other facts and circumstances of this case, has caused Toll's interests to have been damaged. Further, no members of the public witnessed the Fight, and the Applicants were not wearing any clothing that would give rise to anyone associating their conduct with Toll.

(c) I have found Mr Chambers to be a wholly credible witness. The fact that Mr Chambers himself believed that he was bound by Toll's policies and procedures during his own free time, in my view, is neither here nor there. The question is, on a proper construction and application of Toll's policies and procedures, did they apply to the Applicants at the time of the Fight (when the Applicants were in their own 'free' and personal time). I have found that they do not.

(d) Mr Chambers readily accepts that despite the Fight occurring during his own private time, Toll was entitled to investigate the matter. I concur with this view. Whilst the Fight occurred outside of work, Mr Chambers was required to be candid

> and honest with Toll in respect of his responses during Toll's investigation.[71] He also had a duty to co-operate with Toll in respect of such investigation. My findings on the evidence are that Mr Chambers did co-operate with Toll in respect of the investigation, and that he was candid and honest in his responses to Toll during such investigation. It follows that I do not accept that there is any basis to suggest that Mr Chambers' conduct in respect of the investigation was incompatible with his duties to Toll as an employee, or can otherwise be said to cause serious damage to the relationship between Toll and himself.

[77] A final issue for determination arises from Toll's criticisms of Mr Chambers for maintaining the view or belief, both during Toll's investigation, and before this Commission, that he was acting in self-defence.[72] Toll says that *firstly*, Mr Chambers was not acting in self-defence, and *secondly*, it was unreasonable for him to hold that belief. On the balance of probabilities, and in the facts and circumstances of this case, I consider that I am entitled to make a finding that Mr Chambers was indeed acting in self-defence. That said, whether or not Mr Chambers was acting in self-defence is somewhat of a moot point given that the Fight did not occur at work. I deal with the issue of self-defence anyway, in that it dovetails into the issue as to whether it was reasonable for Mr Chambers' to hold and otherwise maintain such a belief, and whether such a belief, if held unreasonably, can be said to be incompatible with Mr Chamber's duties to Toll as an employee.

[78] On the question of self-defence, Toll directed me to the following extract from the decision of McCarthy DP in *John Whittaker v EDI Rail-Bombardier Transport (Maintenance) Pty Ltd*:[73]

> ".. who is the aggressor is not the determinative factor. Once the fact is established that the Applicant hit the other employee it is up to the Applicant to establish that the act or acts were in self-defence. In order to establish whether the act or acts were in self-defence in this matter it is necessary to address:
>
> (i) the holding of the belief;
>
> (ii) whether there were reasonable grounds to hold the belief;
>
> (iii) whether a means of escape was available;
>
> (iv) the type of force used and whether it was excessive and not out of proportion to the danger seeking to be avoided; and
>
> (v) the circumstances giving rise to the incident."[74]

[79] It is not disputed that Mr Chambers held the belief that he acted in self-defence during the Fight. I have made findings as to the circumstances giving rise to the Fight, the type of force used, and whether such force was excessive, previously in this decision.[75]

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[71] *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 (at 81-81); *Digital Pulse Pty Ltd v Harris* (2002) 166 FLR 421 (at 424, [20]-[22]).
[72] Toll's Submissions (27 April 2020), at [4.48].
[73] [2013] FWC 7908.
[74] Ibid, at [7].

[80] Toll submits that there were essentially four occasions in the prelude to and/or during the Fight that Mr Chambers could have extracted himself from further confrontation. *Firstly*, when he became aware of the tension between Mr Newton and himself during conversation (i.e. before any physical altercation had occurred, at the point "fuck you" was exchanged).[76] *Secondly*, when Mr Newton removed his jumper and took a boxing stance (again, before any physical altercation had occurred).[77] *Thirdly*, after Mr Chambers threw the punch that put Mr Newton on the ground.[78] *Fourthly*, after Mr Newton was on the ground, and Mr Chambers was standing over him.[79]

[81] Having regard to the evidence, including the cross-examination of Mr Chambers, I do not accept that a fair reading of the evidence supports Toll's submissions. It is very easy in hindsight, especially in relation to a fight, to say what should have happened, or what decision another individual could have reasonably made. Mr Chambers did not have the benefit of hindsight. He had to deal with what was in front of him at the time.

[82] In my view, the evidence discloses that Mr Chambers was completely taken by surprise as to Mr Newton's behavior. He was confronted by a hostile and highly agitated individual, making physical threats against him, which ended up (in very short compass) in a physical fight. The verbal and physical threats continued until such time as Mr Chambers was able to neutralize Mr Newton, or have Mr Newton unequivocally accept that it was not in his best interests to continue the Fight any further. Mr Chambers only hit Mr Newton twice. In the lead up to those strikes, Mr Chambers repeatedly asked Mr Newton to desist and stand down. Mr Newton refused to do so, and indicated that he had every intention to cause significant harm to Mr Chambers if given the opportunity.

[83] This is not a case where Mr Chambers hit Mr Newton for no apparent reason, or continued to lay into Mr Newton once he was on the ground and compromised. In short, whilst there 'may' well have been instances that provided Mr Chambers with an opportunity to simply run away, on the evidence, and in the overall facts and circumstances confronting Mr Chambers in the lead up to, and at the time of the Fight, I do not consider that I am able to squarely find that any means of escape notionally open to Mr Chambers to avail himself of were such that Mr Chamber's is not entitled to assert that he was acting other than in self-defence.

[84] In any event, and in my view, all that matters for the purposes of the test in *Rose* is whether the belief as to self-defence held by Mr Chambers was reasonable to the extent that the holding of such a belief was not baseless or contrived, or such that it was incompatible with Mr Chambers duty to Toll to be honest. In this regard, I consider that Mr Chambers was and is entitled to hold and maintain such belief, both with Toll, and before this Commission. Even if it might be said that such a belief is arguably wrong (by reference to the strict legal definition of self-defence), it is not a belief that Mr Chambers can be said to hold disingenuously, or for the purposes of misleading Toll about his conduct or role in the Fight.

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[75] See also, Toll's Submissions (27 April 2020), at [3.25] to [3.38], [4.23] to 4.26].
[76] Toll's Submissions (27 April 2020), at [4.29] to [4.30].
[77] Toll's Submissions (27 April 2020), at [4.31] to [4.35].
[78] Toll's Submissions (27 April 2020), at [4.36] to [4.38].
[79] Toll's Submissions (27 April 2020), at [4.39] to [4.40].

No valid reason

[85] In view of my having found that the impugned conduct *vis-a-vis* the Fight does not bare a sufficient connection with Mr Chambers' employment, and my also having found that Mr Chambers' held a genuine belief that he was acting in self-defence at the time, I conclude that there was not a valid reason to dismiss Mr Chambers.

Was the Applicant notified of the valid reason? Was the Applicant warned about unsatisfactory performance before the dismissal? Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[86] If there is no valid reason for dismissal, and the reason relied upon was not about Mr Chambers' performance, then s.387(b), (c) and (e) have no utility.[80] As such, these criteria go no further than being neutral considerations.

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

[87] Mr Chambers was accompanied by a support person, being TWU organiser Mr Ken Hunt.[81] As such, I treat this criterion as being a neutral consideration.

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

[88] Toll is a large business, and has access to a well-resourced human resources and workplace relation teams. I therefore treat these criteria as being of neutral consideration.

What other matters are relevant?

[89] Mr *Boncardo* (on behalf of Mr Chambers), raised various other matters that he submitted weigh in favour of a finding that Mr Chamber's dismissal was harsh, unjust and/or unreasonable.[82] Toll joined issue on those matters, and essentially submitted that they are not matters that are determinative on their own as to the fairness of the dismissal, and/or do not mitigate against a finding of fairness.[83] Having considered those matters, in the circumstances of this case, I weigh them as no more than neutral considerations in terms of my ultimate finding as to whether the dismissal of Mr Chambers was harsh, unjust, and/or unreasonable.

Was Mr Chambers' dismissal hash, unjust, or unreasonable?

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[80] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[81] Mr Chambers' submissions at [26].

[82] Final Submissions for Wayne Chambers, 25 March 2020, at [91] to [104].

[83] Toll Submissions, 27 April 2020, at [6.1] to [6.22].

[90] Having regard to the findings that I have made in this decision, and having given due weight to each of the essential criteria provided for under s.387 of the Act, I am satisfied that Mr Chambers' dismissal was unfair within the meaning of s.385 of the FW Act.

[91] Mr Chambers was dismissed by Toll for conduct that did not occur at work, and did not have a sufficient connection with Toll or its workplace. He accepted that Toll was entitled to investigate the Fight that he was involved in, genuinely participated in that investigation, and was open, consistent and honest with Toll in answering the matters raised with, or asked of, him during that investigation. I am therefore satisfied that Mr Chambers dismissal was harsh, unjust, and unreasonable (within the ordinary meaning of those terms).

Remedy

[92] Being satisfied that Mr Chambers:

(a) has made a valid application for an order granting a remedy under s.394 of the Act;

(b) was a person protected from unfair dismissal; and

(c) was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the Act, order the reinstatement of Mr Chambers, or the payment of compensation to him.

[93] Under s.390(3) of the Act, I must not order the payment of compensation to Mr Chambers unless:

(a) I am satisfied that his reinstatement is inappropriate; and

(b) I consider that an order for payment of compensation is appropriate in all the circumstances of the case.

[94] Mr Chambers seeks reinstatement, continuity of service, and restoration of lost pay. He made the following submissions in support of such remedies:

(a) Reinstatement is the first and perhaps foremost remedy for unfair dismissals under the Act. Pursuant to s.390(3)(a) of the Act, there must be a finding that reinstatement is inappropriate before the Commission has power to make an order for compensation. The relevant question, therefore, in determining whether to order reinstatement in relation to an unfair dismissal is whether reinstatement is appropriate in the particular case.

(b) A salient factor in determining whether reinstatement is appropriate is whether there has been a loss of trust and confidence in the employment relationship. This is a relevant but not determinative criterion. Whether there has been a loss of trust and confidence is an objective matter. The party asserting a loss of trust and confidence bears the onus of making good the assertion.

(c) Reinstatement is manifestly appropriate in the current case. There are, in fact, no compelling factors which would make reinstatement impracticable. The following factors weigh in favour of this conclusion:

(i) Mr Chambers has been a loyal and long-serving employee of Toll, and had a good employment record over his almost eight years' service;

(ii) Toll is a substantial employer and is doubtless able to accommodate Mr Chambers' reinstatement. Mr Chambers had previously been offered and accepted a transfer to a yard work position at Toll's Eastern Creek yard, which he would happily take up if he were reinstated. This would involve Mr Chambers working at an entirely different depot to Mr Newton, and no longer holding the position of TWU Linehaul Delegate;

(iii) there is no evidence to demonstrate that Mr Chambers would ever engage in the conduct for which he was terminated during the course of his employment; and

(iv) Mr Chambers was cooperative, consistent, honest and forthright throughout the investigation process.

[95] Toll opposes Mr Chambers' reinstatement. Toll's submissions in this regard are as follows:

(a) reinstatement, continuity of service and back-pay is not appropriate given:

(i) the serious nature of Mr Chamber's conduct;

(ii) the fact that Mr Chamber's has consistently maintained (and continues to maintain in these proceedings) that he acted in self-defence; and

(iii) the fact that the trust and confidence of Toll (as Mr Chamber's employer) has been irreparably destroyed as a result of the Fight.

(b) If the Commission were to find against Toll, then the Commission should not make the requested orders for back-pay and continuity of service as to do so would be plainly inappropriate, and have the effect of depriving Mr Chamber's misconduct of any consequence.

[96] In reply, Mr Chambers' submitted that Toll's submissions on the question of reinstatement should be rejected. The Fight was not within the scope of Mr Chambers' employment and therefore was incapable of grounding a valid reason for dismissal. Further, Mr Chambers' actions were lawful and in self-defence. In the circumstances, there is no basis for Toll's bald contention that there has been a loss of trust of confidence.

[97] Further, Mr Chambers' made the following closing submissions:

(a) Mr Chambers' cites the principles espoused by the Full Bench decision in *Nguyen v Vietnamese Community in Australia*:[84]

> "The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:
>
> - Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
>
> - Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
>
> - An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
>
> - The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
>
> - The fact that it may be difficult or embarrassing for an employer to be required to reemploy an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.
>
> Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party".

(b) The only evidence led by Toll, as to the reinstatement of Mr Chambers being inappropriate, was from Mr Smith. None of the managers or supervisors who had responsibility for Mr Chambers whilst he was actually performing work for Toll were called to give evidence about their views on reinstatement. Mr Smith detailed that he had had no involvement whatsoever in directing Mr Chambers to perform work, and was never responsible for supervising Mr Chambers' performance of work. Mr Smith

[84] [2014] FWCFB 7198.

is based in Melbourne (rather than at Bungaribee), and his interactions with Mr Chambers were only in the context of Mr Chambers' union delegate role. Mr Smith gave evidence under cross-examination that he did not even know who Mr Chambers' supervisors were. Mr Smith thus never managed or supervised Mr Chambers in the performance of work. His opinions and views about the appropriateness of reinstatement are, in the circumstances, bereft of any probative value and his evidence is incapable of discharging the onus carried by Toll.

(c) Mr David Mulquiney and Mr Shaun Wilson were the supervisors responsible for Mr Chambers. Neither of these individuals were called by Toll. Mr Chambers gave evidence that he had a positive and respectful working relationship with them both, which was not challenged on this by Toll at the hearing. Mr Chambers' evidence in this regard should be accepted. Mr Markham, who was appointed about mid-year, has had no interactions with Mr Chambers. In any event, Mr Markham was not called by Toll. The failure of Toll to call either of Mr Mulquiney, Mr Wilson or, for that matter, Mr Markham, without any explanation means that the Commission should infer that the evidence of these supervisors and managers would not have supported or assisted Toll's case against reinstatement.

(d) In the circumstances, there was no evidence from any supervisor or manager who actually supervised or managed Mr Chambers that as a result of the Fight such supervisors or managers have lost trust and confidence in him. The analysis of Gray J in *AMIEU v G&K O'Connor Pty Ltd* [2000] FCA 627 is germane to the present case:

> "The law relating to the need for trust and confidence in an employment relationship was developed at a time when employment invariably involved a close personal relationship between employer and employee. The advent of corporate employers has diminished the importance of this element of the employment relationship. A corporation has no sensitivity. The crucial question must be what effect, if any, loss of trust by a manager in an employee is likely to have on the operation of the workplace concerned. It might be more significant, for instance, to know the name of Mr Voss's immediate supervisor and to know the attitude of that person towards him. If the immediate supervisor had no trust in Mr Voss, it might also be relevant to know whether it would be possible to place Mr Voss in another part of the workplace, under another supervisor, who did have such trust. It would also be relevant to know what effect any lack of trust by any manager or supervisor in a particular employee might have on the conduct of operations in the workplace. There is no evidence as to any of these matters".

(e) Further, Mr Chambers' acts during the Fight were perceived by him to be necessary to defend himself and engaged in in circumstances well detached from his conduct of work as a Truck Driver. That his conduct was premised upon him defending himself is not, contrary to Mr Smith's bald assertions, something capable of grounding a sound foundation against reinstatement.

(f) Moreover, the notion advanced by Mr Smith that Mr Chambers, who drove linehaul, worked 'unsupervised' is without basis. Mr Chambers' evidence was that he was monitored at all times by cameras in his truck was not challenged by Toll. The

comprehensive nature of Toll's monitoring of linehaul drivers whilst they performed work was explicated by Mr Chambers in his oral evidence.

(g) Finally, subsequent to the Fight there was (and is) no animosity between Mr Newton and Mr Chambers. Their respective evidence about this was not challenged in cross-examination by counsel for Toll. Moreover, Mr Newton and Mr Chambers met and discussed their future working relationship. They shook hands and both agreed that they would be able to work positively together, and that there would be no on-going issues between them. This evidence was not challenged by Toll during cross-examination, and should be accepted. It cannot, therefore, be suggested that there would be any disruption or difficulty if the reinstatement of both of Mr Newton and Mr Chambers occurred.

(f) In the circumstances, there is no sound or rational basis for concluding that it is inappropriate to restore the employment relationship. To the contrary, reinstatement is manifestly appropriate and should be ordered. If the Commission orders Mr Chambers to be reinstated, consequential orders for backpay and continuity of service should also be made.

[98] Toll made the following closing submissions:

(a) It is well accepted that reasonable minds may differ on the appropriate disciplinary response to a particular instance of misconduct and, consequently, that the Commission should not substitute its own views for the discretion reasonably exercised by Toll.

(b) Reinstatement, continuity of service and back-pay is not appropriate given:

(i) the serious nature of Mr Chambers' conduct, including his own admissions regarding same; and

(ii) the fact of Mr Chambers maintaining, despite the objective evidence, that he was justified in his responses and would do it again if faced with the same circumstances, or a belief that he was required to defend himself.

(c) Further to Mr Chambers' stance, and refusal to express that he had committed any wrongdoing and would act similarly again, the Commission has, faced with a similar attitude, found reinstatement to be an inappropriate remedy. In *Gwatking v Schweppes Australia Pty Ltd* [2015] FWC 3969, Commissioner Hampton found (at [64]) that there had been a valid reason for dismissal, but that the dismissal was harsh due to the nature of the conduct, and the fact that the employee was long serving and had been detrimentally impacted by the dismissal. However, Commissioner Hampton found that reinstatement was not appropriate given, relevantly, Mr Gwatking's view that "it is a man's right to fight", and that something beyond mere reasonable self-defence is appropriate when confronted. Commissioner Hampton reduced the amount of compensation by 40 percent due to misconduct.

(d) Mr Chambers, as an experienced employee, undertook most of his work away from Toll's depots, and Toll relied upon him to act responsibly at all times when acting in connection with Toll's business and employees.

(e) The trust and confidence of Mr Chambers' employer has been irreparably destroyed as a result of the Fight.

(f) Mr Chambers' submission that there is no ill will between Mr Newton and himself, and that they have recently had positive interactions, is opportunistic and should be given no weight. In particular, it is noteworthy that, following termination of employment on 23 August 2019, there is no evidence to suggest that there was any interaction or attempted communication between the Applicants until 29 January 2020 (that is, some days before the hearing commenced on 4 February 2019). Mr Chambers explained that this meeting was organised at the TWU Office to address the ability of both persons to continue as union delegates. In other words, it would appear to be a meeting organised with the involvement of the TWU three business days before the hearing was due to commence.

(g) If the Commission were to find against Toll in this regard, then the Commission should not make the requested orders for back pay and continuity of service as to do so would be plainly inappropriate, and have the effect of depriving Mr Chambers' serious misconduct of consequence.

[99] Mr Chambers made the following closing submission in reply:

(a) It is not and has never been the law that the Commission should not substitute its view in determining an unfair dismissal case for the discretion reasonably exercised by an employer. Unsurprisingly, no authority is cited for this fallacious proposition.

(b) It was never suggested to Mr Chambers or Mr Newton in cross-examination that their meeting and 'shaking hands' was a confection, or other than genuine. Nor was there any suggestion that their consistent evidence that they held no ill will towards one another was a fabrication.

(c) Reinstatement with backpay is appropriate in all the circumstances given that there has been no breakdown in the relationship of trust and confidence.

Is reinstatement appropriate?

[100] Mr Chambers' work will be constantly monitored by Toll if he is reinstated to the position of Truck Driver (pursuant to Toll's in-vehicle surveillance systems).[85] There is no evidence from any person at Toll who would be working directly with Mr Chambers (if he is reinstated) that there has been any loss of trust and confidence in him to perform his role of Truck Driver. Nor is there any evidence that his mere presence at the Toll workplace would cause any concerns or other difficulties. I have already rejected Toll's submissions as to Mr Chambers belief, that he was acting in self-defence, being unreasonable. I equally reject it as a basis upon which I might find that it would not be appropriate to reinstate Mr Chambers. There is no evidence to suggest that Mr Chambers would engage in further fighting at work (i.e. the Fight that occurred on 30 May 2019 appears to be a highly unusual event). Even if Mr Newton is reinstated, the evidence is that he and Mr Chambers rarely (if

[85] Exhibit C2, at [2.29].

ever) work together.[86] All things considered, I concur with Mr *Boncardo* that there is no sound or rational basis for concluding that it is inappropriate to restore Mr Chambers' employment relationship with Toll. I have confidence that Mr Chambers return to the Toll workplace will result in a continuing viable and productive working relationship. I also take into account Mr Chambers' remorse, regret and contrition in relation to his role in the Fight.[87]

[101] It is also appropriate to identify at this juncture that the actual fallout of the Fight has been nothing short of devastating for Mr Chambers. *Firstly*, he has had to engage in a physical altercation with Mr Newton that he did not want to be a part of. *Secondly*, he has been suspended from work whilst the Fight was investigated. *Thirdly*, he has been wrongly accused of glassing and/or "coward punching" Mr Newton, no doubt being allegations that would have made their way back to the workforce (and being actions that ordinary Australians consider disgraceful). *Fourthly*, he has been the subject of a workplace investigation. *Fifthly*, he has been terminated from a job that he had been working in for nearly eight years, with a nearly impeccable work history, because of a fight (initiated by Mr Newton). It is without doubt that Mr Chambers, in the events that have happened, has been subjected to significant emotional distress, reputational damage, and financial distress.

Conclusion

[102] In all the circumstances, my evaluative assessment is that the appropriate remedy in this matter is an order under s.391(1)(a) of the Act, reinstating Mr Chambers to the position in which he was employed immediately before his dismissal, namely as a Truck Driver. I also consider it appropriate to make an order under s.391(2) of the Act as to continuity of employment, and an order under s.391(3) as to lost remuneration, being remuneration lost by Mr Chambers between the date of his dismissal and the date he is reinstated.

[103] Section 381(2) of the Act is a significant overarching object of Part 3-2 of the Act. It is expressed as follows:

> "**381 Object of this Part**
>
> (1) The object of this Part is:
>
> (a) to establish a framework for dealing with unfair dismissal that balances:
>
> (i) the needs of business (including small business); and
>
> (ii) the needs of employees; and
>
> (b) to establish procedures for dealing with unfair dismissal that:
>
> (i) are quick, flexible and informal; and
>
> (ii) address the needs of employers and employees; and
>
> (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
>
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

[86] Note also Exhibit C2, p.11, [E[9]].
[87] Exhibit C1, at p.131-132; Exhibit C2, at [2.32].

Note: The expression "fair go all round" was used by *Sheldon* J in *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95."

[104] In my judgment, the outcome in this case is consistent with the object of Part 3-2 of the Act of providing a 'fair go all round' to both the applicant and the employer.

[105] A separate order will be issued giving effect to this decision. Should there be any issue dispute as to the implementation of such orders, or the calculation of lost remuneration, parties have liberty to apply to my Chambers.

DEPUTY PRESIDENT

Appearances:

Mr M *Gibian* of Senior Counsel, instructed by Mr G *Webb* of the TWU appeared for Mr Newton.

Mr P *Boncardo* of Counsel, instructed by Ms L *de Plater* of the TWU, appeared for Mr Chambers.

Mr B *Rauf*, instructed by Ms E *Strachan* of Herbert Smith Freehills, appeared for Toll.

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