



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Steve Newton

v

Toll Transport Pty Ltd
(U2019/9520)

DEPUTY PRESIDENT BOYCE

SYDNEY, 25 NOVEMBER 2020

Application for an unfair dismissal remedy — applicant a union delegate of 41 years of service with employer — applicant dismissed for alleged ‘serious misconduct’ for fighting and separately engaging in a verbal altercation — applicant travelled from Sydney to Melbourne to attend meetings convened by union — fighting occurred post the cessation of union meetings at a hotel — applicant on paid union delegate’s leave — employer paid for airfares, accommodation, and meals in Melbourne — fighting did not have sufficient connection to ‘work’ and thus not a valid reason for dismissal — verbal altercation not a valid reason for dismissal — employer investigation into fight and verbal altercation — applicant dishonest during investigation — applicant maintained version of events put forward to employer during hearing — whether dishonestly that became apparent during hearing a valid reason for dismissal — valid reason for dismissal found on the basis of dishonesty — procedural fairness concerns and other matters weighed against dishonesty — application for unfair dismissal remedy dismissed.

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

[2] The matter was heard together with the unfair dismissal application made by Mr Wayne Chambers in *Chambers v Toll Transport Pty Ltd* (**Chambers’ Decision**),¹ with evidence in one proceeding being evidence in the other. Many of my core findings in the Chamber’s decision apply equally in this decision.

[3] Where I refer to the “Applicants” in this decision, I am referring to both Mr Newton and Mr Chambers.

[4] Both of the Applicants were:

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

¹ [2020] FWC 5819.

(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).

[5] Mr Newton 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.

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

[7] A further reason relied upon by Toll to dismiss Mr Newton concerns his role in another verbal altercation with another Toll TWU delegate, Mr Robert Mitchell, on 9 April 2019 (**Verbal Altercation**).

[8] In summary, Mr Newton does not dispute that he engaged in the Fight or the Verbal Altercation. However, he submits that there is no “valid reason” for his dismissal because the Fight and the Verbal Altercation have no relevant connection to his employment with Toll. Further, or in the alternative, Mr Newton disputes a number of factual issues that he submits, if found in his favour, remove or diminish his culpability and/or the seriousness of the incidents, even if such incidents are found to have occurred at work, meaning that his conduct in respect of the incidents do not give rise to valid reasons for his dismissal. In the absence of a valid reason, Mr Newton submits that his dismissal was harsh, unjust, and/or unreasonable.

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

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

Permission to be legally represented granted to all parties

[11] 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.

[12] 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).

[13] 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

[14] Mr Newton is 61 years of age. He has been employed by Toll since 25 May 1978 (around 42 years). At the time of his dismissal, Mr Newton was based at the Toll Bungaribee depot in New South Wales.

[15] During his employment with Toll, Mr Newton received a verbal warning in February 2009, a written warning in July 2014, and a further written warning in October 2016.² Given that the dismissal of Mr Newton was for reasons of serious misconduct, concerning the Fight and the Verbal Altercation, the previous warnings issued to Mr Newton travel no further (for the purposes of these proceedings) than factual context in terms of Mr Newton's employment history at Toll.³

[16] At or around the time of the commencement of his employment, and/or during the course of that employment, Mr Newton agreed to comply with Tolls policies and procedures (as amended from time to time), pursuant to express terms to that effect contained under his contract of employment and job description.⁴

[17] 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.⁵ The Agreement relevantly applied to Mr Newton whilst employed by Toll.

[18] On 30 May 2019, Mr Newton and Mr Chambers 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.

[19] 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).

[20] 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.⁶ 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.⁷

[21] Mr Newton did not attend the TWU meetings on 31 May 2019 due to injuries sustained during the Fight. Mr Chambers did not attend the full day of TWU meetings on 31

² Joint 'agreed' chronology.

³ Exhibit R7, paragraph [13] (Three warnings in 41 years of service), Transcript, 6 February 2020, PN3904-PN3907 – previous warnings issued to Mr Newton did not form part of Toll's decision to dismiss him.

⁴ Exhibit R7, at [9], [11], Annexure PS-3; Annexures MR-2 ("Toll Workplace Behaviors Policy"), MR-3 ("Toll Standard"); MR-4 ("Toll Code"); MR-5 ("Toll Serious Misconduct Policy"); MR-1, Attachment 2 to Agreement (Toll Drugs and Alcohol Policy); Transcript, PN601-PN608; See also Transcript, PN678-PN688.

⁵ See clauses 9, 16, 19, and 37(b) of the Agreement.

⁶ 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 (indicating Toll was aware of the TWU meeting agendas).

⁷ Exhibit R7, at [15].

May 2019 because he was directed to return to Sydney by Toll, after Toll management had become aware of the Fight having taken place and stood him down from his employment pending investigation.⁸

[22] 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.⁹ 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.

[23] Whilst attending the TWU meetings, Mr Newton was on paid “Delegates’ Leave” as provided for under cl.49 of the Agreement. Clause 49 relevantly reads:

“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.

⁸ Exhibit R8, Annexures RL-2 and RL-3.

⁹ Exhibit R7, at [15].

(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)

[24] Neither party asserted that there had been any non-compliance with cl.49.3 of the Agreement in respect of the Delegates' Leave taken by Mr Newton 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.

[25] Toll covered the cost of the following expenses for Mr Newton:

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

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

(c) the cost of Mr Newton's meals whilst in Melbourne, being dinner on 30 May 2019, and breakfast on 31 May 2019.¹⁰

¹⁰ Transcript, PN732; 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).

[26] Further, Toll prepared and provided Mr Newton with a travel itinerary as Toll had booked and paid for Mr Newton's accommodation and travel.¹¹ The management by Toll of TWU delegates' travel and accommodation, including that of Mr Newton, was a private arrangement between Toll and the TWU (i.e. there is nothing in the Agreement requiring that this courtesy be provided).¹²

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

[28] 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 only events organised were the TWU Meetings, which were organised by the TWU, and concluded between 3:00pm and 4:00pm each day.¹³

[29] There is neither CCTV footage of, nor any witnesses to, the Fight.¹⁴

[30] 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.¹⁵ There has been no indication from the Police that they propose to pursue the Fight any further.¹⁶

[31] 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 backwards (due to momentum) hitting his head on the concrete pavement/driveway;
- (b) a split lip;
- (c) a cut to his left cheek; and

¹¹ Transcript, 4 February 2020, PN733.

¹² There is no evidence in these proceedings as to the exact nature and extent of this private arrangement between the TWU and Toll.

¹³ 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 (i.e. as opposed to the TWU organising the dinner as part of or in connection with the TWU meetings).

¹⁴ 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).

¹⁵ Exhibit R-8, Annexure RL-6.

¹⁶ Exhibit R8, Annexure RL-6, p.18.

(d) bruising to his lower right eyelid.¹⁷

[32] WorkCover medical certificates were also produced in respect of Mr Newton, referring to temporary post-concussion dysfunction.¹⁸ This condition was diagnosed on 6 June 2019 (i.e. seven days after the Fight took place).¹⁹

[33] Mr Newton immediately commenced a period of personal “sick” leave the day following the Fight.²⁰ That same day, a medical examination of Mr Newton identified, at that time, that he was not concussed as a result of the Fight.²¹ This is despite Mr Newton asserting that he had lost consciousness or blacked-out during the Fight (at around 10.25pm on 30 May 2019) as a result of Mr Chambers striking him from behind.

[34] 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.

[35] 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);²²
- (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).²³

[36] 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).

[37] 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

¹⁷ 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).

¹⁸ Exhibit N4, Annexure SN-10 and SN-12.

¹⁹ Exhibit N4, Annexure SN-09.

²⁰ Exhibit R7, at [36]-[37]; Exhibit N4, Annexures SN-09 and SN-10.

²¹ Transcript, 4 February 2020, PN493.

²² 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).

²³ 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)).

June 2019.²⁴ 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 (i.e. Mr Chambers allegedly “king hit” or “coward punched” Mr Newton).²⁵

[38] Investigation interviews were held with Mr Newton, Mr Chambers, and other relevant persons,²⁶ pursuant to which a detailed Investigation Report of the Fight was produced to Toll.²⁷

[39] The Applicants were issued with “Show Cause” letters,²⁸ and attended disciplinary Show Cause interviews with Toll management representatives (where they verbally responded to the allegations made against them).²⁹ Both Mr Newton and Mr Chambers also provided written responses to the Show Cause letters.³⁰

[40] 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.³¹

[41] 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

[42] 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 the Verbal Altercation.

[43] 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.³²

[44] 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

²⁴ 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.

²⁵ Exhibit N7, pp.19-20, email from Michael Rugendyke, 31 May 2019 (12.03pm). Exhibit R9, p.2 of Investigation Report.

²⁶ Exhibit C1, Annexure WC5; Exhibit N3, paragraph [40].

²⁷ Exhibit C1, Annexure WC14; Exhibit R9.

²⁸ Exhibit C1, Annexure WC6; Exhibit N3, paragraph [42].

²⁹ Exhibit C1, Annexure WC7.

³⁰ Exhibit C1, Annexure WC8; Exhibit N3, paragraph [43].

³¹ Exhibit C1, Annexure WC9; Exhibit N3, paragraph [44].

³² Exhibit R8, Annexure RL-25 (see also Exhibit R9).

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”.

(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).

(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 Newton 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 (Verbal Altercation), 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).³³

[45] 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.³⁴ However, much of his evidence is hearsay, opinion and/or inconsistent with the timeline of events.³⁵ He states that Mr Chambers was giving him a

³³ Exhibit R8, Annexure RL-22.

³⁴ Exhibit R4.

³⁵ See, for example, Exhibit R4, p.26 (p.25 of record of interview, at point 0.8 of page).

blank stare (or ‘stink eye’) in the restaurant area prior to the Fight,³⁶ 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

[46] The decision to dismiss Mr Newton was made by Mr Michael Rugendyke (Toll General Manager NSW/ACT Express Parcels).³⁷ The decision to dismiss Mr Chambers was made by Mr Paul Smith (Toll General Manager Operations).³⁸ Mr Michael Byrne (Toll, Managing Director) strongly concurred with the decision to terminate the Applicants.³⁹

[47] Each of the decisions to terminate Mr Newton and Mr Chambers 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 (i.e. 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).

[48] 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 2019.⁴⁰

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

³⁶ Exhibit R4, p.17 (p.16 of record of interview); Exhibit R9, first page, last line of second last paragraph on that page. By way of example, Mr Paul Newton says that when he first saw Mr Stephen Newton on the driveway of the Hotel, Mr Stephen Newton had his jumper off, was having a smoke, and chatting to Mr Chambers (this was prior to the Fight, when Mr Stephen Newton and Mr Chambers were having initial discussions). On Mr Stephen Newton’s own evidence, he took his jumper off to go to bed (when discussions had ended with Mr Chambers). On Mr Chambers’ evidence, Mr Newton’s jumper was taken off immediately prior to him taking up a boxing stance. Mr Paul Newton’s evidence as to timeline and sequence of events is not consistent with either Mr Stephen Newton or Mr Chambers.

³⁷ Exhibit R7, paragraphs [43]-[45]; [53]-[56].

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

³⁹ Exhibit N3, Annexures SN-03.

⁴⁰ Toll’s Final Submissions, Newton, 27 April 2020, at [4.2].

[49] 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.

[50] Having considered the witness statements of Mr Chambers and Mr Newton, their answers in cross-examination,⁴¹ 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.

[51] 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;
- (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.

[52] 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;⁴² 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.⁴³

⁴¹ Transcript PN734 to PN898; PN1135 to 1141; PN1229 to PN1234; PN1260 to PN1355; PN1838 to 2207; PN2431 to PN2656.

⁴² Mr Chambers' clear evidence is that at no time did Mr Newton lose consciousness or black-out during the Fight. The medical evidence is that Mr Newton was not suffering from concussion the day after the Fight (Transcript PN493).

⁴³ Exhibit R9; compare Exhibit C2, at [3.5] and [3.9].

[53] 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.⁴⁴

[54] In making the foregoing observations and conclusions in paragraphs [50] to [53] 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.⁴⁵

[55] 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 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).

⁴⁴ Transcript, 4 February 2020, PN770-PN786; PN794-PN795; PN836-PN898; PN908; See also Exhibit R7, p.5, at [21]: "Oh I was set upon last night and I was attacked. It wasn't a regular fight. I was king hit."

⁴⁵ Toll's Final Submissions, Newton, 27 April 2020, at [4.8] to [4.20].

(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.

[56] 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.⁴⁶

(b) I reject Mr Newton’s evidence that Mr Chambers initiated or provoked the Fight.⁴⁷

(c) I reject Mr Newton’s evidence that Mr Chambers was the main aggressor during the Fight.⁴⁸

(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.⁴⁹

(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.⁵⁰

⁴⁶ 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 pleasant”. See also Exhibit R4, p.26 (p.25 of record of interview): “RL: Cold night in Melbourne?” PN: Freezing”.

⁴⁷ Transcript, 4 February 2020, PN740-PN741; PN749; PN777; PN785-PN786; PN816; PN836-PN898.

⁴⁸ Transcript, 4 February 2020, PN740-PN741; PN 823.

⁴⁹ Transcript, 4 February 2020, PN752; PN794; PN801; PN815; Exhibit N3, paragraph [32].

⁵⁰ Transcript, 4 February 2020, PN908.

(f) I reject Mr Newton's evidence that he passed out, blacked-out, or otherwise became unconscious at any point during the Fight.⁵¹

(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.⁵²

Mr Newton's verbal altercation with Mr Mitchell at the TWU Parramatta Conference on 9 April 2019

Facts not in contention

[57] In relation to the second reason relied upon by Toll to dismiss Mr Newton, the following facts are not in dispute:

(a) Mr Newton attended the TWU Parramatta Conference on 9 April 2019 (being held at a hotel in Parramatta, New South Wales) in his capacity as a Toll TWU delegate whilst on paid Delegate's Leave.

(b) Mr Robert Mitchell, another Toll TWU delegate was present, as were around 60 other Toll TWU delegates.

(c) Mr Mitchell stated to Mr William Brian (Toll Truck Driver, and TWU delegate), that he (Mr Mitchell) considers Mr Newton to be a "dickhead", "fuckwit", "spastic" or "retard" (I do not place any importance as to what term/s was used).⁵³

(d) Mr Brian told Mr Newton that Mr Mitchell had called him (Mr Newton) a "dickhead".⁵⁴

(e) Prior to the TWU Parramatta Conference commencing, Mr Newton confronted Mr Mitchell about what he had said. This confrontation occurred in a large carpark outside the hotel, where around 60 other Toll TWU delegates were gathering prior to the delegates meeting. The confrontation lasted around one minute or so,⁵⁵ and did not escalate into any form of physical confrontation.

Facts in contention

[58] Mr Newton called evidence from Mr Mark Stevens (Retired Toll Trainer / Driver, and former TWU delegate)⁵⁶ and Mr Brian.⁵⁷

⁵¹ Exhibit N3, at [32], Annexure SN-01 (Part G of Investigation Report), pp.12 of Exhibit N3. See also Transcript PN493; Exhibit R7, Annexure MR-13; and Exhibit 8, Annexure RL-13 (Ambulance not required). I do not equate post traumatic concussion diagnosed a week after the Fight with concussion during the Fight (that was not diagnosed the day after the Fight).

⁵² *Chambers v Toll Transport Pty Ltd* [2020] FWC 5819.

⁵³ Exhibit R8, Annexure RL-24, p.191-192 (pp.21-22 of the record of interview on 4 July 2019).

⁵⁴ Transcript, 4 February 2020, PN403-PN405.

⁵⁵ Transcript, 5 February 2020, PN1576.

⁵⁶ Exhibit N1.

[59] Relevantly, both of these witnesses gave evidence that:

- (a) Mr Newton did not become “pissed off”, angry or agitated about the comments made by Mr Mitchell about him;
- (b) Mr Newton’s and Mr Mitchell’s discussion concerning the comments was brief and “unheated”; and
- (c) neither Mr Stevens nor Mr Brian, noticed Mr Newton remove his false teeth.

[60] Mr Newton acknowledges that he removed his teeth shortly prior to speaking with Mr Mitchell, but says that he did so because he had abscesses on his gums (at that time) and found it difficult to talk with his teeth in his mouth.⁵⁸ He says that he removed his teeth, and placed them in a handkerchief, when he was sitting at a table prior to approaching and talking to Mr Mitchell. Mr Newton is adamant that he did not remove his teeth in the presence of Mr Mitchell, or as he walked towards or otherwise approached Mr Mitchell in preparation for a potential physical altercation with Mr Mitchell.⁵⁹

[61] Contrary to the evidence of Mr Stevens and Mr Brian, Mr Newton acknowledged that he was “pissed off” about the things that Mr Mitchell had been saying to him, and that the discussion with Mr Mitchell was heated:

MR RAUF: Right. What I want to put to you is whether you agree with - he describes it as a face to face heated discussion. What do you say about that description?

MR NEWTON: Yes. Yes. It's not far off.⁶⁰

...

MR RAUF: ... So, understandably you were pissed off because from your perspective you have been serving the interests of the employees over many years and you didn't appreciate that there might be some junior delegate out there, calling you a dickhead, spastic retard?

MR NEWTON: Yes, I was.⁶¹

[62] Given that neither Mr Stevens nor Mr Brian noticed that Mr Newton had removed his teeth, and that their evidence is contrary to Mr Newtons (i.e. that Mr Newton was not pissed off, and the discussion between Mr Newton and Mr Mitchell was not heated⁶²), I do not rely upon the evidence of Mr Stevens or Mr Brian in relation to the ‘conduct’ of Mr Newton towards Mr Mitchell on 9 April 2019.

⁵⁷ Exhibit N2.

⁵⁸ Transcript ,5 February 2020, PN1186.

⁵⁹ Transcript ,5 February 2020, PN1187.

⁶⁰ Transcript ,5 February 2020, PN1202.

⁶¹ Transcript ,5 February 2020, PN1206, see also PN1199-PN1203 and PN1231.

⁶² Compare, Transcript ,5 February 2020, PN1208.

[63] Mr Mitchell gave evidence by telephone. Mr *Gibian* of Senior Counsel cross-examined Mr Mitchell as to whether Mr Newton had referred to a fence or a wall in their heated exchange, and whether the carpark actually contained a garden, a fence or a wall (and how high the wall was). This cross-examination appeared to me to test Mr Mitchell's credit, and/or his recollection of the verbal confrontation with Mr Newton, including as to the words exchanged during that confrontation.

[64] Although Mr Mitchell gave evidence via telephone, having heard that evidence myself, I prefer his evidence to that of Mr Newton concerning the Verbal Altercation that occurred between them on 9 April 2019. Again, Mr Newton's evidence did not come across to me as genuine (i.e. observing him in the witness box in relation to his answers to questions about the Verbal Altercation with Mr Mitchell).

[65] Mr Mitchell's evidence was consistent with the statements made by him to Mr Lambie, as part of the investigation process, and he was repeatedly resolute in confirming the same evidence before the Commission.⁶³ My assessment is that Mr Mitchell gave "no nonsense", straightforward, and candid answers to the questions that were put to him.⁶⁴ Further, I do not accept that Mr Mitchell had any grievance or particular axe to grind in relation to Mr Newton or Toll in these proceedings.⁶⁵ Indeed, he made no complaint about the confrontation with Mr Newton at the time. Mr Mitchell's evidence was also consistent with the evidence adduced during the cross-examination of Mr Newton (i.e. that Mr Newton was pissed off, and that the discussion was heated).

Findings

[66] Having regard to the evidence before me, in respect of the disputed facts between the parties, my findings in relation to the Verbal Altercation are as follows:

- (a) Mr Newton was annoyed (i.e. "pissed off") that Mr Mitchell had been calling him a "dickhead" or "retard" behind his back;
- (b) Mr Newton approached Mr Mitchell to talk to him about the name-calling;
- (c) during those discussions, Mr Newton pushed Mr Mitchell in the chest and challenged Mr Mitchell to step away from the group of gathered delegates to privately discuss the name calling. Inherent in this challenge was the intimation that the name calling could be resolved by way of physical altercation. Shortly before or immediately after that challenge was made, in an effort to intimidate Mr Mitchell and make it clear that he was willing to get physical, Mr Newton removed his false teeth,⁶⁶ and

⁶³ Exhibit R8, Annexure RL-22, pp.161-166, and 169 (pp.4-9, and 12 of interview transcript); Transcript, 5 February 2020, PN1472-PN1581.

⁶⁴ Although Mr Gibian SC sought to make a collateral attack upon Mr Mitchell's character (and credit) on the basis that Mr Mitchell had entered into a Deed of Release with Toll concerning the cessation of his employment, I give no weight to such attack (it is not supported by tangible evidence).

⁶⁵ Transcript PN1175 (Mr Newton did not even know Mr Mitchell).

⁶⁶ Transcript PN1588-PN1589 ("It was a weird thing"); Exhibit R8, Annexure RL-21, p.161 (point 0.7 of record of interview with Mr Mitchell on 19 June 2019)

(d) as quickly as the situation escalated, it de-escalated, lasting only around one minute. No further confrontation on the matter occurred.

[67] In making the foregoing findings, I reject Mr Newton’s evidence that he removed his false teeth and placed them in a handkerchief prior to confronting Mr Mitchell (and away from or out of the sight of Mr Mitchell). Further, even if Mr Newton’s false teeth were causing him discomfort, my view on the evidence is that Mr Newton removed his false teeth in the presence of Mr Mitchell, shortly prior to or just after he pushed Mr Mitchell in the chest, for the primary purpose of intimidating Mr Mitchell.⁶⁷ Indeed, at the very least, Mr Newton himself considered that in confronting Mr Mitchell, there was the potential for Mr Mitchell to “take a swing at him”, and in those circumstances Mr Newton “wasn’t going to pay out another \$2,000 to get me [sic] teeth”. In other words, even on Mr Newton’s own evidence, the reason he removed his false teeth prior to confronting Mr Mitchell was because he had considered the potential for a physical altercation to evolve from his confrontation with Mr Mitchell.⁶⁸

[68] I equally reject Mr Newton’s evidence that he did not in any way act aggressively towards, or seek to intimidate, Mr Mitchell during the Verbal Altercation.⁶⁹

Relevant law

[69] 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”.

[70] The parties are not in dispute that Mr Newton 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

⁶⁷ Transcript, PN1209.

⁶⁸ Exhibit R8, Annexure RL-24, p.191 (point 0.4 of p.21 of the record of interview on 4 July 2019). Compare Exhibit R8, Annexure RL-24, pp.183-184 (pp.13-14 of the record of interview on 4 July 2019).

⁶⁹ Transcript, PN1203, compare PN1222.

enlivened in this matter. Hence, the only question before me to determine is whether the Mr Newton’s dismissal was “harsh, unjust, or unreasonable”.⁷⁰

[71] 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
- (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”.

I turn to consider these factors.

Was there a valid reason for the dismissal related to Mr Newton’s capacity or conduct?

General principles

[72] 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”.⁷¹ 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.⁷²

⁷⁰ *c.f.* ss.385(b) and 387 of the Act.

⁷¹ *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333; (2000) IR 371 at 373.

⁷² *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.

[73] There is no mandate for giving the ‘valid reason’ criterion any greater emphasis or weight than any of the other criteria in s.387. That said, relevant weight is a matter for the relevant decision-maker.

[74] It is well settled that a statutory requirement to ‘have regard to’ or ‘take into account’ requires the Commission to give a matter(s) weight as a fundamental element in the decision making process. Even if it is found that there was a valid reason for the dismissal, an overall assessment must be made as to whether the dismissal was harsh, unjust or unreasonable.⁷³ However, as Kitto J noted in *Rathborne v Abel*⁷⁴:

“In the third place, plainly the provision that the listed matters are to be regarded does not imply that nothing else may be regarded. So this Court said in *Owen v. Woolworths Properties Ltd* (1956) 96 CLR 154, at 160; and indeed to hold otherwise would be to alter and not to construe the words of parliament.

Finally, to require that regard be had to a particular matter in making a discretionary judgment is not to require that that matter shall be allowed an actual influence upon the ultimate result. The matter is to be considered for such bearing as it may have upon the question to be decided, and it is to be allowed such weight (if any) as the tribunal thinks it ought to be given; but if the tribunal thinks it ought to have no weight, then no weight is required to be given to it: cf. *Beresford v. Ward* [1961] YR 632, at 634”.

(my emphasis)

[75] 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.⁷⁶ 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).⁷⁷

[76] 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.⁷⁸

[77] As to an employer’s workplace 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

⁷³ *Murdoch University v Mainsbridge* (1998) 84 IR 111.

⁷⁴ *Rathborne v Abel* (1964) 38 ALJR 293.

⁷⁵ *Ibid*, at 301.

⁷⁶ *Edwards v Justice Giudice* (1999) 94 FCR 561; (1999) 169 ALR 89; [1999] FCA 1836 at [7].

⁷⁷ *King v Freshmore (Vic) Pty Ltd* Print S4213 [2000] AIRC 1019 at [23] to [24].

⁷⁸ *Bista v Glad Group Pty Ltd* [2016] FWC 3009. Note also my observations in *Mark Barlett v Ingleburn Bus Services* [2020] FWC 2914, at [20]-[22].

respond. Further, the Commission is required to be satisfied that the conduct occurred (i.e. it is not a question of an employer's reasonable belief).⁷⁹

[78] 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.⁸⁰

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

[79] In *Rose v Telstra Corporation Limited (Rose)*,⁸¹ 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".⁸²

[80] *Rose* has been cited and applied in many decisions of this Commission. Its facts concerned a physical altercation in a private 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 after work, and then a nightclub, where they consumed alcohol, before returning to a 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 incurred a cut across the chest, that rendered him unfit for work. At the time of the fight, neither employee was wearing clothing that

⁷⁹ *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].

⁸⁰ *WU-FIME v Queensland Alumina Limited* (1995) 62 IR 385 at 391 (Moore J).

⁸¹ [1998] AIRC 1592.

⁸² *Ibid*. See also: *Appeal by Dobson* [2013] FWC 10037 at [20]; *Hughes v Momentum Wealth Pty Ltd* [2017] FWC 759 at [20]; *Gosek v Illawarra Coal Holdings Pty Limited* 2 [2017] FWC 4574; *Keenan v Boral Amey NSW Pty Ltd* [2015] FWC 3156.

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.

[81] The facts and reasoning in the case of *Keenan v Leighton Boral Amey NSW Pty Ltd (Keenan)*⁸³ also 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, attempting to inappropriately touch a female colleague, and kiss another female colleague without her consent.

[82] The employer terminated the employee for this conduct, arguing that such behavior would fall afoul of the *Sex Discrimination Act 1984 (SDA)*. 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, and 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 [SDA], 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 [SDA], 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”.⁸⁴

⁸³ [2015] FWC 3156.

⁸⁴ Ibid at [101] to [103].

[83] A contrasting case to *Keenan* is *Drake v BHP Coal Pty Ltd; Bird v BHP Coal Pty Ltd (Drake; Bird v BHP)*,⁸⁵ which Toll seeks to rely upon. Again, the factual circumstances warrant consideration. Two employees were terminated because they had been involved in a physical altercation at a Christmas function organised, in part, by their employer. Despite the employees' position that they were under the belief that the event had been privately organised by their colleague, the employer contributed to the purchase of food and alcohol, and otherwise sanctioned the event.

[84] 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 – 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”.

Mr Newton's submissions

[85] In summary, Mr Newton made the following submissions regarding s.387(a) of the Act:

(a) Applicant not guilty of misconduct as alleged: In the present matter, the Commission should determine that Mr Newton's conduct in relation to the Fight and/or the Verbal Altercation did not amount to a valid reason for dismissal. The following factors overwhelmingly support this conclusion:

(i) The Fight and the Verbal Altercation occurred outside of the workplace, and there is not a sufficient connection between the conduct and Mr Newton's employment relationship with Toll.

⁸⁵ [2019] FWC 7444.

(ii) In neither incident was Mr Newton the aggressor, nor did he ever engage in any intimidating or threatening behaviour.

(iii) Mr Newton's conduct in the Verbal Altercation was simply a non-violent confrontation with a fellow colleague who had spoken offensive words towards him, and Mr Newton denies saying the things he has been alleged as saying.

(iv) Mr Newton's role during the Fight was cursory, and the physical interaction (push) instigated by himself was in retort to Mr Chamber's intruding into his personal space.

(b) *Conduct was out of hours*: There is no requirement for the Commission to determine the facts of the Fight or the Verbal Altercation, as both incidents occurred out of hours, and there is not a sufficient connection between such conduct and the employment relationship to warrant a valid reason for dismissal. Referring to *Rose*, Mr Newton says that even at its worst, the alleged conduct:

(i) when viewed objectively, was not likely to cause serious damage to the relationship between Mr Newton and Toll;

(ii) the conduct has not damaged Toll's interests, nor is it capable of damaging Toll's interests; and

(iii) the conduct is not incompatible with Mr Newton's duty as an employee to Toll.

(c) *Allegations of serious misconduct not made out*: Mr Newton has been dismissed for reasons of serious misconduct. Even though Mr Newton's termination letter reads that "the business has decided to terminate your employment on the grounds of misconduct" (emphasis added), thereby omitting the word 'serious', it is submitted that the circumstances overwhelmingly indicate the dismissal was on the grounds of serious misconduct. This is because:

(i) Mr Newton's termination was "effective immediately";

(ii) five weeks' notice was only paid out to Mr Newton as a "gesture of good faith";

(iii) Toll's Investigation Report recommended that Mr Newton's termination be on the grounds of 'serious misconduct';

(iv) the Show Cause Letter indicated that Mr Newton's conduct "warrants termination of [his] employment for serious misconduct"; and

(v) internal email correspondence within Toll demonstrates that Toll's members of management supported the findings of the Report that Mr Newton engaged in serious misconduct.

- (d) On a proper characterisation of the facts, Mr Newton's conduct did not make the continuance of the employment relationship impossible.

Toll submissions

[86] Toll submits that Mr Newton's involvement in the Fight, particularly when considered in concert with the Verbal Altercation, constitute a valid reason for dismissal. The Commission can be satisfied, on the basis of the admissions made by Mr Newton alone, that he engaged in relevant misconduct and that, during the course of the investigation and disciplinary process, he was less than forthcoming as to his involvement in the Fight.

[87] The evidence of Mr Newton during his cross-examination reveals more clearly Mr Newton's involvement in the Fight. His admissions, which were only forthcoming at the hearing, are significant, and establish the serious nature of his misconduct. They also reveal that:

- (a) Mr Newton gave inconsistent versions as to his involvement in the Fight; and
- (b) Mr Newton sought to downplay his involvement, thereby withholding important information from Toll during the investigation and disciplinary processes.

[88] Mr Newton's witness evidence paints a very clear picture of aggression on his part, and resistance to the perceived challenges of Mr Chambers, and a belief that Mr Chambers was acting upon the instructions of Mr Trevillian (another Toll TWU delegate). Indeed, there was, in cross-examination, an acceptance that Mr Newton's conduct and responses contributed to the tension and escalation to the point of a physical altercation.

[89] In regard to the Verbal Altercation, and given Mr Newton's evidence in cross-examination as to the context of the discussion, and it being a face-to-face, heated discussion in front of a crowd of other Toll TWU delegates, the Commission should not accept Mr Newton's attempt at explaining the event away in terms of Mr Mitchell being the aggressor or provocateur, and Mr Newton being calm in dealing with the incident. Indeed, the other statements relied upon by Mr Newton from Mr Brain and Mr Stevens indicate Mr Newton as challenging, or posing a challenging question, to Mr Mitchell.

[90] Toll is entitled to take a strong stance in response to the misconduct that has occurred. With the benefit of Mr Newton's admissions, the Commission is better placed to find that there was a valid reason for his dismissal. The admissions of Mr Newton during cross-examination cannot be ignored, lightly cast aside, or otherwise overcome.

[91] Mr Newton was less than candid during the investigation and the disciplinary process (as to his engagement during the Fight and the Verbal Altercation). Such a lack of candour shown by Mr Newton is itself a sound, defensible and well-founded reason for termination of his employment. In this regard, Toll relies upon the case of *Telstra v Streeter*.⁸⁶ Mr Newton needed to be candid and upfront with Toll during the investigation so that Toll could determine and take appropriate remedial action. In relation to the Fight, it had occurred during an interstate trip arranged by Toll; involved the police attending; involved allegations of verbal threats and a physical altercation between two employees; impacted upon other

⁸⁶ (2008) 170 IR 1

employees who had to attend to the aftermath; and required Toll to undertake an investigation which involved speaking to various employees and third parties. Mr Newton has been in a number of important respects dishonest and misleading in his responses, both during the investigation and in these proceedings. His lack of candour and/or prevarication mean that Toll cannot be confident that Mr Newton will be candid with it into the future, particularly if Mr Newton was involved in other conflict with, for example, another employee. This conclusion is a valid reason alone for the termination of Mr Newton's employment. Toll's concern as to Mr Newton's future conduct is further heightened by the tokenistic remorse expressed by him for his misconduct.⁸⁷

[92] On the basis of the evidence before the Commission, and in the circumstances relating to the Verbal Altercation and the Fight, the Commission ought to be readily satisfied that there is a clear connection between, on the one hand, the incidents in question and, on the other hand, the employment of Mr Newton. The following evidence is relevant:

- (a) Mr Newton understood that he had to comply with the Toll Standard and Code at all times whilst he was in Melbourne. That understanding is consistent with the understanding expressed by other former Toll TWU delegates.
- (b) It is also clear, on the express terms of the Toll Standard, that Toll's expectations as to behaviour apply both within and outside of the workplace. It is unsurprising that this is the position given that, for the most part, Mr Newton drove trucks outside of the Toll workplace, and spent his time on public roads and at the sites of Toll's customers.
- (c) Mr Newton was attending the TWU meetings in Melbourne to discuss matters relating to the Toll workplace and was granted leave on 30 and 31 May 2019 to attend such meetings. He was in Melbourne because he was an employee of Toll, and an elected TWU delegate of other employees of Toll.
- (d) The purpose of the meeting on 30 May 2019 (the day of the Fight) was to discuss matters relating to the Toll workplace, including with Toll management.
- (e) Mr Newton was paid for leave to attend the meetings in Melbourne in accordance with cl.49.3(a) of the Agreement, and received penalties and other entitlements as though he was rostered for work.
- (f) Toll booked and paid for Mr Newton's return flights from Sydney to Melbourne, and his accommodation at the Hotel for the night of 30 May 2019.
- (g) The Fight arose from a conversation concerning Toll. That is, the merging the IPEC agreement with other Toll agreements.
- (h) The Fight directly affected a number of Toll employees (and the relationship that existed between various employees who work together at Toll), either because they were staying at the Hotel at the time of the Fight, or because they had to participate in the Investigation process that followed. Toll is re-considering its

⁸⁷ Transcript, PN958.

involvement in arranging Toll TWU delegates to stay at hotels booked and paid for by Toll.

[93] Much of the above evidence is also relevant to the Verbal Altercation. Toll submits that there was the requisite connection between the Verbal Altercation and Mr Newton's employment. In addition, the Verbal Altercation:

- (a) involved attendance by Mr Newton and other employees, including Mr Mitchell, at a meeting in accordance with the Agreement;
- (b) members of Toll management attended the delegates meeting on 9 April 2019
- (c) the Verbal Altercation occurred during work time, and Mr Newton received payment as if at work; and
- (d) involved employees of Toll, and affected such employees upon them returning to work.

[94] For the above reasons, the Commission should find that there was a sufficiently relevant connection in respect of each of the incidents and Mr Newton's employment, justifying Toll's intervention and decision to terminate Mr Newton's employment based upon his misconduct. Indeed, Mr Newton accepted that, in effect, he did not expect Toll to ignore the Fight. The Fight, taking into account the admissions of Mr Newton, was likely to cause serious damage to the employment relationship, and did damage Toll's interests. In summary, the conduct of Mr Newton was such that is incompatible with his duties as an employee of Toll.

Mr Newton's reply

[95] It is appropriate to address the submissions of Mr Newton in reply, by dealing first with the out of hours conduct issue and then, in the alternative, dealing with the submissions as to whether the alleged conduct of Mr Newton provided a valid reason for dismissal.

[96] In reply, Mr Newton submits that Toll purports to rely upon "all the circumstances" in answering the question as to whether or not there is a relevant connection between the conduct of Mr Newton and his employment. The difficulty with this position is that it then relies upon a range of matters which are either irrelevant to the actual conduct complained of, or which could not, on any view, establish such a connection. For example:

- (a) In relation to the Fight, Toll says that a relevant connection arises because Mr Newton was "attending at a meeting at which workplace issues would be discussed with employees, union representatives and management representatives", and that the meetings in Melbourne were to "discuss matters to [sic] relating to the Toll workplace". Toll ignores that Mr Newton was not dismissed as a result of anything that occurred at the meeting on 30 May 2019. Mr Newton was dismissed as a result of conduct which occurred in his private time, many hours after the meeting had finished.
- (b) Toll relies upon the fact that Mr Newton was granted leave on 30 and 31 May 2019 to attend the TWU Meetings and received payment "as though [he was] rostered for work." The same position is taken in respect to the Verbal Altercation. However,

Toll appears to now acknowledge that the fact that an employee is on paid leave is not sufficient to establish the requisite connection with employment. The fact that an entitlement to leave arises from the Agreement does not distinguish Delegate's Leave from any other form of paid leave entitlement. 'Leave' is the antithesis of work.

(c) Prior to the hearing, Toll asserted that Mr Newton attended the TWU Meetings, and the meeting at Parramatta on 9 April 2019, "as an employee of Toll" or "because he was an employee of Toll". This position elides the distinction between Mr Newton's employment with Toll, and his role as a TWU delegate. Mr Newton is a truck driver. The duties of his employment did not involve attendance at TWU Meetings, discussion of issues concerning Toll's business, employees generally, or the representation of other employees. Mr Newton attended the meeting as a TWU delegate.

(d) Toll relies upon the subject matter of the discussion between Mr Newton and Mr Chambers to assert that the Fight "arose from a conversation about Toll". Again, the submission is simplistic and misleading. The discussion related to issues concerning the position the TWU should adopt in relation to Telematics technology, the industrial instruments applying to Toll linehaul employees, and Mr Chamber's position as a union delegate. None of those issues related to the work of Mr Newton, or his job with Toll.

(e) Toll relies upon its Workplace Behaviours Standard and Serious Misconduct Policy without addressing the terms of either document. It does not assist to simply quote the Workplace Behaviours Standard as extending the "workplace" to "company organised social functions, or where the company has sanctioned attendance of employees to attend social functions organised by external parties." Toll does not explain how that language could have any relevance to the Fight. The altercation between Mr Newton and Mr Chambers did not occur at any "social function", and certainly not at any function attendance at which was sanctioned by Toll.

(f) Toll places considerable reliance upon what is asserted to be Mr Newton's "understanding" as to the application of the Workplace Behaviours Standard and Code of Conduct. Toll again invites the Commission into error. The application of an employer's policies, and whether a relevant connection exists between the conduct of an employee and his or her employment, cannot depend upon the subjective belief or opinion of an employee. The task of the Commission is to interpret the employer's policies and make an objective assessment of whether relevant conduct has a sufficient connection to employment.

(g) Toll suggests that the Fight "directly affected a number of Toll employees" because such employees were staying at the same hotel, or were required to participate in the investigation process. That is not an accurate reflection of the evidence. At most, a small number of fellow TWU delegates assisted Mr Newton on the evening of 30 May 2019 in their own private time. The fact that Toll chose to interview some employees as part of an investigation cannot thereby establish the requisite connection to employment. Toll cannot create the connection by its own investigation. There was no evidence that the Fight has affected Toll's business, the workplace, or the performance of work by employees at all. Toll's submissions in this regard are without merit.

(h) Toll endeavours to sidestep the interference in freedom of association, which would result from the acceptance of its submissions, by insisting that the case is “focused on the circumstances of Mr Newton”. That ignores the consequences of such a submission. Toll suggests that the requisite connection to employment is established because Mr Newton was in Melbourne because of his employment with Toll, discussed matters concerning Toll at a union meeting, and attended the meetings as a union representative of employees of Toll. If that is correct, Toll would have the capacity to supervise any conduct by a union official or delegate when undertaking union business outside of their employment. Such interference in freedom of association is supported by no authority and is inconsistent with the objects of the Act, and the *Fair Work (Registered Organisations) Act 2009*.

[97] Toll’s submissions encourage the Commission to accept that the conduct alleged against Mr Newton had a sufficient connection to his employment based upon a misleading account of the facts and by ignoring inconvenient aspects of the evidence, particularly the fact that the conduct relied upon did not occur at the official TWU meetings on 9 April 2019 or 30 May 2019, but in what was unarguably Mr Newton’s private time. Toll’s submissions in this regard must be rejected.

[98] Toll acknowledges that the approach in *Rose* should be applied in the present case. For the reasons set out above, Toll’s submissions do not establish that the conduct of Mr Newton in his private time was such that it seriously damaged the relationship between employer and employee, caused any damage to Toll’s interests, or was otherwise incompatible with Mr Newton’s duties to Toll.

[99] Toll endeavours to develop a submission that the decision of *Keenan* has no application to the present matter. This is, no doubt, because Toll recognises that the decision in *Keenan* is fatal to its submissions. Toll suggests, quite wrongly, that *Keenan* was concerned solely with whether the relevant conduct constituted sexual harassment for the purposes of the SDA. *Keenan* was an unfair dismissal case, and the issue was whether the conduct of Mr Keenan following the work function was sufficiently connected to the employment to provide a valid reason for dismissal for the purposes of s.387(a) of the Act. The question of whether the conduct constituted sexual harassment arose because, on the approach in *Rose*, the employer contended that the relevant conduct fell within the scope of legitimate employer supervision (because it fell within s 28A of the SDA).

[100] In this matter, the connection between the employment and the conduct alleged against Mr Newton is far more distant in that:

- (a) the altercation occurred in a private social setting many hours after the conclusion of the TWU meetings in Melbourne on 30 May 2019, and not at or even following any event organised by Toll;
- (b) Mr Newton was not in Melbourne as part of the duties of his employment with Toll, but as a result of him being a TWU delegate and attending meetings organised by the TWU (not Toll);

(c) Mr Newton and Mr Chambers shared the same employer, but did not work at the same location, interact at all in their employment, or have any relationship other than through the TWU; and

(d) it could at most be said that the altercation would not have occurred but for Mr Newton and Mr Chamber's shared employer in the distant sense that both men were delegates of the TWU at Toll.

[101] Toll relies upon the decision in *Drake*. That decision is obviously distinguishable. The contrast to the present matter is stark. The altercation between Mr Newton and Mr Chambers did not occur at any kind of function or event (much less a Toll function), the altercation occurred as a result of an entirely private arrangement whereby Mr Chambers asked to speak to Mr Newton, and no other persons were present or witnessed the altercation.

Consideration of the Fight

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

[103] In regard to the Fight, I have determined that it does not, in and of itself, bear a sufficient connection to Mr Newton's employment with Toll. The following factors have led me to this 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,⁸⁸ 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 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

⁸⁸ Exhibit R8, Annexure RL-19 (bottom of p.120 of Exhibit R8).

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.⁸⁹

(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.

(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 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. 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

⁸⁹ Transcript, PN1812-1821, especially the premise in 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”.

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.

[104] Having concluded that Mr Newton was not at work at the time of the Fight, I also conclude that Mr Newton's involvement in the Fight was not, of itself, of such gravity or importance as to indicate a rejection or repudiation by Mr Newton 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. Indeed, there is no suggestion that members of the public, or even other Toll TWU 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 them or their conduct with Toll.

(c) The fact that Mr Newton 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.

Whether the Fight and/or the Verbal Altercation ground a valid reason for dismissal

[105] The reasons relied upon by Toll to dismiss the Applicants are set out at paragraph [47] of this decision.

[106] The core reasons relied upon by Toll to dismiss Mr Newton were that:

(a) Mr Newton, along with Mr Chambers, had been a willing participant in the Fight;

(b) the Fight occurred at work;

(c) fighting at work amounts to serious misconduct;

(d) the Investigation Report made findings as to serious misconduct; and

(e) the Investigation Report recommended the dismissal of Mr Newton for his involvement in the Fight.

[107] Given my findings in paragraphs [103] to [104] above, I do not consider that Mr Newton's mere instigation of, or involvement in, the Fight (that occurred outside of work) is, in and of itself, a valid reason for his dismissal.

[108] Toll also relies upon Mr Newton's involvement in the Verbal Altercation as a valid reason for his dismissal. My findings in relation to the Verbal Altercation are set out at paragraphs [66] to [68] of this decision.

[109] I do not need to determine whether the Verbal Altercation occurred at work or not. I say this because even if I proceed on the basis that the Verbal Altercation occurred at work, I do not consider that Mr Newton's role in the Verbal Altercation was, in and of itself, a valid reason for his dismissal, let alone an instance of serious misconduct.

[110] It is undisputed that the Verbal Altercation arose because Mr Newton was being called names behind his back by Mr Mitchell. Upon Mr Newton being made aware of this name calling, he sought to clarify why it was occurring. No complaint or report was made by Mr Mitchell (or anyone else) about the Verbal Altercation. Albeit Mr Mitchell did feel it was not worth reporting because he might be labelled a "dobber" by other employees⁹⁰ (accepting, rightly or wrongly, that many employees will consider a person who dobs or snitches on other employees as some form of 'scoundrel').

[111] The Verbal Altercation did not result in any physical engagement, and lasted only around a minute or so. There has been no on-going animosity or other repercussions flowing from the Verbal Altercation. Mr Newton's conduct in respect of the Verbal Altercation certainly warrants sanction, perhaps in the form of a warning, but it does not (in and of itself) warrant the sanction of dismissal (in that, in my view, in all the circumstances, Mr Newton's role in the Verbal Altercation is not a sound, defensible or well-founded reason for the dismissal of an employee with (at the time of dismissal) more than 41 years of service).

[112] I have set out the basis upon which I have concluded that the two core reasons relied upon by Toll for the dismissal of Mr Newton, individually or combined, do not amount to valid reasons for his dismissal. I stress that these conclusions relate only to these specific reasons for dismissal (as relied upon by Toll).

Whether Mr Newton's dishonesty constitutes a valid reason for his dismissal

[113] In determining to dismiss both of the Applicants, Toll formed the view that both of the Applicants had been dishonest, or at the very least, less than candid, in relation to their versions of the Fight (i.e. as to what happened to start the Fight, what was said in the lead up to the Fight, and what occurred during the Fight).

[114] There are, however, questions concerning Toll's reliance upon issues of dishonesty in that, at the time of the Applicants' dismissals, Toll was unable to properly articulate exactly what the Applicants had been dishonest about.

⁹⁰ Transcript, PN1465.

[115] Rather, Toll appears to have proceeded simply on the basis that neither of the Applicants could be believed (to more or less degrees). This is not a criticism of Toll, or its investigation. The Investigation Report highlights the difficulties that Mr Lambie encountered in determining what actually happened in relation to the Fight, especially in circumstances where there were no witnesses to the Fight, and much of the evidence from persons other than the Applicants was based upon hearsay, speculation and innuendo. It was also apparent to Mr Lambie that there was a factional split amongst TWU delegates, which made evidence from other employees difficult to assess in terms of reliability (i.e. having regard to unknown union factional allegiances).

[116] However, the fact that Toll's reliance upon issues of dishonesty, as at the time it made the decision to dismiss Mr Newton, might have been incomplete or not fully capable of articulation, does not mean that Mr Newton's dishonesty (as found to have occurred on the evidence in these proceedings) is to be cast aside from the perspective of the Commission's ability to make a findings about same, or an ultimate finding as to such dishonesty being a valid reason for his dismissal.

[117] The determination as to whether a 'valid reason' for dismissal exists is not confined or otherwise limited to a finding as to whether an employer properly identified and relied upon a valid reason for dismissal. Rather, the position is much broader. In my view, the relevant question is:

On the evidence before the Commission, in all the circumstances of the case, does a valid reason for dismissal exist as at the time of the dismissal, notwithstanding that such a valid reason might not be one that was relied upon by the employer at the time of the dismissal, but for example comes to light in a hearing before the Commission?

[118] It follows that the Commission's inquiry as to whether a valid reason for a dismissal exists is not limited to only the reasons given by an employer for a dismissal, but may include, for example, reasons later identified by an employer, or by the Commission, that were in existence at the time a dismissal occurred. Such reasons could be grounded by evidence exposed or uncovered during an unfair dismissal hearing. For example, such evidence may go to facts that were in existence at the time the employee was dismissed, but not at that time known or reasonably apparent to the employer, or otherwise able to be clearly articulated (e.g. due to an inability to resolve conflicting employee statements).⁹¹

[119] Unlike Mr Chambers, I have found Mr Newton to have engaged in dishonest conduct during the course of the investigation into the Fight and the Verbal Altercation, and before this Commission. Mr Newton's conduct in this regard marks a departure from the circumstances that applied to Mr Chambers. Mr Newton's dishonest behaviour in terms of a valid reason for dismissal must be considered separately to the conduct relied upon by Toll in dismissing Mr Newton (i.e. for his willing involvement in the Fight and the Verbal Altercation).

⁹¹ See: *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 at 8 to 9 (Ross VP, Polites SDP, Hoffman C); *Lane and Ors v Arrowcrest Group Pty Limited* (1990) 43 IR 210 at 237 to 238; *Jennison v Advanced First Supermarket Pty Limited t/as IGA Berkeley* PR946806 (AIRC, Drake SDP, 20 MAY 2004) at [15]; *Belic v Air Direct Transport* PR955577 (AIRC, Grainger C, 11 February 2005) at [31]; at [42]; *MM Cables v Zammit* Print S8106 (AIRC, Ross VP, Drake SDP, Lawson C, 17 July 2000) at [42].

[120] Mr Rugendyke became aware of the Fight at around 8.00am on 31 May 2019. At this time, it was reported to him that Mr Newton had been glassed by Mr Chambers the evening prior.⁹² When Mr Rugendyke followed this report up directly with Mr Newton that day over the telephone, Mr Newton stated to him:

“Oh I was set upon last night and I was attacked [by Mr Chambers]. It wasn’t a regular fight. I was king hit.”

“ ... [Mr Chambers] turned up out of nowhere. ... We were going to bed and [Mr Chambers] turned up and asked me to come outside and he started getting in my face and talking about Telematics and a number of other things and then next minute I was on the deck. He just whacked me. I think he glassed me because I’ve got a cut on my head and there was glass all over the ground and he was on top of me belting me when I was on the deck. He’s broken my nose. When I woke up he was just on top of me.

“Yeah, I must have been [knocked out]”

“ ... The police went and saw Chambers and Chambers didn’t deny it. He said ‘Yeah, I did it’.”⁹³

[121] Shortly after this, Mr Rugendyke was advised by Mr Grant Roger (TWU Official) that as part of or during the Fight Mr Newton had pushed Mr Chambers and taken his jumper off.

[122] At 9.00am, Mr Rugendyke had a further conversation with Mr Newton, where he again asked Mr Newton what happened, and questioned him as to why he had taken his jumper off. Mr Newton stated:

“I just shoved him out of the way, he was in my face, so I just sort of shoved him out of the way.”

“I don’t know [why I took my jumper off]. I don’t know. I was going inside”.⁹⁴

[123] Mr Chambers was stood down for his role in the Fight on 31 May 2019, post the foregoing discussions between Mr Rugendyke and Mr Newton. I point out that these discussions highlight that in the space of an hour, Mr Newton’s version of the Fight had gone from being ‘king hit’ by Mr Chambers, to Mr Newton pushing or shoving Mr Chambers. Mr Rugendyke makes the same observation in his evidence:

“I did not stand down Mr Newton immediately because at that stage I believed Mr Newton’s version of events and thought that he was a victim of an unprovoked assault. I did find it strange that Mr Newton’s story had changed from being king hit out of nowhere to pushing Mr Chambers and taking his jumper off, however, left this to be dealt with by the investigation process.”⁹⁵

⁹² Exhibit R7, at [20].

⁹³ Exhibit R7, at [21]. See also Annexure ‘MR-13’.

⁹⁴ Exhibit R7, at [23]. See also Annexure ‘MR-13’.

⁹⁵ Exhibit R7, at [35]

[124] At 5.00pm on 31 May 2019, Mr Rugendyke had a further conversation with Mr Newton (in the presence of Ms Harvey on car speakerphone). Mr Newton stated to Mr Rugendyke:

“I was set upon, it was a set up, you know, that was organised. Steve Philpott and Mark Trevillian had sent Wayne Chambers over to do a job. To rile me up and have a fight. I’m absolutely confident it was premeditated”.⁹⁶

[125] On 11 June 2019, Mr Rugendyke became aware that Mr Newton’s version of the Fight was being contested by Mr Chambers on the basis that Mr Newton was the aggressor who first provoked the Fight, and that Mr Chambers had been acting in self-defence. Mr Rugendyke stood down Mr Newton on the basis of this new information.⁹⁷

[126] On 9 July 2019 Mr Newton contacted Mr Rugendyke and advised him that he was in receipt of threatening text messages concerning, connected to, or otherwise relating to, the Fight. Mr Rugendyke requested copies of such text messages from Mr Newton. However, there is no evidence that such text messages were provided by Mr Newton to anyone at Toll.⁹⁸

[127] Upon receiving the Investigation Report, Mr Rugendyke became concerned that despite Mr Newton portraying to him that he had essentially been a victim in the Fight, Mr Newton had been a willing participant.⁹⁹

[128] In his first interview about the Fight on 4 June 2019, which was electronically recorded (**First Interview**), Mr Newton gave the following account of the Fight:

(a) Mr Chambers “gets on the piss” on some Friday and Saturday nights and rings up and “abuses the shit” out of another Toll TWU delegate, Mr Freddy Vecki, and threatens him that he will punch his head in. Apparently, the abuse and threats concern Mr Chambers desire to be the Toll TWU delegate for all IPEC linehaul drivers on the eastern seaboard.¹⁰⁰ He makes similar calls to Mr Rod Cole.¹⁰¹

(b) He stated to Mr Chambers prior to the Fight, “I’ve had a few to drink, so don’t go talking about anything too technical”.¹⁰²

⁹⁶ Exhibit R7, at [31].

⁹⁷ Exhibit R7, at [37].

⁹⁸ Exhibit R7, at [41]. I note that the evidence of Mr Rugendyke at [41] is somewhat confused in that it appears to say that the text sent by Mr Rugendyke to Mr Newton was sent to Mr Newton by a person threatening Mr Newton, however, the text itself is not a threat. I work on the basis that the words set out in paragraph [41] reflect a text sent by Mr Rugendyke to Mr Newton following their conversation about Mr Newton asserting that he had been receiving threatening texts.

⁹⁹ Exhibit R7, at [42]-[44].

¹⁰⁰ Exhibit R8, Annexure RL-8, pp.30-31 (point 0.8 of p.10 to point 0.3 of page 11 of record of interview).

¹⁰¹ Exhibit R8, Annexure RL-8, p.55 (point 0.2 of p.35 of record of interview).

¹⁰² Exhibit R8, Annexure RL-8, p.33 (p.13 of record of interview). That Mr Newton used these words at any point in time is categorically denied by Mr Chambers: Transcript: PN2448-PN2449 (Note also PN2451-PN2453).

(c) During discussions prior to the Fight, Mr Chambers first raised concerns that he had with Toll's use of Telematics (in-vehicle monitoring), and then turned around and abruptly launched into his desire to be the Toll TWU delegate for IPEC linehaul drivers for New South Wales. He asked Mr Newton to push the issue for him and support him.¹⁰³

(d) When Mr Newton refused to further engage on Mr Chambers desire to be the IPEC linehaul drivers delegate for New South Wales, Mr Chambers "got the shits", raised his voice, and carried on.¹⁰⁴

(e) In response, Mr Newton stated to Mr Chambers, "Fuck this shit, I'm out of here". Mr Newton then took his jumper off and turned to walk away — and that's the last thing Mr Newton remembers. When he woke up or otherwise regained consciousness, Mr Chambers was over the top of him, and hit him in the side of the face and put his tooth straight through his lip.¹⁰⁵

(f) He does not know whether he was cracked over the back of the head with a bottle, or hit his head on the ground. In this regard, Mr Newton stated:

"I would like to think that he wouldn't have done something like that cos that's just a dog act. Yeah [after] he sucker punched me and I'd done nothing wrong to provoke or – I don't even know the guy, I don't even talk to the guy. So anyways ..."¹⁰⁶

"I didn't see anything coming. So I just, I was, I think I turned, taken my jumper off and gone to walk upstairs but I didn't get that far"¹⁰⁷

"No [I did not take my jumper off to get into a fight with Mr Chambers]" and "It was stinking hot inside the restaurant"¹⁰⁸

"No [I did not see him hit me]"¹⁰⁹

"Yep [I lost consciousness]"¹¹⁰

"Yep [I can't say exactly what transpired because I was knocked out]"¹¹¹

[129] On the issue of provocation, the following exchange occurred at the First Interview:

¹⁰³ Exhibit R8, Annexure RL-8, p.33 (p.13 of record of interview); p.35 (p.15 of record of interview).

¹⁰⁴ Exhibit R8, Annexure RL-8, p.33 (p.13 of record of interview).

¹⁰⁵ Exhibit R8, Annexure RL-8, p.33 (p.13 of record of interview); p.44 (p.24 of record of interview); p.51 (point 0.5 of p.31 of record of interview);

¹⁰⁶ Exhibit R8, Annexure RL-8, p.34 (p.14 of record of interview).

¹⁰⁷ Exhibit R8, Annexure RL-8, p.35 (p.15 of record of interview).

¹⁰⁸ Exhibit R8, Annexure RL-8, pp.35-36 (pp.15-16 of record of interview).

¹⁰⁹ Exhibit R8, Annexure RL-8, p.36 (p.16 of record of interview).

¹¹⁰ Exhibit R8, Annexure RL-8, p.36 (p.16 of record of interview).

¹¹¹ Exhibit R8, Annexure RL-8, p.36 (p.16 of record of interview).

MR LAMBIE: “So at no stage leading up to the incident did you provoke any attack [by Mr Chambers]?”

MR NEWTON: “No. No. No. I was in too much of a good mood by then ...”¹¹²

[130] At the end of the First Interview, the following exchange occurred:

MR LAMBIE: “Yep, okay. Is everything you’ve told us today the truth to the best of your knowledge?”

Mr Newton: “Yep.”¹¹³

[131] Following Mr Lambie’s interview with Mr Chambers, Mr Newton attended a second interview with Mr Lambie on 4 July 2019 (**Second Interview**). At the Second Interview, Mr Chambers’ account of the Fight and the circumstances leading up to same were put directly to Mr Newton. In response to such matters, Mr Newton:

- (a) denied that he removed his jumper and got into a boxing stance;¹¹⁴
- (b) denied pushing Mr Chambers during the Fight (instead, Mr Newton says that he did not push him away but only “put his hand up” as though to push Mr Chambers away);¹¹⁵
- (c) denied participating or throwing punches at Mr Chambers at any point during the Fight;¹¹⁶
- (d) denied ever stating to Mr Chambers “I’m going to kill you”;¹¹⁷
- (e) did not dispute the proposition that, prior to the Fight, Mr Newton had said to Mr Chambers, “Fuck you”, and Mr Chambers had replied, “No, fuck you”;¹¹⁸
- (f) maintained that he was unconscious from the time he went to walk away from Mr Chambers, after copping a punch or bottle to the back or side of his head;¹¹⁹
- (g) maintained that the Fight arose from Mr Chambers pressing upon Mr Newton that he wanted to be the IPEC linehaul delegate;¹²⁰

¹¹² Exhibit R8, Annexure RL-8, p.45 (p.25 of record of interview).

¹¹³ Exhibit R8, Annexure RL-8, p.56 (p.36 of record of interview); Transcript, PN711-PN712; PN874. Compare PN894-PN895.

¹¹⁴ Exhibit R8, Annexure RL-24, p.175 (p.5 of the record of interview on 4 July 2019); p.193 (p.23 of record of interview on 4 July 2019).

¹¹⁵ Exhibit R8, Annexure RL-24, pp.176-177 (pp.7-8 of the record of interview on 4 July 2019).

¹¹⁶ Exhibit R8, Annexure RL-24, p.176 (p.6 of the record of interview on 4 July 2019); p.178 (p.8 of the record of interview on 4 July 2019).

¹¹⁷ Exhibit R8, Annexure RL-24, p.176 (p.6 of record of interview on 4 July 2019)

¹¹⁸ Exhibit R8, Annexure RL-24, p.175 (p.5 of record of interview on 4 July 2019)

¹¹⁹ Exhibit R8, Annexure RL-24, p.177 (p.7 of the record of interview on 4 July 2019); p.193 (p.23 of record of interview on 4 July 2019).

- (h) maintained that he does not know whether he was cracked over the back of the head with a bottle, and made statements such as, “I would like to think he didn’t”, and “I’d like to hope he wouldn’t”;¹²¹
- (i) acknowledged that his discussion with Mr Chambers prior to the Fight also concerned a discussion over yard agreements;¹²²
- (j) stated that he said to Mr Chambers on at least three occasions prior to the Fight, words to the effect of, “I’ve had a few to drink, so don’t go talking about anything too technical”;¹²³ and
- (k) confirmed that he had said all that he wished to say concerning the Fight and the Verbal Altercation.¹²⁴

[132] At the Second Interview, Mr Mitchell’s account of the Verbal Altercation and the circumstances leading up to same we also put directly to Mr Newton. In response to such matters, Mr Newton:

- (a) denied that he pushed Mr Mitchell in the chest;¹²⁵
- (b) denied that he took out his teeth shortly prior, to or shortly after, pushing Mr Mitchell;¹²⁶
- (c) said that he only took his teeth out as they were uncomfortable as he had abscess, and his false teeth or mouth plate made it hard and/or painful for him to talk;¹²⁷ and
- (d) denied any form of aggressive confrontation with Mr Mitchell and/or that he was attempting to provoke Mr Mitchell into having a fight.¹²⁸

[133] In his Show Cause Response, Mr Newton:

- (a) doubles down on the responses he gave at the First and Second Interviews, and relies upon those responses as reflecting his recollection of events concerning the Fight and the Verbal Altercation;¹²⁹
- (b) makes an admission that he in fact did push Mr Chambers in the chest, but only to get Mr Chambers out of his face;¹³⁰

¹²⁰ Exhibit R8, Annexure RL-24, p.177 (p.7 of the record of interview on 4 July 2019).

¹²¹ Exhibit R8, Annexure RL-24, p.179 (p.9 of the record of interview on 4 July 2019).

¹²² Exhibit R8, Annexure RL-24, p.175 (p.5 of the record of interview on 4 July 2019).

¹²³ Exhibit R8, Annexure RL-24, p.175 (p.5 of record of interview).

¹²⁴ Exhibit R8, Annexure RL-24, p.196 (p.26 of the record of interview on 4 July 2019).

¹²⁵ Exhibit R8, Annexure RL-24, p.183 (p.13 of the record of interview on 4 July 2019).

¹²⁶ Exhibit R8, Annexure RL-24, p.183 (p.13 of the record of interview on 4 July 2019).

¹²⁷ Exhibit R8, Annexure RL-24, p.183 (p.13 of the record of interview on 4 July 2019).

¹²⁸ Exhibit R8, Annexure RL-24, p.193 (p.23 of the record of interview on 4 July 2019).

¹²⁹ Exhibit R7, MR-18 (p.195), at 1.1, (1)-(3).

(c) states that he has an impaired memory of the Fight,¹³¹ and

(d) states that he was in a serious medical condition immediately after the Fight, and had suffered concussion.¹³²

[134] In his first witness statement tendered in these proceedings, Mr Newton's evidence in relation to the Fight essentially maintained what he told Mr Lambie in the First and Second Interviews. He maintains his admission that he did push Mr Chambers.¹³³ However, he fails to include the admission that he made in the Second Interview that discussions between Mr Chambers and himself prior to the Fight involved the differing Toll yard agreements.¹³⁴

[135] In his second witness statement tendered in these proceedings, Mr Newton provides the following caveat to his evidence:

"I make the following statements in reply to what is contained in Wayne's [Mr Chamber's] statement:

a. In relation to my interactions with Wayne on the night of 30 May 2019, I confirm that it is difficult for me to recall exactly what had occurred prior to, during and after the physical altercation. This is due to a number of factors including as a result of the injuries I sustained as a result of the altercation and the fact that I was under the influence of alcohol at the time. However, the statements I make below are to the best of my recollection in the circumstances."¹³⁵ **(Caveat)**

[136] This Caveat was not raised by Mr Newton in his First or Second Interviews with Mr Lambie.¹³⁶ Indeed, in both of these interviews Mr Newton advanced the position that he was not suffering any ill effects of the Fight.¹³⁷ Any loss or absence of recollection during the interviews was limited, by Mr Newton, to the period he was allegedly "knocked out".

[137] The Caveat asks the Commission to accept what Mr Newton can recollect as true, but to the extent that any issue (or issue of detail) cannot be recalled by Mr Newton, it should not be held against him, and/or is relied upon in relation to some issues to suggest that no conclusive finding on a relevant issue can or should be made at all. I reject that I need, or otherwise ought, to adopt such an approach to Mr Newton's evidence. Even accepting some form of memory loss or poor recollection on the part of Mr Newton, his evidence as to the Fight is in complete contrast to the evidence of Mr Chambers (and my findings in relation to

¹³⁰ Exhibit R7, MR-18(p.195), at 1.1, (4).

¹³¹ Exhibit R7, MR-18(p.195), at 1.1, (4).

¹³² Exhibit R7, MR-18 (p.197), at 2.1, (17).

¹³³ Exhibit N3, at [30].

¹³⁴ Exhibit N3, at [16]-[38].

¹³⁵ Exhibit N4

¹³⁶ Albeit a fleeting reference to "impaired memory" is made in Mr Newton's Show Cause Response.

¹³⁷ Exhibit R8, Annexure RL-8, pp.47-48 (pp.27-28 of record of interview); Annexure RL-24, pp.172 (at point 0.8 of page) (p.3 of second record of interview).

such evidence). For example, Mr Newton's evidence is that he barely provoked the Fight, never threw one punch, and was knocked out cold by a 'king hit'.

[138] In his second witness statement, Mr Newton also says:

- (a) (for the first time) Mr Chambers became agitated during initial discussions over the issue of Telematics (in-vehicle monitoring),¹³⁸
- (b) (for the first time) the issue of yard agreements arose as part of Mr Chambers desire to be the delegate for Toll Long Distance (Linehaul) Drivers on the Eastern Seaboard, and to replace Mr Vecki (as the current individual holding this delegate position),¹³⁹
- (c) Mr Chambers version of events does not make sense as Mr Newton was "knocked out cold for most of the time",¹⁴⁰ and
- (d) he has never used the word "victim" to describe himself.¹⁴¹

[139] In his first witness statement tendered in these proceedings, Mr Newton's evidence in relation to the Verbal Altercation is that he was not aggressive to Mr Mitchell, and that his interactions with Mr Mitchell (over the name calling) were essentially a 'shrug of the shoulders' affair.¹⁴²

[140] Based upon my Mr Newton's responses to Toll during the First and Second Interviews, and his evidence before this Commission, given my findings in this decision, I reiterate my view that Mr Newton has not been honest with Toll or the Commission in relation to his accounts of the Fight and the Verbal Altercation.

[141] In this decision I have found that in the specific circumstances of this case, Mr Newton's willing involvement in the Fight and/or the Verbal Altercation are not valid reasons for his dismissal. However, Mr Newton was required to be honest and candid with Toll in respect of their investigation into the Fight and the Verbal Altercation. He does not dispute this.

[142] Mr Newton made no submission that it was inappropriate or wrong for Toll to have conducted an investigation into the Fight or the Verbal Altercation. Mr Newton made no objection to his participation in Toll's investigation during the First or Second Interviews. Indeed, he relies upon such responses as part of his evidence in these proceedings.

[143] Even if Mr Newton did make an objection to Toll's investigation, I would reject the objection. Issues of liability have come to weigh heavily upon the employer in the 'modern' day employment relationship. Indeed, from a statutory liability perspective, employers may be found liable, directly, vicariously or accessorially, for anything from deteriorations in mental health, to failing to provide the correct information on a payslip. Put simply, in my view, in

¹³⁸ Exhibit N4, at [7(c)(iii)].

¹³⁹ Exhibit N4, at [7(d)].

¹⁴⁰ Exhibit N4, at [7(j)(ii)].

¹⁴¹ Exhibit N4, at [18(h)].

¹⁴² Exhibit N3, at [9]-[15]

the facts and circumstances of this case, it would be wrong of Toll to have simply ignored or cast aside the conduct of Mr Newton and Mr Chambers simply because such interactions did not take place at work. In many cases, interactions between employees outside of the workplace require careful management back at the workplace, so as to eliminate potential future risk and/or liability. At the very least, Toll needed to inquire as to what had happened in relation to the Fight and the Verbal Altercation, and whether any issues arising from same would flow back into the workplace (and thus need to be managed).

[144] It follows from the foregoing that whilst an employee may engage in conduct or behaviour that does not occur at work, or does not have a requisite connection with work, if such matters are investigated by their employer, such an investigation will occur at work. It equally follows that any answers provided by an employee to questions put to him or her by their employer during such an investigation fall within the scope of the employment relationship. And in so falling within the scope of the employment relationship in this case, Mr Newton had a duty to answer questions and/or give his version of events honestly.¹⁴³ As Dixon and McTiernan JJ stated in *Blyth Chemicals v Bushnell*¹⁴⁴:

“Conduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal...But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises”.¹⁴⁵

[145] Of course, the case of *Blyth Chemicals* relates to summary dismissal under an employment contract, but there is no basis to suggest that the principle articulated by the High Court is not equally applicable in forming a view as to whether a sound, defensible or well-founded reason for dismissal exists in proceedings for unfair dismissal.¹⁴⁶ Indeed, in this matter, Toll’s policies and procedures are replete with references to Toll’s core values being underpinned by employees acting with “Integrity and Trust”, being “Open and Transparent”, and “openly participat[ing] in workplace investigations with integrity”.¹⁴⁷

[146] The entire factual matrix must be considered in determining whether an employee’s lie or dishonesty is a valid reason for dismissal.¹⁴⁸ The Commission follows the approach long

¹⁴³ See, for example, *Coulter v Woolworths (WA) Pty Ltd* [2004] WAIRComm 11973, at [120] (citing *Associated Dominions Assurance Society v Andrew* (1949) SR (NSW) 351, at 357-358. I note that Herron J in *Associated Dominions* refers to the requirement to answer questions or make disclosures during an investigation on the premise of “generally speaking”, however, I do not consider there to be any basis to depart from the ‘general’ in the facts and circumstances of this case.

¹⁴⁴ (1933) 49 CLR 66.

¹⁴⁵ *Ibid*, at 81-82.

¹⁴⁶ *Telstra v Streeter* (2008) 170 IR 1, at 11-12, ([23], [27] and [29]).

¹⁴⁷ Exhibit R7, Annexures MR-2 (p.91); MR-3 (p.95, 108); MR-4 (p.115, 118, 140); MR-5 (p.171).

¹⁴⁸ *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, at 413 (Lee, Tamberlin and Marshall JJ); *Woodman v The Hoyts Corporation Pty Ltd* (2001) 107 IR 172, at 178 to 179 (Giudice J, President, Watson SDP, Grainger C).

taken by its predecessors in weighing the gravity of any finding of dishonesty. In some circumstances, relevant dishonesty can be said to be of such insignificance or triviality that any decision to terminate the employee on the basis of same may be disproportionality “harsh”.¹⁴⁹ In other circumstances, the dishonesty may be of such gravity that any dismissal that follows is an appropriate consequence (and thus not harsh).¹⁵⁰ That said, it would be inappropriate to measure this case against the factual matrix of other cases.¹⁵¹ The most that can be drawn from a survey of the authorities is that it is open to the Commission to consider the gravamen of the dishonesty in question as to whether it forms a valid reason for dismissal.

[147] By representing the facts of the Fight and the Verbal Altercation as he has, Mr Newton has (both to Toll, and before this Commission) been both dishonest and misleading. In this regard, I note the following:

- (a) Mr Newton has maintained his version of events. To date, Mr Newton has not recanted, to any substantial degree, his evidence that he did not in any way provoke the Fight. Nor has he moved away from his assertion that he was ‘king hit’ in a cowardly fashion by Mr Chambers, knocked unconscious, and then punched (absent any resistance from him) whilst he lay on the ground (with Mr Chambers sitting on top of him).
- (b) Mr Newton’s dishonesty has been completely self-serving, with absolutely no regard to Mr Chambers personal reputation. Indeed, Mr Newton during the First and Second Interviews continued to maintain that he does not really know if he was glassed by Mr Chambers, and made sanctimonious comments about same, such as “I would like to think he wouldn’t have done something like that”. Given that I have rejected Mr Newton’s evidence that he did not provoke the Fight, and was not knocked unconscious during the Fight, his maintenance of the suggestion that he may have been glassed by Mr Chambers (or otherwise ‘king hit’ by Mr Chambers) is appalling.
- (c) Mr Newton’s dishonesty in relation to the Verbal Altercation and his interactions with Mr Mitchell on 9 April 2019, whilst not of the same gravity as his dishonesty in relation to the Fight, are equally self-serving, and only serve to reinforce my view as to the self-serving nature of Mr Newton’s evidence more generally in these proceedings.
- (d) Mr Newton’s dishonesty has not been in relation to insignificant or trivial matters. Whether the Fight justified dismissal or not, it was nonetheless a physical altercation between two employees that resulted in physical injury. Toll needed to know the truth as to what had occurred, and why it had occurred, so that it could make a proper assessment of any changes it needed to make at the workplace.
- (e) Dishonesty of any form in the employment relationship will undermine the trust and confidence between an employer and an employee. The seriousness of such

¹⁴⁹ *Ibid.*; *McIndoe v BHP Coal Pty Ltd* [Print PR901846, 2 March 2001.

¹⁵⁰ See: *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 (Buchanan J); *Dawson v Qantas Airways Limited* [2017] FWCFCB 1712 (Catanzariti VP, Gooley DP, Wilson C); *Telstra v Streeter* (2008) 170 IR 1, at 11-12, ([23], [27] and [29]).

¹⁵¹ *Hoyts Corporation Pty Ltd* (2001) 107 IR 172, at 178 to 179.

dishonesty measures the degree to which such trust and confidence may be weakened. In this case, Mr Newton's dishonesty was serious. It has had implications for Toll and Mr Chambers, including in terms of Toll's investigation, the decisions Toll has made in reliance upon such dishonest information, and the impact it has had upon Mr Chambers.

[148] All in all, I find that Mr Newton's dishonesty in relation to the Fight and/or the Verbal Altercation constitute a valid reason for his dismissal by Toll. This weighs in favour of a finding that Mr Newton's dismissal was not harsh, unjust or unreasonable.

Was the Applicant notified of the valid reason?

[149] Mr Newton was not notified of the reason for his dismissal. Toll dismissed Mr Newton for "misconduct" because it formed the view that he engaged in the Fight (and was an active participant in same), and the Verbal Altercation (and was the aggressor in same).¹⁵² However, inherent in Toll's decision to dismiss Mr Newton was the fact that Toll did not believe Mr Newton's version of events in relation to the Fight and the Verbal Altercation. The facts in this matter are also unusual in that the Commission has found a valid reason for Mr Newton's dismissal that existed at the time of his dismissal, being a reason upon which Toll did not expressly identify to Mr Newton at the time he was advised of his dismissal. In the circumstances, I consider this factor a neutral consideration in this matter.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[150] Mr Newton's dismissal was not for reasons of conduct, not unsatisfactory performance. I therefore treat this factor as being a neutral consideration in this matter.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[151] I agree with Mr Newton that the allegations made against him by Toll lacked specificity, and merely concerned his involvement in the Fight and the Verbal Altercation. However, this is also to be considered in light of the fact that Mr Chambers and Mr Mitchell's version of events were directly put to him by Toll, but he maintained his assertions as to what occurred. In short, Mr Newton had every opportunity to revise or otherwise correct his version of events, including before this Commission, but chose not to do so.

[152] Further, whilst Toll did not warn Mr Newton that his false denials would give rise to a finding of serious misconduct (before or during the First and Second Interviews),¹⁵³ such failure is ameliorated by the fact that questions of dishonesty and/or disparity in his evidence were directly put to him during his evidence before the Commission.¹⁵⁴

[153] In view of this, I treat any failure by Toll to put specific allegations of dishonesty to Mr Newton during the First and/or Second Interviews, or as part of the disciplinary process, as a neutral consideration in the circumstances of this case.

¹⁵² Exhibit R7, Annexure MR-19. Note internal Toll emails as identified in Mr Newton's Submissions, 25 March 2020, at [57].

¹⁵³ See Exhibit R7, Annexure MR-5, third dot point under heading "Serious Misconduct".

¹⁵⁴ Transcript, PN1174-PN1228; PN1260-PN1356.

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

[154] Mr Newton was provided with the opportunity to have a support person present at all meetings he attended with Toll as part of its investigation and the disciplinary process in relation to the Fight and the Verbal Altercation. I therefore treat this factor as being a neutral consideration in this matter.

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?

[155] Toll is a large business and has access to a well-resourced human resources and workplace relation team. I therefore treat these factors as being a neutral consideration in this matter.

What other matters are relevant?

[156] Mr Newton submits that his dismissal was a disproportionate outcome to his conduct, and therefore harsh. In this regard, Mr Newton submits that:

- (a) at the time of his dismissal, he had worked for Toll for about 41 years (having commenced employment with Toll when he was 19 years of age);
- (b) he has a virtually unblemished record of employment with Toll;
- (c) any previous concerns raised with Mr Newton have not concerned his role as a TWU delegate, which has been confirmed by Mr Rugendyke;
- (d) Mr Newton has enjoyed an excellent relationship with Toll and its management, as exemplified by his various roles with the TWU;
- (e) the Fight and the Verbal Altercation did not occur at work;
- (f) Mr Newton has not had any previous or subsequent run-ins with Mr Chambers or Mr Mitchell;
- (g) there were disciplinary options open to Toll that did not involve the termination of his employment. Further, there is no evidence that Toll gave serious consideration to such other options; and
- (h) Mr Newton has a wife, a seven-year old son, and a mortgage. His age and length of service mean that it is likely he will experience considerable difficulty in

finding comparative alternative employment. Hence, his dismissal has and will continue to have significant financial and personal consequences for him.¹⁵⁵

[157] For its part, Toll submits that the subjective factors relied upon by Mr Newton, and his personal circumstances, are not determinative factors (in and of themselves) in determining whether Mr Newton's dismissal was harsh, unjust or unreasonable. Indeed, other decisions of the Commission have, taking into account similar matters, still found a dismissal not to be unfair.¹⁵⁶

[158] Taking into account the "other matters" raised by Mr Newton, I accept that they should be given weight in the context of my overall determination as to whether his dismissal was unfair.

Differential treatment and comparative fairness

[159] Mr Newton submits that there is an issue of comparative fairness. Mr Newton says that another employee, Mr Scott Egginton, was given a warning by Toll after he was found to have spat on another employee and punched him on the jaw (**Spitting Incident**). Mr Newton says that the Spitting Incident is more serious than the Fight because it involved a punch, and occurred in the workplace (whilst Mr Egginton was on duty).

[160] Mr Newton relies upon evidence given by Ms Jody Duncan (Human Resources, Toll). Ms Duncan came to the conclusion that she could not be satisfied that Mr Egginton had spat on, or struck, another employee. Mr Newton says that Ms Duncan's evidence is contrary to an investigation report that concluded the Spitting Incident occurred as alleged, a statement by the victim, Mr Daniel Farrell, and a doctor's report indicating that an injury was consistent with a punch to the jaw.

[161] Toll submits that the Commission must compare "apples with apples", being that any examples of differential treatment are properly comparable.¹⁵⁷ With that in mind, Toll submits that:

(a) There is evidence as to the different approaches taken in the different parts of Toll's business. More particularly, the incident occurred in a business unit that operates independently to other business units. Furthermore, human resource staff take a more active role in the decision-making process as to the disciplinary outcomes of employees. Ultimately, Toll submits that it is incorrect to presume that there are similar approaches to decisions in its Energy business unit.

(b) Consistent with her more active role, Ms Duncan reviewed the investigation report and was not satisfied that there was a sufficient basis to proceed to termination. In this regard, whilst she accepted that there was a verbal altercation, she was unable to conclude that there had been any physical altercation as alleged.

¹⁵⁵ Mr Newton's submissions, 25 March 2020, at [74]; see also Exhibit N3, Annexure SN-6, at [2.1]; Mr Newton's submissions in-reply, 14 May 2020, at [39]; see also Exhibit N3, Annexure SN-6, at [2.1].

¹⁵⁶ Toll Submissions, 27 April 2020, at [6.2]-[6.5]. *Telstra v Streeter* (2008) 170 IR 1, at 11-12, ([23], [27] and [29]).

¹⁵⁷ *Sexton v Pacific National (ACT) Pty Ltd* PR931440 (AIRC, Lawler VP, 14 May 2003) at [36]; *Darvell v Australian Postal Corporation* [2010] FWAFB 4082.

(c) There is no basis to conclude that the circumstances of the Spitting Incident were comparable (let alone worse) than the circumstances of the Fight. Regarding the former, there was no evidence or admission by any employee as to the allegation of physical altercation. In contrast, there is clear evidence and admissions by both of Mr Newton and Mr Chambers as to their involvement in the Fight. There is also greater information as to the Verbal Altercation, including an acceptance by Mr Newton that he partly provoked the escalation into a physical altercation.

[162] By way or reply, Mr Newton submits that Toll has failed to address the evidence. Mr Newton submits that it cannot be seriously suggested that the allegations against Mr Egginton were not more serious than those involving Mr Newton. Mr Egginton was alleged to have been involved in a fight at the workplace whilst performing duties for Toll. No allegation of comparable seriousness is made against Mr Newton.

[163] Clearly, the parties are in furious disagreement regarding whether issues of comparative fairness arise *vis-à-vis* between the outcome of the Fight and the Spitting Incident. Had Mr Newton's dismissal only been grounded in respect of the Fight, he may have been able to mount an argument of differential treatment. The issue here, however, is that no dishonesty appears to directly arise in respect of the Spitting Incident, or the investigation into same.¹⁵⁸ I have already found that there was a valid reason for dismissing Mr Newton for dishonesty, his involvement in the Fight aside. Hence, Mr Newton's case is markedly distinct from that of Mr Egginton.

[164] The comparison sought to be made by Mr Newton is therefore that of "apples and oranges", to continue the metaphor. That being the case, I must treat the circumstances concerning Mr Newton, and the Spitting Incident, as being of no more than that of a neutral consideration.

Was Mr Newton's dismissal harsh, unjust, or unreasonable?

[165] 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 Newton's dismissal was not unfair within the meaning of s.385 of the Act.

[166] In all the circumstances, I have determined that Mr Newton's unfair dismissal application is to be dismissed.

[167] In weighing the finding I have made as to valid reason, as against the neutral considerations I have identified, and as against the weight to be given to the "other matters" put forward by Mr Newton, I do not consider the latter to be, in the specific facts and circumstances of this case, matters that render Mr Newton's dismissal harsh, unjust or unreasonable. Mr Newton's dishonesty with Toll and before this Commission means that Toll cannot be confident that he will be honest with it into the future. His dishonesty has been in relation to straightforward issues as to his interactions with other persons during the Fight

¹⁵⁸ Despite Toll's investigation finding that some claims were unsubstantiated, there is a clear difference between being unable to making a finding of fact, as compared to a positive finding of dishonesty. Toll's investigation goes no further than the former. There is no express or implied finding of dishonesty.

and the Verbal Altercation, however, such straightforward issues have been about significant matters for both Toll and Mr Chambers.

[168] In the circumstances of this case, the question becomes is it harsh, unjust or unreasonable for an employee (even an employee of lengthy service who does not hold a management role) to be dismissed for dishonesty of the gravity engaged in by Mr Newton? Giving due weight to each of the matters set out under s.387 of the Act, I have concluded that it is not.

Fair go all round

[169] 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.

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”.

[170] 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 Mr Newton and Toll. I have not found Mr Newton’s dismissal to be unfair, and I have taken into account the needs of both Toll and its employees in reaching this determination.

Disposal of proceedings

[171] A separate order will be issued dismissing the Application for an unfair dismissal remedy made by Mr Newton in this matter.



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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<PR724341>