



## DECISION

*Fair Work Act 2009*  
s.604 - Appeal of decisions

**Scott Tracey**

v

**BP Refinery (Kwinana) Pty Ltd**  
(C2019/5845)

VICE PRESIDENT HATCHER  
VICE PRESIDENT CATANZARITI  
COMMISSIONER BOOTH

SYDNEY, 28 FEBRUARY 2020

*Appeal against decision [2019] FWC 4113 of Deputy President Binet at Perth on 2 September 2019 in matter number U2019/1141.*

[1] Scott Tracey has lodged an appeal, for which permission to appeal is required, against a decision of Deputy President Binet issued on 2 September 2019<sup>1</sup> (decision). The decision concerned Mr Tracey's application for an unfair dismissal remedy in respect of the termination of his employment with BP Refinery (Kwinana) Pty Ltd (BP). In the decision, the Deputy President determined that Mr Tracey's dismissal was not unfair and dismissed his application. Mr Tracey contends in his appeal that the decision was attended by appealable error in a number of respects and seeks that the decision be quashed, that his unfair dismissal remedy application be re-determined in his favour, and that he be reinstated to his former employment with BP.

[2] Mr Tracey commenced employment with BP as a process technician at its oil refinery at Kwinana in Western Australia on 16 January 2012. The background to the circumstances which led to his dismissal is that BP and its operations workforce, represented by the Australian Workers' Union (AWU), became involved in a long-running industrial dispute arising from bargaining for a new agreement to replace the *BP Refinery (Kwinana) Pty Ltd & AWU Operations & Laboratory Employees Agreement 2014* (2014 Agreement). The bargaining commenced in mid-2017, and relevantly involved proposals advanced by BP for major changes to a number of existing conditions of employment contained in the 2014 Agreement which, it contended, restricted productivity, efficiency and flexibility and adversely affected its competitiveness. BP's bargaining team was, until early 2018, led by Mr Brett Swain, the Refinery Manager. After that time, Ms Marina Campbell, BP's Health, Safety, Security, Environment and Quality Manager, led the negotiations.

[3] Facilitated bargaining conducted by the Commission took place during 2018, but this failed. BP then took its proposed enterprise agreement to a vote of employees, but it was overwhelmingly rejected with 98 percent of employees voting against it. In mid-October

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<sup>1</sup> [2019] FWC 4113

2018, BP lodged an application in the Commission to terminate the 2014 Agreement. Employees subsequently took protected industrial action in support of their position. On 4 January 2019 BP applied for, and obtained by consent, an order pursuant to s 424(4) of the *Fair Work Act 2009* (FW Act) to terminate all protected industrial action in connection with the bargaining.<sup>2</sup> These events caused a substantial degree of tension between management and the workforce at Kwinana and were widely publicised.

[4] Mr Tracey was dismissed effective from 18 January 2019, with four weeks' pay in lieu of notice. His dismissal arose from a video which he prepared together with his wife, Mrs Rhyanna Tracey, on 3 September 2018 entitled "*Hitler Parody EA Negotiations*". There was a factual dispute about the respective degrees of input into the making of the video on the part of Mr and Mrs Tracey to which we will return later. The video was prepared using a website called "*Caption Generator*". This website contains a small collection of video clips with non-English dialogue and allows the user to add subtitles to create an alternate story or theme for the video. The most well-known of the videos is a clip from the German language movie *Downfall*, which portrays the last days of the Third Reich and is centred on events in Adolf Hitler's bunker near the Reich Chancellery building in Berlin. The scene depicted in the clip shows Hitler breaking down when he learns that a counterattack against advancing Russian forces, which he had previously ordered SS Obergruppenfuhrer Felix Steiner to initiate, had not occurred and launching into an angry and bitter tirade in which he blames various persons for the situation into which he had led Germany. It marks Hitler's final realisation that all his plans had come to nothing, that the complete defeat of Germany could not be avoided and that Berlin would soon fall.

[5] Parody videos of this scene from *Downfall* began not long after the film was released in 2004. Typically, they use subtitles to adapt the scene's depiction of Hitler's realisation of defeat to contemporary political, cultural or social issues. In many cases, the humorous effect is achieved by the juxtaposition of the grave and dramatic events depicted in the film and the relative banality of what is being discussed in the subtitles and the degree of inventiveness displayed in the adaptation of the scene to an entirely different context. There were already thousands of these parody videos on the internet by 2010 such that the use of the clip in the way described can be said to have become a meme. A "meme" - a term coined by the evolutionary biologist Richard Dawkins in the 1970s - is a cultural element, concept or behaviour which is passed from one individual to another by imitation and communication.

[6] The subtitles added in the Traceys' version of the clip make reference to the bargaining for the new agreement at the Kwinana refinery. A full transcript of the subtitles is attached to this decision. In summary, it is apparent that Hitler is assigned the role of an unnamed BP manager in charge of the bargaining strategy. He is informed that the employees have voted overwhelmingly to reject BP's proposed enterprise agreement, and then falls into a rage about the failure of the company's bargaining strategy and the continued resistance of employees.

[7] The Tracey's video appeared (as one of thousands of videos) on the Caption Generator website. It is reasonable to say that it could only be found on that website if one already knew it was there and used the browse function to search for it. On 3 September 2018, Mr Tracey posted a link to the video on Facebook, but access to the video was confined to the Tea Tree

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<sup>2</sup> PR703616. A hearing has since taken place in relation to the making of an industrial action related workplace determination pursuant to s 266 of the FW Act, and the Commission has reserved its decision.

Taverners Group page – a closed group the members of which were all employees of BP at the Kwinana Refinery. That same day, while working the nightshift, Mr Tracey showed the video to some other BP employees working with him. He did this in two ways: first, by using the work computer of another employee to access his Facebook account and, second, by showing the video using his personal device.

[8] BP management became aware of the existence of the video (presumably by word of mouth from someone who had seen it) and commenced an investigation. On 31 October 2018 Mr Tracey was required to attend a formal investigation meeting, at which he admitted that he had shared the video but beyond that declined to provide information. The following day he was, by letter, stood down on pay on the basis of the following allegations:

“It is alleged that you:

- Have shared and distributed material which is highly offensive and inappropriate;
- Utilised another employee’s BP logon to share the material;
- Were involved in creating this material; and
- Are aware of other/s involved in creating the material and are potentially covering up.”

[9] After a number of further steps were taken in the process, Mr Tracey emailed a letter to BP concerning the allegations. He explained that he had not intended to offend anyone; that the video was created by his wife, was intended to be humorous and boost employee morale and did not identify BP or any individual; that it was posted on a private Facebook page and was not intended to be viewed by members of BP’s management or negotiation team; and that he removed the link on the Facebook page once he became aware that it may have been viewed outside of the private group. He also said that he suffered from a mental illness which affected his thought processes and caused him to have a tendency to impulsivity and poor judgment, and he had an unblemished work record of 7 years.

[10] Once an investigation report had been prepared, it was sent to Ms Lisa Archbold, a BP Manager based in Melbourne who had not been involved in the negotiation team, for consideration of the disciplinary action to be taken. Mr Tracey was advised of the findings of the investigation report and given further opportunities to respond. On 18 January 2019, Mr Tracey was advised at a meeting that he was dismissed effective immediately, and was provided with a letter which confirmed his dismissal. The grounds for dismissal identified in this letter were as follows:

“**Allegation 1** - You created, made available, shared and/or distributed an offensive and inappropriate video which purportedly depicted BP representatives involved in the current Operations and Laboratory Agreement negotiations as Nazis.

This allegation was substantiated and is a breach of:

1. BP Code of Conduct, specifically:
  - Employee Responsibilities
  - BP Values and Behaviours (Respect)
  - Section 2 of the Code which relates to People
2. BP Respect & Equal Opportunities Policy, specifically:

Clause 8 of the policy which relates to harassment and bullying  
Clause 13 of the policy which relates to roles and responsibilities.

**Allegation 2** - You inappropriately used BP computers, logins and/or networks to create, access, share and/or distribute the video.

This allegation was substantiated and is a breach of:

1. BP Code of Conduct, specifically:  
Section 5 of the Code which relates to – our assets and financial integrity
2. BP Protecting Our Information Policy, specifically:
  - a. Clause 5.2 which relates to acceptable use of IT equipment
  - b. Clause 5.4 which relates to being discreet in public and online.”

### **The decision**

[11] After setting out the facts of the matter and confirming, uncontroversially, that Mr Tracey was a person protected from unfair dismissal, the Deputy President turned in the decision to the consideration of whether Mr Tracey’s dismissal was unfair and, in doing so, addressed the matters required to be taken into account under s 387 of the FW Act. In relation to s 387(a), the Deputy President gave consideration as to whether the contentions of misconduct set out in Mr Tracey’s dismissal letter constituted a valid reason for his dismissal. As to the factual occurrence of the conduct, the Deputy President found that Mr Tracey was involved in the creation of the video and, in any event, he made it available, shared and/or distributed it as alleged by BP.<sup>3</sup> In respect of Mr Tracey’s posting of a link to the video on the private Facebook page, the Deputy President said (footnotes omitted):

“[79] Notwithstanding that the TTT Facebook Group is a private group which only members of the TTT Facebook Group can access, the evidence is that many of the 2014 Agreement covered workforce are members of the TTT Facebook Group. While a member of the public would be unlikely to relate the video to the industrial events then occurring at BP, the members of the TTT Facebook Group were familiar with the negotiations and the identities of those involved and could easily draw parallels between the words attributed to Hitler and the Nazi generals via the captions and events which occurred during the negotiations.

[80] It was in fact conceded on Mr Tracey’s behalf at the Hearing that he did not suggest “*that a reasonable person at BP would not be entitled to view the video as being about events at BP and the BP employers negotiating team*” In fact Mr Tracey’s counsel conceded that his client accepted “... *that a reasonable person at BP could construe the video as being about BP employees, and even Brett Swayn and the negotiating team.*”

[81] The members of the TTT Facebook Group are people that Mr Swayn and his senior management team are charged with leading and with whom they must establish a critical relationship of mutual trust and confidence given the highly volatile and dangerous product, systems and equipment with which they all work.

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<sup>3</sup> [2019] FWC 4113 at [73]-[78]

[82] Notwithstanding that the audience of the TTT Facebook Group was restricted, the very identity of that audience made the sharing and distribution of more significance than a larger audience with no relationship to the BP worksite.”

[12] The Deputy President rejected a submission by Mr Tracey that BP’s investigation was corrupted by bias and conflicts of interest and pre-determined, and then considered in respect of Allegation 1 in the dismissal letter whether the video was offensive or inappropriate having regard to BP’s submission that “...by synchronising Hitler’s speech with words said by BP senior managers, the video likens one with the other”.<sup>4</sup> The Deputy President found that the video caused actual offence, notwithstanding that Mr Swayne was not called to give evidence. In making this finding, the Deputy President referred to the evidence of Ms Sharon Rudderham, the Human Resources Manager at the refinery, Ms Allyson Woodford, the Operations Manager, and Ms Archbold. The Deputy President quoted Ms Rudderham’s evidence that the video was inappropriate because it was “... a parody about the Kwinana Refinery and its management team (without their permission), in which it compares Brett Swayn to Hitler (who was a man who committed genocide and mass murder)” and Ms Woodford’s evidence that she was “shocked” because she perceived the video as “... specifically targeting Brett and [BP]” and that it was “was intentionally made at the expense of Brett”, and that she believed the video potentially depicted herself and Ms Campbell.<sup>5</sup>

[13] The Deputy President then gave consideration as to whether a reasonable person would consider the video to be offensive or inappropriate, and said (footnotes omitted):

“[99] I do not accept that by labelling something as a parody is a ‘get out of jail free card’ and necessarily means something is not offensive. A racist joke is by name humour but is likely to offend a person of the nationality at which it is aimed.

[100] Depending on the circumstances in which it occurs ‘poking fun’, ‘taking the mickey’ or ‘sending up’ might be disrespectful, rude, demeaning and/or offensive. For example ‘sending up’ a religious deity might be deeply offensive to some groups of people.

[101] The FWC and its predecessors have previously considered cases in which an employee has made references, or likened their employer, to Hitler or the Nazi regime. In *APS Group (Placements) Pty Ltd v O’Loughlin* [2011] FWAFB 5230 it was held that carving the words “Welcome to hell” and etching a swastika into an ice block in protest of the conditions of work in a freezer room was insulting and offensive conduct (whether or not the business employed Jewish people or the employee intended to offend anyone). Such conduct was held to have been a valid reason for the relevant employee’s dismissal.

[102] In *CPSU v Australian Broadcasting Corporation* [2005] AIRC 737 SDP Drake held that calling an employer a ‘Nazi’ was ‘inappropriate and offensive’ even in the ‘context of a heated industrial meeting’.

[103] In *Pitt v Woolworths (SA) Pty Ltd* [2003] AIRC 673 an employee’s actions in calling his employers ‘Nazis’ was found to amount to a valid reason for his dismissal.

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<sup>4</sup> Ibid at [84]

<sup>5</sup> Ibid at [87]-[94]

[104] Mr Tracey made reference to a decision of a Hong Kong court in *Grant David Vincent Williams v Jefferies Hong Kong Ltd* (HCA 320/2011, Judge Seagroatt, 20 June 2013). In that case the applicant was awarded damages after being dismissed for sharing a link to a captioned extract of the *Downfall* film. Self-evidently the decision involved the application of different laws and cultural norms. The decision is also distinguishable on its facts. While Judge Seagroatt expressed views about the offensiveness of the captioned video, relevantly the dismissal was held to be wrongful because the employee was not in fact responsible for the distribution of the link to the video. The link was embedded in a client newsletter that internal protocols dictated should have been vetted by a nominated senior employee before being distributed. The newsletter was distributed by an administrative staff member and not the applicant. In addition, the disciplinary process was swift and without reference to the most basic principles of procedural fairness.

[105] I am satisfied that when viewed in context that a reasonable person would consider the Hitler Video inappropriate and offensive.

[14] The Deputy President then considered whether Mr Tracey's conduct constituted a breach of BP's Code of Conduct and Respect and Equal Opportunity Policy which, relevantly, required employees to treat each other with respect and professionalism and provided that "*...offensive messages, derogatory remarks and inappropriate jokes are never acceptable*". The Deputy President firstly said:

“[112] For the reasons set out earlier in this decision I am satisfied that the Hitler Video offended and was objectively inappropriate and/or offensive in the circumstances. The Hitler Video had the potential to undermine, demean and denigrate the BP senior management team amongst an audience which they were charged to lead. Sharing the Hitler Video amongst his colleagues could not reasonably be described as Mr Tracey treating BP senior managers with respect or professionalism. The sharing or distribution of the Hitler Video was not a single occurrence. Mr Tracey shared it to the TTT Facebook Group then shared it further to a colleague who would not have otherwise accessed it via Facebook.

[113] Mr Tracey submits that he was not responsible for offence being taken by any individual who claims to be offended by the Hitler Video because he only distributed or shared the Hitler Video among the workforce covered by the 2014 Agreement by way of his Facebook post and by showing the Hitler Video to colleagues. He says those who claimed to be offended by the Hitler Video became aware of the Video via Mr Stoner who located the video on the Caption Website, the publicly accessible site where the Hitler Video was initially created by his wife. In effect, Mr Tracey is asserting that his wife is responsible for an offence which occurred.

[114] The possibility that the Hitler Video would eventually be leaked to management is not vague or remote but a real possibility that Mr Tracey ought to have considered when he chose to share the video among his work colleagues: not only by showing the Hitler Video to work colleagues while at work but by posting the link to the Hitler Video in the TTT Facebook Group.

[115] That Mr Tracey did not share or distribute the video directly with those offended does not exculpate him. The effect of the Hitler Video was to demean, denigrate and

undermine the standing of senior BP management. The possibility that the existence of the Hitler Video would come to the attention of BP was not unlikely or improbable. A parallel can be drawn with explicit posters in crib rooms which can have harassing and intimidatory effect on women employed in roles elsewhere in the business and notwithstanding they may not be members of the workgroups using the crib rooms on a day to day basis.”

**[15]** The Deputy President rejected Mr Tracey’s submissions that the Code of Conduct was too vague and subjective to be enforceable<sup>6</sup> and that BP had not consistently applied its policies,<sup>7</sup> and then concluded:

“[124] I am satisfied that Mr Tracey made available, shared and or distributed the Hitler Video. I find that in doing so he breached BP policies and that his conduct was destructive of the necessary trust and confidence that are an essential element of any employment relationship. I therefore find that there was a valid reason for Mr Tracey’s dismissal.”

**[16]** In relation to the second contention of misconduct in the dismissal letter, the Deputy President repeated her finding that the effect of the video was to “demean, denigrate and undermine the standing of senior BP management” and therefore did not constitute “authorized limited personal use for the purposes of the BP Protecting Our Information Policy”<sup>8</sup> and she concluded that:

“[138] I am satisfied that Mr Tracey breached the BP Protecting Our Information Policy by using the BP IT system to access and share material which was inappropriate and likely to cause offence. I find that in all the circumstances that this conduct formed a valid reason for Mr Tracey’s dismissal.”

**[17]** In relation to s 387(b) and (c), the Deputy President found (in broad summary) that Mr Tracey was accorded procedural fairness by BP. The findings made by the Deputy President in relation to s 387(e)-(g) are not controversial and need not be recited. In relation to s 387(h), the Deputy President considered a number of matters raised by Mr Tracey, including a lack of malicious intent, his mental illness, that his behaviour was one-off and he had an otherwise exemplary record, his contrition as demonstrated by his early removal of the link to the video on the Facebook page, the industrial context in which the events occurred and the personal and economic consequences of his dismissal.<sup>9</sup> In the course of her consideration on these matters, the Deputy President said:

“[195] Had a member of BP management team created a video portraying delegates and union officials in a similar manner for a management function I would anticipate it would have rightly caused uproar among the workforce and led to its creator’s swift removal from the organisation.”

**[18]** The Deputy President’s overall conclusions as to the fairness of the dismissal were as follows:

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<sup>6</sup> Ibid at [116]-[118]

<sup>7</sup> Ibid at [119]-[123]

<sup>8</sup> Ibid at [132]-[133]

<sup>9</sup> Ibid at [191]

“[207] While Mr Tracey expressed remorse during the Investigation and in these proceedings, his remorse is expressed in terms of him not intending to cause offence, if it occurred. He does not appear to accept that his conduct did cause offence or that it could reasonably be said to cause offence. Given this lack of insight it is likely that he would come into further conflict with his employer.

[208] In all the circumstances, and taking into account the heavy emotional and financial impact of the dismissal on Mr Tracey and his family, and taking into account the payment in lieu of notice, I am satisfied that his dismissal was not harsh, unjust and unreasonable.”

### **Appeal grounds and submissions**

[19] Mr Tracey’s notice of appeal contains 8 appeal grounds. Grounds 1-5 challenge in various ways the Deputy President’s characterisation of the video which founded her conclusion that there was a valid reason for the dismissal. In respect of these grounds, it was submitted that:

- it was necessary for the Deputy President to correctly characterise the video;
- BP’s dismissal was based on the view that the video likened BP managers to Hitler and Nazis, notwithstanding that Mr Tracey denied this before the dismissal;
- in determining that there was a valid reason for dismissal, the Deputy President accepted BP’s characterisation of the video;
- in doing so, the Deputy President manifestly mischaracterised the video and consequently Mr Tracey’s conduct;
- the *Downfall* video genre involves an absurd juxtaposition between Hitler’s downfall and a contemporary mundane, commonplace or day-to-day matter not going to plan, and is a device to make a humorous point about the contemporary matter not going to plan;
- there would be no humour in the video genre if it constituted depicting a person as a Nazi or likening a person to a Nazi;
- the Deputy President failed to assess the video in the context of this genre;
- Mr Tracey’s video was an exercise in humour in this vein, and a reasonable person would not construe it as calling BP managers Nazis or depicting them as such or drawing parallels between them and Nazis; and
- the Deputy President erred by failing to properly characterise the video or, alternatively, failing to characterise it all beyond describing it merely as inappropriate and offensive.

[20] Ground 6 of the appeal contends that, in considering whether there was a valid reason for the dismissal, the Deputy President took into account an irrelevant consideration or acted on a wrong principle by taking into account her assessment that BP’s investigation of Mr

Tracey's conduct was not pre-determined, biased or affected by any conflict of interest. Ground 7 contends that the Deputy President erred in her consideration under s 387(h) in having regard to a hypothetical scenario in which a BP management member had made a video about union representatives of the same nature as that made by Mr Tracey. Ground 8 contends that the decision was plainly unreasonable and unjust having regard to the true characterisation of the video, Mr Tracey's contrition and removal of the Facebook link to the video, the personal and economic consequences for him of the dismissal, his otherwise unblemished employment record and the context of the difficult industrial dispute. Mr Tracy submitted that, should his appeal be upheld, the Full Bench should re-determine his unfair dismissal remedy application on the basis of the evidence that was before the Deputy President.

[21] In relation to appeal grounds 1-5, BP submitted that Mr Tracey's contention that the Deputy President erred in mischaracterising the video was misconceived for two reasons. The first was that the Deputy President did not characterise the video in the manner alleged, and did not find that the video depicted BP employees as Nazis or Hitler or liken them as such. The second was that it was not necessary for the Deputy President to find that the video depicted BP employees as Nazis, since Allegation 1 in the dismissal letter did not, properly construed, state that this was the case. The reference to "Nazis" was contained in a subordinate clause in the sentence and was subject to the caveat "purportedly". The Deputy President addressed the issue as to whether the video was a parody, and found that it was offensive even if it was a parody, and gave lengthy consideration to the nature and effect of the video and its gravity.

[22] As to appeal grounds 6 and 7, BP submitted that the paragraphs [86] and [122] of the decision, in which the Deputy President dealt with and rejected a submission advanced by Mr Tracey that the BP investigation was predetermined or biased were *obiter dicta* and peripheral to the ultimate determination that was made. As to the hypothetical example in paragraph [195], it served to assist the better understanding of the Deputy President's reasoning process but was otherwise unremarkable and extraneous. As to appeal ground 8, the matters relied upon by Mr Tracey to demonstrate that the decision was unreasonable or plainly unjust either repeated matters raised in connection with appeal grounds 1-5 or were matters to which the Deputy President gave express consideration. Mr Tracey, it was submitted, had not demonstrated why these matters were pertinent or why their consideration by the Deputy President was flawed or insufficient.

### Consideration

[23] Grounds 1-5 of Mr Tracey's appeal challenge the Deputy President's conclusion pursuant to s 387(a) of the FW Act that there was a valid reason for his dismissal. It is well established that a reason for dismissal based on the employee's conduct would be valid if the conduct in fact occurred and justified termination and, conversely, the reason would be found not to be valid if the conduct did not occur or it did occur but did not justify termination.<sup>10</sup> In this case, there was no factual dispute about the content of the video or Mr Tracey's conduct in posting a link to it on the private Facebook page and showing it to persons at work. There was some issue taken with the extent of Mr Tracey's role in the making of the video, but the

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<sup>10</sup> *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [6]- [7], *Titan Plant Hire v Van Malsen* [2016] FWCFCB 5520, 263 IR 1 at [28]

Deputy President found that he was involved to an extensive degree<sup>11</sup> and this finding is not challenged in the appeal. Accordingly, the critical issue which the Deputy President had to determine was whether the conduct was of such a nature to justify dismissal. This required the making of an evaluative judgment on her part as to the character of the video's content.

[24] As is recorded in the decision, BP's case at first instance was that the video was offensive and inappropriate because it likened BP's management team with Hitler and Nazis. Its case in this respect reflected its reasons for Mr Tracey's dismissal as stated in Allegation 1 in the dismissal letter which, we consider, clearly characterised the video as offensive on the basis that it "*depicted BP representatives involved in the ... negotiations as Nazis*". BP's attempt in the appeal to resile from this position by parsing the first sentence of Allegation 1 contained in the letter is rejected; to the extent that there could be any doubt about the meaning of that sentence, it is dispelled by the characterisation of the video given by its own witnesses. We also reject BP's submission that the Deputy President did not find that the video was offensive on the basis that it likened the BP management team to Nazis. The Deputy President's reasoning in the decision recorded BP's position, and then proceeded on the basis of a consideration and rejection of Mr Tracey's submission that it was unreasonable to interpret the video as depicting BP employees as Nazis and it was merely a parody. In doing so, the Deputy President relied upon three decisions which she described as "cases in which an employee has made references, or likened their employer, to Hitler or the Nazi regime". Two of those cases involved employees calling their employers "Nazis", and the third involved an employee carving a swastika in the workplace in protest against his working conditions. No other basis for characterising the video as offensive or inappropriate was identified in the decision.

[25] We do not accept that it was reasonably open for the video to be characterised in the way it was by the Deputy President. Even considered in isolation from its memetic context, it is apparent that the video does not liken BP management to Hitler or Nazis in the sense of stating or suggesting that their conduct or behaviour was in some sense comparable in their inhumanity or criminality. What it does do is to compare, for satirical purposes, the position BP had reached in the enterprise bargaining process as at September 2018 to the *situation* facing Hitler and the Nazi regime in April 1945. The position might be different if the clip used from the *Downfall* film depicted Hitler or Nazis engaging in inhumane and criminal acts (as many other parts of the film do); in such a case a comparison in terms of conduct or behaviour might be inferred and reasonably be regarded as offensive. But it does not. By way of illustration, if it is said that someone is like Napoleon at Waterloo, this is obviously not to be understood as drawing a comparison between the person and the personality, behaviour, deeds or stature of Napoleon Bonaparte; rather, it is a stock way to say that the person is facing a final, career-ending defeat.

[26] The position becomes even clearer when one considers the context of the development of the use of the *Downfall* clip into a meme. That the clip has been used thousands of times over a period of more than a decade for the purpose of creating, in an entirely imitative way, a satirical depiction of contemporary situations has had the result of culturally dissociating it from the import of the historical events portrayed in the film. After this period, any interest which remains in the clip will usually reside in the degree of inventiveness involved in successfully adapting the scene to fit some new situation. Anyone with knowledge of the

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<sup>11</sup> [2019] FWC 4113 at [75]

meme could not seriously consider that the use of the clip was to make some point involving Hitler or Nazis.

[27] There is no doubt that the clip would be understood by the reasonable viewer as satirising BP's conduct during the enterprise agreement bargaining process at the Kwinana Refinery. That, by itself, did not make it offensive or inappropriate. Given the industrial circumstances at the refinery as at September 2018, when the heated and protracted bargaining dispute between BP and its employees and their union was approaching its nadir, it is entirely understandable that persons in the opposing camps might between themselves engage in criticism of the other party's position and conduct. Significant economic interests were at stake both for BP and its employees, and it would be unrealistic to expect that a dispute of this nature could continue to its conclusion without any form of criticism and reproach being expressed at least privately. Members of BP's negotiating team could not genuinely have been surprised that employees such as Mr Tracey would be strongly critical of BP's conduct during the course of the bargaining.

[28] It is important in this context to distinguish between criticism of the other party's position and conduct during an industrial dispute and targeted personal disparagement of an individual in the other camp. The Traceys' video clip certainly engages in the former activity through the use of satire, but the evidence did not establish that it involves the latter. It may be accepted that the subtitles for the Hitler character may readily be understood as referable to Mr Swayn (although no BP manager is identified by name in the video). However, we do not consider that the fact that the subtitles "send up" the way in which BP conducted the negotiations through the agency of Mr Swayn in his capacity as manager of the Kwinana refinery means that the video was personally denigrative of him. Mr Swayn did not give evidence at first instance, so there is no proper basis on which to conclude that he considered himself targeted by the video or even that he was personally offended by it. The hearsay evidence of Ms Rudderham and Ms Woodford Black to the effect that they thought the words "*I can't afford to get fired from another job again*" attributed to the Hitler character referred to the fact that Mr Swayn had been made redundant in a previous job was not confirmed by him. We do not consider that the evidence supports the proposition that any other character in the video can be identified with any particular person in BP's bargaining or management team, notwithstanding Ms Woodford Black's evidence that she believed the video might be depicting her and Ms Campbell.

[29] For these reasons, we consider that it was not reasonably open to the Deputy President to find that Allegation 1 in the dismissal letter constituted a valid reason for dismissal. The allegation was premised on the proposition that the video was offensive and inappropriate because it compared BP's negotiating team to Hitler and Nazis - a proposition which we consider to be unsustainable. The Deputy President's consideration of whether Allegation 2 also constituted a valid reason for dismissal was infected by her conclusion that the video was offensive and inappropriate on the same basis, and for that reason was also attended by appealable error.

[30] The Deputy President's erroneous determination that there was a valid reason for Mr Tracey's dismissal was fundamental to her decision that his dismissal was not unfair and that his unfair dismissal remedy application should be dismissed. Because the decision was affected by error in this way and manifests an injustice to Mr Tracey, and because the appeal raises issues of general application concerning the capacity of employees to engage in legitimate criticism of management in the conduct of an industrial dispute, we consider that

the grant of permission to appeal would be in the public interest. Accordingly, permission to appeal is granted as required by s 604(2) of the FW Act. The appeal is upheld on the basis of grounds 1-5, and the decision is quashed. It is unnecessary in those circumstances to consider any of the other grounds of appeal.

[31] We consider that the appropriate course in light of this conclusion is to re-determine Mr Tracey's unfair dismissal remedy application ourselves. This can be done on the basis of the evidence that was before the Deputy President except in respect of one issue which is identified below.

### **Re-determination of Mr Tracey's unfair dismissal remedy application**

[32] In relation to the matters set out in s 396 of the FW Act requiring initial determination, we find as follows:

- (a) Mr Tracey's application was made within the period required by s 394(2);
- (b) Mr Tracey was a person protected from unfair dismissal;
- (c) BP was not a "*small business employer*" as defined in s 23 of the FW Act, so that the Small Business Fair Dismissal Code was inapplicable; and
- (d) the dismissal was not a case of genuine redundancy.

### *Whether the dismissal was unfair*

[33] It is next necessary for us to determine whether Mr Tracey's dismissal was harsh, unjust or unreasonable having regard to the matters specified in s 387 of the FW Act. In relation to s 387(a), we find that there was no valid reason for Mr Tracey's dismissal related to his character or conduct. Allegation 1 specified in the dismissal letter did not constitute a valid reason because, for the reasons explained earlier, we do not consider that the video which he was involved in making and distributing was offensive or inappropriate in the circumstances. We also note that he initially sought to distribute the video only on a private Facebook page accessible by fellow employees covered by the 2014 Agreement. This was purely out-of-work conduct, and the evidence did not demonstrate that it had any relevant adverse effect on the conduct of work at the Kwinana Refinery.<sup>12</sup> As to Allegation 2, it may be accepted that Mr Tracey breached BP's policy by using a work computer to show the video to another employee during working hours, and to that extent misconducted himself. However this was not sufficiently grave conduct to justify dismissal, taking into account that the video was not itself offensive and inappropriate as alleged, Mr Tracey did not engage in general distribution of the video but only showed it to one employee,<sup>13</sup> and he did not intend that the video be seen by any member of BP management.

[34] In relation to s 387(b), (c), (d), (e), (f) and (g), we agree with and adopt the conclusions reached by the Deputy President in relation to these matters. In relation to

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<sup>12</sup> See *Rose v Telstra Corporation Limited* Print Q9292 [1998] AIRC 1592 (4 December 1998); *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156, 250 IR 27 at [104]

<sup>13</sup> Cf. *Anderson v Thiess Pty Ltd* [2015] FWCFB 478

paragraph 387(h), we regard the following matters as relevant and favouring the conclusion that Mr Tracey's dismissal was unfair:

- Mr Tracey's record of employment over seven years was otherwise unblemished;
- the conduct which caused his dismissal occurred in the context of a tense and embittered industrial environment;
- Mr Tracey expressed contrition for his conduct, and took the link down from the Facebook page as soon as he became aware it had come to BP's attention; and
- the dismissal caused Mr Tracey financial hardship in the form of unemployment (at least until the date of hearing) and the consequential loss of 75% of his family's household income, and also caused personal distress to him and his wife.

[35] Taking the above matters into account, we find that Mr Tracey's dismissal was unjust and unreasonable because there was no valid reason for his dismissal, and harsh because of the mitigating factors identified in the preceding paragraph. Accordingly, he was unfairly dismissed.

#### *Remedy*

[36] Reinstatement is the primary remedy provided for in respect of unfair dismissals under the FW Act in the sense that s 390(3)(a) requires that there be a finding that reinstatement is inappropriate before consideration can be given to the award of compensation.<sup>14</sup> Accordingly, in respect of remedy, the primary issue which must be considered is whether it would be appropriate to make an order for Mr Tracey's reinstatement. In considering whether to exercise its discretion in favour of the making of an order of reinstatement, the Commission will treat as an important consideration whether the necessary trust and confidence for a workable, viable and productive employment relationship can be restored.<sup>15</sup>

[37] In this case, a number of witnesses for BP expressed the view that the necessary trust and confidence had been destroyed and accordingly that Mr Tracey should not be reinstated. However those views were founded upon a characterisation of the video as having likened members of BP's negotiating team and management to Nazis. Because we have found that it was not reasonably available to characterise the video in that way, we do not place much weight upon those views. Certainly reinstatement would involve Mr Tracey working under the managers who participated in the enterprise agreement negotiations and who may have perceived themselves to have been the subject of criticism in the video. However the evidence is that his day-to-day interactions with them are limited, and in any event we consider that Mr Tracey's prior record of employment suggests that he will have no difficulty in re-establishing himself as a productive and cooperative member of the workforce at the Kwinana refinery. Because reinstatement will clearly be the most effective remedy for Mr Tracey's unfair dismissal, and there is no substantial impediment to the restoration of a workable employment relationship, we will order that BP reinstate Mr Tracey within 14 days from the date of this decision pursuant to s 391(1)(a) of the FW Act. We will also make orders pursuant to s 391(2)

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<sup>14</sup> *Melanie Millington v Traders International Pty Ltd* [2014] FWCFB 888 at [66]

<sup>15</sup> *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 at [20]-[28]

to maintain the continuity of Mr Tracey's employment and the period of his continuous service with BP.

[38] We also consider that an order should be made pursuant to s 391(3) to compensate Mr Tracey for the remuneration he has lost because of his dismissal. However we lack sufficient information to make an order in appropriate terms as part of this decision. We will invite further evidence and submissions about this, including but not limited to the following matters:

- (1) any alternative remuneration earned by Mr Tracey since his dismissal up to the date of any compensation order we might make; and
- (2) whether any deduction should be made for Mr Tracey's misconduct in using of a work computer to show the video to another employee during working hours.

[39] We also invite the parties to confer about this issue to explore whether a consent position about the making of such an order may be reached.

### **Orders and directions**

[40] We make the following orders:

- (1) Permission to appeal is granted.
- (2) The appeal is upheld.
- (3) The decision ([2019] FWC 4113) is quashed.
- (4) BP Refinery (Kwinana) Pty Ltd is ordered to reinstate Scott Tracey to the position in which he was employed immediately before his dismissal within 14 days of the date of this decision.
- (5) BP Refinery (Kwinana) Pty Ltd shall maintain the continuity of Mr Tracey's employment and the period of his continuous service upon Mr Tracey's reinstatement taking effect.

[41] We direct that Mr Tracey and BP file any evidence and submissions concerning the making of a compensation order pursuant to s 391(3) within 21 days.



VICE PRESIDENT

*Appearances:*

*K Farouque* on behalf of Mr Tracey.  
*H Millar* on behalf of BP Refinery (Kwinana) Pty Ltd.

*Hearing details:*

2019.  
Sydney:  
14 November.

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## ANNEXURE

GENERAL 1: We made several changes to the Enterprise Agreement. We deleted key clauses and put in confusing wording statements here. Here and here. We made them so we can enforce them any way we want. Despite what we told them what the “Intent” of the clause is.

HITLER: That will fuck them. Are the results from the vote in?

GENERAL 1: Ummm...Yes...

GENERAL 2: The result was not what we were expecting. 98% voted “NO” and there were only 4 “YES” votes.

(Long pause)

HITLER: Everyone not on the negotiating team get out.

Why didn't they vote it in? I offered the carrot, I tried using the stick. I threatened to cancel the agreement and go back to the award. Why haven't they broken? We went to IBB. We made up facts and figures to suit our case. The commissioner was on our side. We even bought out that useless Solomon information that no one understands

GENERAL 3: But they are united against us

HITLER: I let them keep their “5 Panel Roster”, I offered them a sign on bonus and “Cash Incentives”

GENERAL 3: They see through our tricks, they can't be bullied

HITLER: Don't they know how lucky they are to have their jobs? Now the Liberal Party is all fucked up. There is so much in-fighting. We now have a new Prime Minister again! Turnbull, Morrison, Dutton and Abbot are all as bad as each other. Bill Shorten popularity is growing and he was in town last week rallying support. At this rate Labour will win the election for sure. Then we will have no power to negotiate. We need to get the Enterprise Agreement we want while we can still use Work Choices. And what is #BBD? I see it on stickers, coffee cups, signs, and now painted on the road. I have tried Googling it. What does “Big Black D#@ks” or “Bell Biv DeVoe” have to do with this? They are just openly mocking me. Don't they know that I am in charge? Somebody tell me what it means.

WOMAN OUTSIDE: Its OK, I don't know what #BBD means either.

HITLER: But I made promises to London. I can't afford to get fired from another job again. We have lost. Plans “D” and “E” won't work either. They are threatening Protected Industrial Action. I thought this would be easy. I don't know where to go from here.