DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Andrew Bobrenitsky
v
Sydney Trains
(U2021/1757)

DEPUTY PRESIDENT CROSS SYDNEY, 1 JULY 2021

Application for an unfair dismissal remedy.

Introduction

[1] On 20 December 2019, Mr Andrew Bobrenitsky (the Applicant) lodged an application pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act). The Applicant had been employed by Sydney Trains (the Respondent). The Applicant commenced his employment with the Respondent on or about 14 February 2005. The Applicant was notified of his dismissal on 19 January 2021, and was actually dismissed by the Respondent on 18 February 2021.

[2] In the hearing of the matter Mr P Matthews, Legal Officer of the Australian Rail, Tram and Bus Industry Union, appeared for the Applicant, and Ms C Bembrick of Counsel appeared for the Respondent, instructed by McCullough Robertson Solicitors.

[3] On 17 May 2021, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). The Directions were as follows:

1. *Andrew Bobrenitsky (the Applicant) is directed to file with the Fair Work Commission, and serve on Sydney Trains (the Respondent), an outline of submissions, witness statements and other documentary material the Applicant intends to rely on in support of the application in this matter by 4pm on 7 May 2021.*

2. *The Respondent is directed to file with the Fair Work Commission, and serve on the Applicant, an outline of submissions, witness statements and other documentary material the Respondent intends to rely on in opposition to the application in this matter by 4pm on 28 May 2021.*

3. *The Applicant is directed to file with the Fair Work Commission, and serve on the Respondent, any reply material, that is, any witness statements and other documentary material in reply to the Respondent's witness statements and documents by 4pm on 4 June 2021.*

4. *Any party that requests permission to be legally represented at the hearing is directed to file with the Fair Work Commission, and serve on the other party, a brief outline of submissions in support of its request by 4pm on 28 May 2021.*

[4] The parties complied with the Directions. In particular:

(a) On 10 May 2021, the Applicant filed an Outline of Submissions (the Applicant's Submission) and a Statement from the Applicant with annexures;

(b) On 28 May 2021, the Respondent filed an Outline of Submissions (the Respondent's Submission), and a statement of Ms Emma Bunting, Deputy Executive Director, Sector 1 and 3 Train Crewing and Support of the Respondent, with annexures; and

(c) On 7 June 2021, the Applicant filed an Outline of Submissions in Reply (the Applicant's Reply Submission).

Background Facts

[5] The relevant background facts were not in dispute in any significant way, and the matter turned on the effect and importance of those facts. I found both witnesses to be honest and responsive, and that they sought to directly and truthfully answer the questions asked of them. On the basis of the material before me the following findings may be made about the relevant facts in this matter regarding the issues of the Applicant's conduct and the investigation of that conduct, the policies of the Respondent, the safety critical nature of the Applicant's employment, and the Applicant's employment record.

(a) The Applicant's Conduct and the Investigation of that Conduct

[6] At 8:20am on 16 August 2020, the Applicant was driving on the Great Western Highway in Warrimoo and was arrested by the NSW Police Force for suspicion of impaired driving. He was taken to the Police Station in Springwood where he was required to undertake a breath analysis test. That breath analysis test, completed at 9.02am, returned a positive reading of 0.206 grammes of alcohol in 210 litres of breath, meaning the Applicant was driving his vehicle while more than four times over the legal limit for blood alcohol concentration. The Applicant was issued with a Court Attendance Notice for having a high-range prescribed content of alcohol (PCA), first offence (the Offence), and his drivers licence was suspended.

[7] The Applicant was next rostered to work on the morning of 17 August 2020.

[8] The Offence was one for which the Applicant may have been liable to a period of imprisonment of 18 months.[1] On 20 August 2020, after receiving advice regarding the nature of the Offence, the Applicant notified the Respondent that on 16 August 2020 he had been charged with the Offence. To do so, the Applicant completed a Notification of a Charge Form that included the following text in its instructional paragraph;

[1] *Road Transport Act 2013* (NSW) s 110(5).

"In accordance with the Code of Conduct, you must immediately inform the Director People and Change if you have been charged or convicted of:

- *a serious criminal offence (an offence punishable by imprisonment for six months or longer), or*

- *any other offence which prevents you from performing your full range of duties safely (for example losing your driver licence or drink driving offences)"*

[9] The Applicant had no reason to see, and had not seen, the Notification of a Charge Form prior to his need to notify arising. The Notification of a Charge Form is not annexed to the Respondent's Code of Conduct.

[10] After becoming aware of the Offence, the Respondent suspended the Applicant from duty with pay while the matter was referred to Sydney Trains' Workplace Conduct and Investigations Unit (the WCIU). The Applicant was informed of his suspension and that the WCIU were conducting a disciplinary investigation on 24 August 2020.

[11] On 15 September 2021 the WCIU wrote to the Applicant with respect to the investigation that outlined the particulars of the Offence and put the following allegation to him:

"If proven, this conduct may represent a breach of the following policies and procedures:

- *The Transport for NSW Code of Conduct (Our Code of Conduct):*

  - *Section 3: Staff Responsibilities*
  - *Section 14: Criminal Conduct."*

[12] On 9 October 2020, the Applicant responded to the letter of 15 September 2020 (the First Response). Among other things, the Applicant confirmed that the allegations regarding the Offence were "*true and correct*" and acknowledged that his action was "*inexcusable.*" The Applicant included the following explanatory detail in that response:

"My action on the day was inexcusable and I can offer the following reasons as to why the event took place. I take full responsibility for my actions. It is not an excuse but an insight in to how traumatic 2020 has been on myself and my family.

This year I have had family and friends pass-away, due to critical health related issues.
At the start of the year my friend tragically took his own life. He was someone who I thought had his life together with a wife and children. This affected me greatly. Not long after this a family member died due to an incorrect medical diagnosis. A death in the family is felt by all and this was no different. A few months later this was followed by the death of a close family friend who I had known from childhood who lost his battle with cancer.

As this year has unfolded with the COVID19 pandemic and all its challenges, health concerns, stresses and anxieties, I have been very worried about my elderly parents who both require care and those concerns associated with their health and care into the future.
These events have led me to suffer from bouts of depression and anxiety. I have lost a significant amount of weight due to unhealthy mental state. It has driven me to seek professional help.

On the night before the incident I had met up with my cousin for the first time since his mother's funeral. I had consumed a large amount of alcohol as a coping mechanism to help deal with the endless pain that I have been feeling. I then made a very, very poor and regrettable choice by getting behind the wheel of a car which resulted in myself being charged with high range PCA.

I acknowledge that since the incident of August 16th that I had hit rock bottom and that I had to ask for professional help. I have voluntarily entered the following:

- *Attended Clean Slate Clinic with Dr Phil Humphris*
- *Prescribed Baclofen from my treating doctor.*
- *Conducting AOD Recovery module programs and attending SMART Recovery meetings through Odyssey House*
- *Seeking counselling with Karen Firth (Social Worker)*
- *Attending Drug and Alcohol counselling through Western Sydney Drug Health Service with Afri*
- *Attending Alcoholics Anonymous at Wentworthville*

I am very remorseful and truly sorry for my actions on the day and not a day goes by that I do not regret my actions and I am eternally grateful that my actions did not cause any harm to other people and any other road user on the day. I was just not thinking clearly.

The affects that these unforgivable decisions that I have made will have a great impact on my family and my life of which I am attempting to and intend to rectify. I am determined in this. To lose my job which I value dearly would have a detrimental effect on my family, my home and would bring a 27- year career with the railways to an end.

In today's COVID19 environment it will be extremely difficult to be able to obtain employment.

I respectfully request that Sydney Trains, in some way, can see leniency in its dealings with my case. I am willing to enter any alcohol rehabilitation program that Sydney Trains wishes me to attend and I will comply with any testing that is needed or required."

[13] On 21 October 2020 the WCIU finalised its "Positive Drug or Alcohol Investigation Report" into the Applicant's conduct. The WCIU determined that the allegation was substantiated and that the conduct constituted a breach of sections 3 and 14 of the Respondent's Code of Conduct.

[14] On 12 November 2020, the Applicant was sentenced in the Local Court to a two year community corrections order and required to pay a fine. His drivers licence was suspended for six months and he was required to have an interlock device installed on his vehicle for two years after the return of his drivers licence.

[15] On 24 November 2020, the Respondent advised the Applicant that a preliminary decision had been made to terminate his employment (the Preliminary Decision). The letter containing the Preliminary Decision included the following:

> *"By engaging in this conduct, you breached the following policies and procedures:*
>
> - ***The Transport Code of Conduct (Our Code of Conduct):***
>
> - *Section 3: Staff Responsibilities*
> - *Section 14: Criminal Conduct*
>
> *Having considered the evidence, Sydney Trains is satisfied that you engaged in the conduct as outlined in the allegation that is the subject of this matter.*
>
> *Sydney Trains determines that having been charged and subsequently convicted of a high-range PCA criminal offence, you have engaged in serious misconduct within the meaning of the Sydney Trains Enterprise Agreement 2018. Sydney Trains further finds that the seriousness of your misconduct is aggravated given your role as a Train Driver.*
>
> *As such, the preliminary view of the appropriate disciplinary outcome for you is as follows:*
>
> ***Dismissal***
>
> *Before coming to a final decision in relation to the disciplinary outcome, I am giving you the opportunity to make a submission to me within ten (10) working days in regard to the proposed outcome. Any such submission should include any information that you would like to have taken into account before the final outcome is determined, and should be sent directly to the Sydney Trains email address SydneyTrainsDisciplinaryReview@transport.nsw.gov.au."*

[16] On 18 December 2020, the Applicant responded to the Preliminary Decision (the Second Response). That response traversed many of the issues and expressions of contrition that were contained in the First Response. The Second Response importantly annexed a number of letters and reports from the following medical and counselling services:

(a) Mr Hugo Rodriguez, a senior Psychologist in private practice;

(b) SMART Recovery Group, a program that helps people manage their addictive behaviours;

(c) Alcoholics Anonymous, a self support organization;

(d) Dr Humphris of the Clean Slate Clinic, a treatment program for reducing/ending problem drinking;

(e) Odyssey House, an organization helping adults with alcohol dependency; and

(f) Blacktown Community Corrections.

[17] A review of the letters and reports from medical and counselling services attached to the Second Response indicates:

(a) That between 31 August and 1 December 2020, the Applicant attended Odyssey House 14 times and completed three modules relating to Alcohol Recovery and Relapse Prevention;

(b) That between 26 August and 14 December 2020, the Applicant attended SMART Recovery Groups 14 times;

(c) That between 28 August and 28 October 2020, the Applicant attended Alcoholics Anonymous Wentworthville 14 times;

(d) That between 21 September and 17 December 2020, the Applicant attended the Clean Slate Clinic four times;

(e) Blacktown Community Corrections advised that, through contact made with the Applicant's family, the Applicant had been abstinent from alcohol since the Offence and appeared committed to addressing his offending.

[18] On 13 January 2021, the Respondent advised the Applicant that a decision had been made to dismiss him from employment. The Applicant was given the opportunity to appeal that decision and he did so, lodging an appeal with the Transport for NSW Disciplinary Review Panel on 28 January 2021. In his submission to that panel the Applicant accepted that his actions in drink driving "*could have caused damage to the reputation of both Sydney Trains and Transport for NSW*." On 18 February 2021, the Applicant was informed that the Disciplinary Panel had determined that the disciplinary decision was not harsh, unfair or unreasonable. The Applicant's dismissal took effect on 18 February 2021.

(b) The Policies of the Respondent

[19] During his employment with the Respondent, the Applicant was subject to all relevant policies, procedures and codes determined by Sydney Trains from time to time. These included:

(a) The *Code of Conduct* (the Code);

(b) The *Transport Managing Conduct and Discipline Policy* (the Discipline Policy); and

(c) The *Drugs and Alcohol Policy* (issued in 2014 and revised in 2017) (the Drugs and Alcohol Policy).

[20] The Code sets out the standards of conduct required of all staff. Part 3 "*Staff Responsibilities*" is set out on one page of the Code, with the highlighted extract in the bottom right hand of the page, as follows:

3. Staff responsibilities

You are responsible for familiarising yourself with agency policies and procedures, and complying with them. You are also responsible for making enquiries if you are unsure about what actions to take.

You need to be aware that the reputation of the transport agencies can be affected by your actions at work and, in certain circumstances, by your conduct outside the workplace.

You must:

- treat our customers and colleagues fairly, consistently and with respect;
- behave in a lawful, professional and reasonable manner and always act in the best interest of Transport;
- comply with agency policies and procedures, as well as relevant legislative and industrial requirements that apply to you;
- understand the duties, responsibilities and accountabilities of your role, and perform these safely, honestly, courteously and fairly;
- make impartial decisions that demonstrate your agency's values and promotes confidence in the integrity of public administration;
- comply with reasonable lawful requests, directions and instructions given in the course of your duties by any person with authority to do so;
- maintain the integrity, confidentiality and security of corporate information;
- report unethical, dishonest and/or corrupt conduct;
- not discriminate, harass, bully or engage in inappropriate workplace conduct;
- not gamble, including online gambling, in the workplace and, in vehicles or vessels using official devices, during paid work time (excluding established practices such as Melbourne Cup sweeps, self-administered football tipping and lottery syndicates); and
- present yourself in a professional manner, including wearing the designated uniform for your agency and required safety gear appropriate to operations.

Nothing in this Code of Conduct affects your rights to participate in lawful industrial activities.

You need to be aware that the reputation of the transport agencies can be affected by your actions at work and, in certain circumstances, by your conduct outside the workplace.

[21] Part 14 of the Code requires staff to immediately notify their manager if charged or convicted of a serious criminal offence. A "*serious criminal offence*" is defined as an offence committed in NSW that is punishable by imprisonment for six months or more.

[22] In relation to criminal conduct, the Discipline Policy, at Section 1.1, defines inappropriate conduct as "*Unacceptable behaviour of a minor or serious nature, including ongoing unsatisfactory performance that may be a breach of the Transport Code of Conduct, the Code of Ethics and Conduct for NSW government sector employees, agency policies, procedures, legislation, rules, regulations and/or any other lawful direction given to Staff*".

[23] Section 3 of the Discipline Policy provides:

> "*Inappropriate Conduct may result in Disciplinary Action up to and including the termination of employment with or without notice.*

Examples of Inappropriate Conduct may include, but are not limited to:

- *wilful refusal to carry out a lawful and reasonable instruction;*
- *conduct that causes a risk to a person's health and safety, organisational reputation and/or business;*
- *victimisation and/or reprisal action against another person, including interfering with Disciplinary Proceedings;*
- *corrupt conduct;*
- *unauthorised release of confidential information;*
- *criminal conduct, theft, fraud and/or assault;*
- *being convicted of a Serious Criminal Offence; and/or*
- *any other breach of the Transport Code of Conduct or the Code of Ethics and Conduct for NSW government sector employees.*

The severity of alleged Inappropriate Conduct will vary according to the nature of the behaviour and/or the implication of the alleged behaviour on the organisation or individuals concerned."

[24] The Drugs and Alcohol Policy provides that the Respondent is a drug and alcohol free workplace. In accordance with this policy, the Respondent implements a random drug and alcohol testing program which requires employees to have test readings showing zero concentration of alcohol in their blood.

[25] I accept that throughout his employment, the Applicant received training on the relevant policies, including the Code, Discipline Policy and Drugs and Alcohol Policy.

(c) The Safety Critical Nature of the Applicant's Employment

[26] Pursuant to the *Rail Safety National Law* (NSW) (the RSNL), a rail transport operator, such as the Respondent, must ensure that each rail safety worker who is to carry out rail safety work in relation to railway operations has the competence to carry out that work.

[27] Under the *National Standard for Health Assessment of Rail Safety Workers* (the National Standard), rail safety workers are categorised as either safety critical or non-safety critical workers. Safety critical workers are identified by the National Standard as:

"...workers whose action or inaction may lead directly to a serious incident affecting the public or the rail network. Their vigilance and attentiveness to their job is crucial, and they are therefore the main focus of this Standard."

[28] Train drivers are further classified as Category 1 Safety Critical Workers, which are described as follows:

"...the highest level of Safety Critical Worker. These are workers who require high levels of attentiveness to their task and for whom sudden incapacity or collapse (e.g. from a heart attack or blackout) may result in a serious incident affecting the public or the rail network. Single-operator train driving on the commercial network is an example of a Category 1 task."

[29] Regarding drug and alcohol screening, the National Standard provides:

> ***"5.2.5. Drug and alcohol screening***
>
> *National Rail Safety Law requires rail transport operators to ensure that rail safety workers are not impaired by alcohol or drugs when performing their work. Rail safety workers themselves also have a duty not to perform rail safety work while impaired by alcohol or drugs.*
>
> *Pre-placement and/or change of risk category health assessments may therefore include a drug screen, depending on the state/territory's legislation and the rail transport operator's requirements.*
>
> *Periodic health assessments should not routinely include a drug or alcohol screen. However, testing may occur as part of a return to work program for a person with a substance misuse condition.*
>
> *In the event that a person is suspected of being intoxicated by alcohol or drugs at the time of an examination, the Authorised Health Professional should assess them and enquire of possible reasons for their condition. Under these specific circumstances the doctor may conduct a drug and alcohol test or assessment according to relevant legislation. If drug or alcohol intoxication is suspected or confirmed, the Authorised Health Professional should stop the examination, classify the worker as temporarily unfit and notify the employer (refer to Section 18.7. Substance misuse and dependence)."*

(d) The Applicant's Employment Record

[30] In his statement filed in the proceedings, the Applicant stated *"Since I began my latest employment as Train Driver in 2005, I have had only one operational incident that have been recorded on my operational record. Compared to my colleagues, this is an exceptional operational record for someone with as much service as I have. In my career with Sydney Trains I estimate I have performed tens of thousands of routine station stops in revenue service, with only one stop having an issue*." That evidence was not put in issue by the Respondent.

[31] The Respondent conducts random drug and alcohol testing in accordance with the quota required by the RSNL and National Standard. On two occasions, the Applicant recorded positive results to random breath testing undertaken shortly before the commencement of a shift.

(i) First Positive Test

[32] The first positive alcohol test occurred on 23 January 2009, when the Applicant was required to undertake a random breath test before commencement of his shift. At 7:08 am, the Applicant returned a reading of 0.04 grams of alcohol in 100 millilitres of blood. At 7:45 am, the Applicant returned a second reading of 0.025 grams of alcohol in 100 millilitres of blood at Redfern Police Station. This was over the prescribed concentration of alcohol for RailCorp

train drivers as provided for in the Drugs and Alcohol Policy applicable at that time, which was 0.02. As a result, the Applicant was removed from rail safety work.

[33] The Applicant was subsequently required to attend the Respondent's Drug and Alcohol Rehabilitation Program.

(ii) Second Positive Test

[34] The second positive test occurred on 12 August 2011, when the Applicant was again required to undertake a random breath test before commencement of his shift. At 4:18 am, the Applicant returned a 'FAIL' reading after undertaking a passive breath test by counting out loud into the air intake area of an SD 400 Alcolmeter.

[35] As a result of the above reading, the Applicant was required to undertake a second test using a tube attached to the SD 400 Alcolmeter. Using this device, the Applicant returned a reading of 0.025 grams of alcohol in 210 litres of breath. This was over the prescribed concentration of alcohol for RailCorp Train Drivers as provided for in the Drugs and Alcohol Policy in effect at the time, which was 0.02.

[36] A third test was conducted 20 minutes later. At 4:37 am, the Applicant returned a reading of 0.000 after using the SD 400 Alcolmeter with the tube attached. Despite having returned a negative reading, the Applicant was removed from duty due to the earlier reading being in breach of the policy, his admission to having consumed alcohol on the previous day and the observations of the Senior Testing Officer who observed the Applicant to have bloodshot eyes and a strong smell of liquor on his breath.

[37] After a disciplinary investigation into the above second positive test, the Applicant was informed that no disciplinary action would be taken against him in this matter but that he would be required to attend counselling at the local management level. The Applicant was informed that "*any future breaches of organisational policies will result in further disciplinary action*" which could include dismissal. The Applicant was placed on alternative suitable duties until 16 August 2012, when he was approved as fit to return to train driving duties.

[38] Ms Bunting conceded that since the second positive test regarding alcohol, the Applicant had performed his duties "*practically flawlessly.*"[2]

(e) The Agreement

[39] The *Sydney Trains Enterprise Agreement 2018* (the Agreement) applied to the employment of the Applicant. The Agreement includes a definition of "serious misconduct" at Clause 33.5, that provides as to whether an employee will be suspended with or without pay during an investigation. That definition includes behaviour such as "*being charged with a serious criminal offence punishable by 6 or more months imprisonment.*"

CONSIDERATION

[2] Transcript PN 707.

[40] Both the Applicant and the Respondent provided detailed written submissions, and made further oral submissions. Those submissions contained detailed references to the evidence in the matter. I have considered all of those submissions in arriving at my decision below.

Preliminary findings

[41] There are no jurisdictional objections to the Applicant's application being determined by the Commission. Specifically, I am satisfied that:

(a) the Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));

(b) his unfair dismissal application was lodged within the 21 day statutory time limitation found at s 394(2) of the Act;

(c) the Applicant is a person protected from unfair dismissal in that:

i. he had completed the minimum employment period set out in ss 382 and 383 of the Act; and

ii. an enterprise agreement, the *Sydney Trains Enterprise Agreement 2018,* applied to his employment (s 382(3)(b)(ii));

(d) his dismissal was not a case of genuine redundancy (s 385(d)); and

(e) his dismissal was not a case involving the Small Business Fair Dismissal Code, as the Respondent employed approximately 11,000 employees at the relevant time (s 385(c)).

[42] As I have just concluded that the above criteria have been satisfied, this leaves only the question of whether the Applicant's dismissal was '*harsh, unjust or unreasonable,*' and therefore an unfair dismissal. To this end, one must direct attention to s 387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. It is trite to observe that each of the matters must be considered and a finding made on each of them, including whether they are relevant or not; for example whether a person was refused an opportunity to have a support person present may be irrelevant, if the request was not made, or the employee declined to take up the offer.

Was the Dismissal Harsh, Unjust or Unreasonable?

[43] I must consider the question of whether the Applicant's dismissal was '*harsh, unjust or unreasonable*' and therefore an unfair dismissal, pursuant to the considerations outlined in s.387 of the Act dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair.

[44] Section 387 of the Act identifies the matters that the Commission must take into account in deciding whether a dismissal was "harsh, unjust or unreasonable:"

(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.

(a) Valid reason

[45] The reasons relied upon by the Respondent were best summarised in the letter of 13 January 2021, in which the Respondent advised the Applicant that a decision had been made to dismiss him from employment. There the reasons were listed as:

(a) The Respondent being satisfied that the Applicant engaged in the conduct constituting the Offence; and

(b) "By engaging in this conduct, you breached the following policies and procedures:

- *The Transport Code of Conduct (Our Code of Conduct):*
  - *Section 3: Staff Responsibilities*
  - *Section 14: Criminal Conduct*"

[46] The above outlined reasons delineate two particular considerations on the question of whether there were valid reason(s) for the dismissal, being:

(i) Whether the Offence was work related conduct; and

(ii) Whether the breach of policies nonetheless brings the Offence within the realm of the employment relationship, and the breach of policy is a valid reason.

[47] As the Full Bench found in *Sydney Trains v Hilder*:[3]

The principles applicable to the consideration required under s 387(a) are well established, but they require reiteration here:

(1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.

(2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.

(3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).

(4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).

(5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).

(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.

(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).

(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.

(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.

[3] [2020] FWCFB 1373, at [26].

(i) Valid Reason - Issue of Whether the Offence was Work Related Conduct

[48] Both the Applicant and the Respondent acknowledged that the determination of whether there existed a valid reason for the dismissal involved consideration of whether the Offence involved out of work conduct that could constitute a valid reason. The parties agreed that the principles applicable to the consideration of whether out of work conduct had a sufficient connection with work were those outlined by Vice President Ross (as he then was) in *Rose v Telstra,*[4] (Rose). His Honour formulated a summary of principle that has since been applied on a number of occasions, and has been recently re-stated by a Full Bench of the Commission:[5]

> *"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:*
>
> - *the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or*
> - *the conduct damages the employer's interests; or*
> - *the conduct 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."*

[49] The Respondent submitted that, viewed objectively, the Applicant's conduct was likely to cause serious damage to the employment relationship, damage the Respondent's interests, and that his conduct was incompatible with his duty as an employee. It was conduct of the sort that attracted the legitimate concern of the Respondent.

[50] The Respondent submitted that the Offence had a direct connection to the Applicant's role as a Train Driver because Train Drivers are, by the very nature of the role, required to drive a vehicle. In doing so, they are required to act safely, and to exercise significant judgement and decision-making. The Applicant's decision to operate a vehicle the morning after an evening of heavy drinking demonstrated a distinct lack of judgement, at odds with the standard of behaviour expected of Train Drivers, who are Category 1 safety critical workers.

[51] The Respondent submitted that the Applicant's conduct had the capacity to cause serious damage to the relationship between the Respondent and the Applicant, and it was not necessary for the Respondent to show that the Applicant had caused actual harm to the Respondent's interests. There would be significant damage to Sydney Trains' reputation in the event that a driver was found to be driving a train or operating a vehicle while under the influence of alcohol.

[52] The Applicant submitted that, regarding incompatibility with employment, the focus must be on the gravity or importance of the conduct, and its connection to the employment.[6] It

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[4] Print Q9292, [1998] AIRC 1592.

[5] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457, at [149].

[6] *Public Employment Office Department of Attorney General and Justice (Corrective Services NSW) v Silling* [2012] NSWIRComm 118 at [41]-[42].

is only in cases of extremely serious out-of-hours misconduct that it is not necessary to establish a connection between the misconduct and the employment.[7] The question of gravity and seriousness relates not to hypothetical circumstances but to the conduct itself.

[53] The Applicant noted that there was no allegation that the Applicant's actual performance at work is a factor in the present matter, and submitted that his operational performance at work is exceptional. A driver's licence is not an inherent requirement of his job and the Applicant had an exceptional safety and operation record.

[54] As to the prospect of damage to the Respondent's reputation, the Applicant submitted that the hypothetical example relied upon by the Respondent is irrelevant. The relevant question is objectively whether it is likely the Applicant's conduct caused damage to the Respondent's interests, including its reputation.

[55] In *Wakim v Bluestar Global Logistics,*[8] Vice President Hatcher found:

> *"The mere fact that a person has committed a criminal act outside of working hours does not necessarily mean that there is a valid reason for the person's dismissal by his or her employer. There needs to be a relationship of the requisite degree between the criminal conduct and the employment. The criteria by which the necessary relationship was to be established was classically stated in Rose v Telstra Corporation Ltd ....:*
>
> *In cases involving out of hours conduct, it is often contended that the necessary relationship between the conduct and the employment is established on the basis of an assertion that the conduct will in some way affect the employer's reputation or compromise the employee's capacity to perform his or her duties. However there needs to be evidentiary material upon which a firm finding may be made that there is or will be the necessary effect; it is not sufficient merely to assert its potentiality: Public Employment Office, Department of Attorney General and Justice (Corrective Services NSW) v Silling ([2012] NSWIRComm 118.)"*

[56] The circumstance of an employee who accrued a drink driving charge out of work hours was addressed in *obiter* by Staindl JR in *Hussein v Westpac Banking Corporation (Hussein)*,[9] a case involving the dismissal of an employee of Westpac following the employee's conviction on credit card fraud unconnected with his employment as a migrant liaison officer. Staindl JR observed:

> *"...a conviction on a drink-driving charge which occurred outside work hours would not be relevant to the employment of many people. However, it would be of critical relevance to a truck or taxi driver. It seems to me that an appropriate test is whether or not the conduct has a relevant connection to the employment."*

[57] In my view the Applicant's conduct in the commission of the Offence lacked the requisite connection to his employment and therefore did not provide a valid reason for his

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[7] *Klazidis v Commissioner of Police* [2016] NSWIRComm 1014 at [90];; *Hansen v Secretary of the Department of Transport* [2016] NSWIRComm 1011 at [47].

[8] [2016] FWC 6992, at [31] and [32].

[9] (1995) 59 IR 103 at 107.

termination. The Offence took place outside of working hours. The Applicant was not on call, and was not due to report for his next shift until the following morning.

[58] I do not accept that the Applicant's conduct viewed objectively, was likely to cause serious damage to his relationship with the Respondent. In this regard I note that during the course of her evidence, Ms Bunting acknowledged that the Applicant had since 2011 performed his duties "*practically flawlessly.*"

[59] Unlike the truck or taxi driver referred to in *Hussein*, the Applicant does not need a valid drivers licence to perform the duties of a Train Driver. I do not accept that a train is a "*vehicle,*" and I consider that the Respondent impermissibly strains to link the Offence to the Applicant's duties by submitting that there exists an absence of judgement and decision-making in the Applicant. The observations of the Vice President in *Rose* are equally apposite to the facts of this matter, where he observed:

> *"I do not doubt that the applicant's behaviour on 14 November 1997 was foolish and an error of judgment. He made a mistake. But employers do not have an unfettered right to sit in judgment on the out of work behaviour of their employees. An employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of their conduct outside work are limited. The facts of this case do not fall within those limited circumstances."*

[60] Further, I do not think that there was any reasonable basis for concluding that the Applicant's conduct had damaged the Respondent's interests, or had any reasonable likelihood of doing so. There exists no evidentiary material upon which such a finding could be made and the Respondent appropriately conceded that there was no more than hypothetical risk of such damage.[10] The Respondent did not have a valid reason to terminate the Applicant's employment because of the Offence.

(ii) Valid Reason - Breach the Code and Policies

[61] The Respondent submits that the breach of policies nonetheless brings the Offence within the realm of the employment relationship, and constitutes a valid reason for termination.

[62] I accept that throughout his employment, the Applicant received training on the relevant policies of the Respondent, including the Code, Discipline Policy and Drugs and Alcohol Policy. I further note that the specific policy said to be breached and relied upon by the Respondent in terminating the Applicant was the Code, particularly Clauses 3 and 14.

[63] I do not consider, however, that the Code outlines a clear and coherent policy proscribing or regulating out-of-hours drink driving. The focus of Clause 3 of the Code is on the reputation of the Respondent, and how it can be affected by actions of employees at work, and in certain circumstances outside work. As noted above regarding out of hours conduct, the only reputational damage arising from the Offence was hypothetical, and I do not consider a reasonable person reading that clause would comprehend that it encompasses the conduct involved in the Offence.

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[10] Transcript PN 932 and 933.

[64] While Clause 14 of the Code does define serious criminal offence as being one that is punishable by imprisonment for six months or more, it specifies that such offence:

(a) Must be one which "may impact on your ability to undertake part or all of the inherent requirements of your role;" and

(b) Must be committed at work or related to work.

[65] For the reasons outlined above regarding out of hours conduct, I do not consider that the Offence, and the subsequent conviction and penalty, have affected the ability of the Applicant to undertake any part of his role, or was in any way related to work.

[66] The Respondent is correct in observing that it is not necessary for the Respondent to have a policy specifically proscribing out-of-hours drink driving.[11] The Respondent referred to the decision of Deputy President Sams in *Natoli v Anglican Community Services t/a Anglicare (Natoli)*[12] where the Deputy President observed:

> *"...it doesn't take a written social media policy for a reasonable person to know, that what the applicant had done, was contrary to common sense and acceptable behaviour."*

[67] *Natoli*, however, did not involve a defence that Ms Natoli's conduct was unrelated to her employment with Anglicare. It involved texts and Facebook posts made while not at work but which were prompted by Ms Natoli's assumption that a fellow employee had caused the damage to her partner's car, were based on two earlier incidents at work, had a direct connection to the working relationship and the prospects of that relationship being appropriately maintained, which were reported to management and had a direct potential to impact on the workplace and an employee's safety. Quite simply, the connection with the workplace was undisputed.

[68] In this matter, the connection with the Offence to the workplace only arose from the requirement, with which the Applicant promptly complied, to notify the Respondent in accordance with Clause 14 of the Code.

[69] The adoption in the Agreement of the definition of "*serious misconduct*" as including behaviour such as "*being charged with a serious criminal offence punishable by 6 or more months imprisonment,*"[13] does not bolster in any way Clause 14 of the Code. That provision relates to whether an employee will be suspended with, or without, pay during an investigation.

(b) to (e) Notification/ Opportunity to Respond/ Support Person/ Warnings

[70] Subsections (b) - (e) of s. 387 of the Act might be broadly characterised as issues relevant to whether a dismissed employee was afforded procedural fairness. Even if there was a valid reason for an employee's dismissal, the dismissal may still be held to be unfair, if the employee was not afforded procedural fairness. On the other hand, any issue or issues of

[11] *Cameron Little v Credit Corp Group Limited t/as Credit Corp Group* [2013] FWC 9642.

[12] [2018] FWC 2180, at [224].

[13] At Clause 33.5.

procedural unfairness may not be of such significance as to outweigh the substantive reason/s for an employee's dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity as to outweigh any other considerations such as age, length of service, contrition and issues of procedural unfairness generally.

[71] In *Crozier v Palazzo Corporation Pty Limited t/as Noble Storage and Transport,*[14] (*Crozier v Palazzo*), a Full Bench of the AIRC, said at paragraph [73]:

> *As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment."* (Emphasis added)

[72] In *Wadey v YMCA Canberra,*[15] Moore J made clear that an employer cannot merely pay lip service to giving an employee an opportunity to respond to allegations concerning the employee's conduct. His Honour said:

> *"In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the employee must be made aware of allegations concerning the employee's conduct so as to be able to respond to them. The second is that the employee must be given an opportunity to defend himself or herself. The second aspect, the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend."*

[73] The Applicant was given the opportunity to have a support person at each of the meetings he attended. The Applicant was provided with notification of the reasons for his dismissal and an opportunity to respond. In particular, the Applicant was:

(a) informed, with precision and sufficient particularity, of the allegation made against him;

(b) suspended, with pay, during the investigation;

(c) provided with multiple opportunities to respond to the allegation, which he took, and his responses were taken into account by the WCIU in preparing its report;

(d) notified in plain and clear terms of the reason for his dismissal; and

[14] (2000) 98 IR 137.

[15] (1996) IRCA 568.

(e) was provided with the opportunity to have the preliminary decision to dismiss him reviewed, which he took the opportunity of and provided another submission to Sydney Trains.

(f/g) Size of the business/human resources

[74] This factor is ordinarily applied to explain poor procedures followed in effecting dismissal by reference to the small size of a business and the absence of dedicated human resource management specialists or expertise. That was not a relevant circumstance in this matter.

(h) Other relevant matters

[75] I consider that the following matters lead to a conclusion that the dismissal of the Applicant was harsh:

(a) The Applicant's age and relatively significant length of service; and

(b) The difficulty I accept the Applicant will face finding employment in the rail industry with his drivers licence restrictions, and the fact that such a licence is necessary to obtain employment in the only other employer of Train Drivers, being the freight rail industry.

[76] I note that the Respondent has submitted the medical evidence annexed to the Applicant's statement to confirm that he has a history of heavy drinking and alcohol dependence. While that submission may be an overstatement of the Applicant's condition as at August 2021, it completely ignores the rehabilitative steps undertaken by the Applicant from 20 August 2021 onwards. As noted above, Blacktown Community Corrections advised that, through contact made with the Applicant's family, the Applicant had been abstinent from alcohol since the Offence and appeared committed to addressing his offending.

[77] The Respondent also submitted that the Applicant went through an alcohol rehabilitation program in 2009, and received further counselling in 2011, after the First Positive Test and the Second Positive Test, and yet still committed the Offence. I consider, however, it is more relevant to focus on the recent conduct and rehabilitation of the Applicant.

Conclusion Regarding s. 387

[78] After consideration of the relevant matters outlined in s.387of the Act, I am satisfied, for the reasons outlined above, that the Applicant's dismissal was '*harsh, unjust and unreasonable*' within the meaning of s. 387 of the Act. His dismissal related to conduct that could only be considered out of work conduct which could never constitute a valid reason for termination. The Applicant's dismissal was also harsh in its effects upon him.

Remedy

[79] The Applicant seeks reinstatement to his former position without loss of continuity of service, and with back-pay. Reinstatement is strongly opposed by the Respondent.

Determining a remedy for unfair dismissal is governed by the provisions of Ch 3, Part 3-2, Div 4 of the Act, which provides as follows in relation to reinstatement:

"Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

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

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

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

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

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

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

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

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

[80] It will be immediately apparent that determining a remedy for an unfairly dismissed employee essentially involves a preliminary finding by the Commission as to whether it is satisfied that reinstatement is inappropriate. It is only upon a finding that reinstatement is inappropriate that the Commission can move on to consider compensation as the alternative to reinstatement.[16]

[81] The Respondent's Submissions in relation to reinstatement were as follows:

"If the Commission decides that Mr Bobrenitsky's dismissal was unfair, it should not order his reinstatement.

The available remedies for unfair dismissal are reinstatement and compensation: s 390(1) FW Act. Whether a person receives a remedy is a matter in the discretion of the

[16] See: *Holcim (Australia) Pty Ltd v Serafini* [2011] FWAFB 7794

Commission. In exercising that discretion 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. The effect of s 390(3) is that the Commission must consider whether reinstatement is appropriate before considering whether to order compensation.

Reinstatement of Mr Bobrenitsky would be inappropriate.

Sydney Trains has lost trust and confidence in Mr Bobrenitsky, in particular with respect to his ability to perform his duties safely: Bunting [68]. Relevantly:

It is of significant concern that the lack of judgement demonstrated by Mr Bobrenitsky on 16 August 2020 could readily transfer to a day on which Mr Bobrenitsky was scheduled to drive a train (which transports up to 1000 passengers at any one time). To allow Mr Bobrenitsky to continue to act as a Train Driver given his history of alcohol consumption prior to shifts and to driving a motor vehicle would pose an unacceptable safety risk to Sydney Trains: Bunting [68(a)].

There is a direct connection between Mr Bobrenitsky's criminal conduct and his role as a Train Driver as both involve driving a vehicle and, in doing so, require an individual to act safely and exercise good judgement and decision making. His decision to operate a vehicle the morning after an evening of heavy drinking demonstrates a lack of judgement at odds with the standard of behaviour expected of category 1 safety workers: Bunting [68(b), (e)].

Indeed, Mr Bobrenitsky's drink driving offence was not the first time that he had been affected by alcohol the morning after a drinking session: see paragraphs 40 to 48 above. It was only because he was stopped for a random breath test that Mr Bobrenitsky was prevented from driving a train in 2009 and 2011. Mr Bobrenitsky's conduct demonstrated that he was prepared to attend work in the morning, having consumed sufficient alcohol the previous day/evening to remain at over the alcohol limit prescribed by his employer: Bunting [69(c)].

It is therefore evident that Mr Bobrenitsky's conduct on 16 August 2020 was not "aberrant" conduct. His previous alcohol readings while at work are clearly not "inherently different matters" to the conduct that led to his termination: AS [70].
To the extent that Mr Bobrenitsky suggests that his previous alcohol readings demonstrate his "ability to modify his behaviour appropriately as they have not recurred" Sydney Trains submits that the circumstances of his recent drink driving conviction indicate that this is not the case: Bunting [69(d)]; cf AS [70]. Despite attending a rehabilitation program in 2009 and receiving counselling in 2011, he engaged in the criminal conduct in issue: see also paragraph 92 above.

> *(f) Sydney Trains cannot be confident that Mr Bobrenitsky will comply with the Drugs and Alcohol Policy, which could compromise his safety and that of other staff and the general community: Bunting [68(f)]. Sydney Trains needs to be confident that its employees (particularly those with roles that require adherence to safety procedures, such as Train Drivers) will comply with its policies: Bunting [68(f)].*

> *(g) Ms Bunting is concerned about the inconsistency of Mr Bobrenitsky being subject to a court order requiring an interlock device before driving a car, but not a train. For the reasons set out in Bunting [68(g)] it would not be operationally possible or financially reasonable for Sydney Trains to implement such a measure on its trains, or to breath test Mr Bobrenitsky prior to every shift. In these circumstances Sydney Trains would be left with less stringent safety measures than those imposed on Mr Bobrenitsky by the judicial system.*
>
> *Mr Bobrenitsky's conduct and its connection with his work is such that the fundamental trust needed for a relationship between Mr Bobrenitsky and Sydney Trains has been severed, despite Mr Bobrenitsky's service."*

[82] As will be clearly apparent from my conclusions regarding valid reasons, I have concluded that the Applicant's conduct that constituted the Offence was out of work conduct that could not constitute a valid reason for termination.

[83] While the Respondent has submitted that it has lost trust and confidence in the Applicant, I do not consider that the Respondent has established a sound and rational evidentiary basis for such asserted loss. Far from the asserted lack of confidence of compliance with the Drugs and Alcohol Policy, the evidence is clear that since 2011 the Applicant has consistently complied with that policy. The Offence was aberrant conduct which did not fall within the purview of the Respondent.

[84] While in committing the Offence the Applicant exhibited a distinct lack of judgment, the evidence does not support a conclusion that such lack of judgment is at all likely to be repeated. Since four days after the Offence, the Applicant has independently undertaken significant rehabilitation, of which the Respondent has been fully aware since 18 December 2020. In light of that significant rehabilitation, it is inexplicable that on 18 February 2021, the Respondent could decide to dismiss the Applicant from employment on the basis it has expressed.

[85] The Offence was a serious criminal matter, but it has been dealt with in the appropriate jurisdiction. It is not for this Commission to add in any way to the punishment that has been imposed upon the Applicant.

Conclusion

[86] In balancing all the relevant factors in this case, I find that reinstatement of the Applicant is not inappropriate. I order that the Applicant be reinstated.

[87] I will also make an order that the Respondent pay to the Applicant lost remuneration for the period from his dismissal to the date of his reinstatement, less the notice paid on termination. Reinstatement of the Applicant shall be effected within 21 days of the date of this Decision or such earlier time as may be agreed by the parties.

[88] Further, I propose to make orders pursuant to s. 391(2) of the Act to maintain the continuity of the Applicant's employment, as if his dismissal had not occurred.

[89] Orders giving effect to my conclusions will be issued contemporaneously with this decision.

DEPUTY PRESIDENT

Appearances:

P Matthews, for the Applicant.
C Bembrick, for the Respondent

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