



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Michael Keane

v

Sydney International Container Terminals Pty Ltd
(U2020/9957)

DEPUTY PRESIDENT CROSS

SYDNEY, 8 FEBRUARY 2021

Application for an unfair dismissal remedy - serious safety breach - breach of mobile phone policy – consultation - whether harsh, unjust or unreasonable..

BACKGROUND

[1] An application was filed on 21 July 2020 (the Application), by Mr Michael Keane (the Applicant), pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act), following his dismissal on 1 July 2020. The Applicant seeks unfair dismissal remedies primarily of reinstatement, continuity of service and lost remuneration, or in the alternative compensation.

[2] The Applicant commenced employment with Sydney International Container Terminals Pty Limited (the Respondent) in a casual capacity on 17 October 2016, and in a permanent position on 23 May 2017.

[3] On 28 August 2020, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). The parties complied with the Directions. In particular:

(a) On 21 September 2020, the Applicant filed an Outline of Submissions, a statement of the Applicant and a statement of Mr Nathan Donato, Assistant Branch Secretary, Sydney Branch of the Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union (the MUA). both dated 21 September 2020;

(b) On 12 October 2020, the Respondent filed an Outline of Submissions, and statements from Mr Jarrod Graham, the Senior Manager Terminal Operations of the Respondent, Mr Geoff Hughes, Manager Human Resources and Training, and Mr Darryl Quinn, a Shift Manager with the Respondent, all dated 12 October 2020;

(c) On 19 October 2020, the Applicant filed statements in reply from the Applicant and Mr Donato, both dated that same date.

[4] The hearing of the matter occurred on 23 October 2020. Each of the deponents of statements, except Mr Donato, were cross-examined. Thereafter the parties filed the following written submissions:

- (a) The Applicant's Written Submissions dated 9 November 2020 (the Applicant's Submission);
- (b) The Respondent's Written Submissions dated 13 November 2020 (the Respondent's Submission); and
- (c) The Applicant's Submissions in Reply dated 19 November 2020 (the Applicant's Reply).

Background

[5] There were only a limited number of factual disputes between the parties, and the determination of those factual disputes is undertaken where those facts relate to the various issues for determination.

[6] The Applicant was employed by the Respondent in the position of Stevedore between October 2016 and 1 July 2020. He was originally employed as a casual employee, and became a permanent employee after eight months. More specifically, the Applicant's primary duties were first aid and he predominantly performed the "First Aider" role at the Port Botany Site.

[7] The Applicant's employment was governed by the *Sydney International Container Terminals Pty Limited (SICTL) and Brisbane Container Terminals Pty Limited (BCT) and Maritime Union of Australia (MUA) Enterprise Agreement 2015*.

[8] During his employment, and before the incidents that resulted in his dismissal, the Applicant was subject to numerous disciplinary actions, including a series of warnings with respect to:

- (a) failures by the Applicant to report for his allocated shifts;
- (b) his unauthorised departure from a shift;
- (c) reckless driving of the Respondent's property; and
- (d) mobile phone usage.

[9] Mr Hughes included a Schedule of the Applicant's disciplinary record in his statement. That schedule, as it related to incidents before the actions that resulted in his dismissal, was as follows:

Date	Description of Warning / Employee Counselling	Attachment to this Statement
28/11/17	Notice to Attend Meeting - Unauthorised Departure from Shift	GHI

Date	Description of Warning / Employee Counselling	Attachment to this Statement
06/12/17	Letter regarding Clarification of Expectations - Unauthorised Departure from Shift	GH2
13/07/18	Notice to Attend Meeting - Failure to Report for Allocated Shift	GH3
24/07/18	Written Warning- Failure to Report for Allocated Shift	GH4
30/07/18	Counselling - Excessive Leave	GHS
27/08/18	Notice to Attend Meeting - Failure to Report for Allocated Shift	GH6
07/09/18	Final Written Warning- Failure to Report for Allocated Shift and Timekeeping	GH7
10/09/18-10/12/18	Punctuality Record (3 months)	GH8
15/10/18	Verbal Warning/File Note - Mobile Phone Usage	GH9
17/01/19	File Note - Lateness	GH10
11/02/19	Notice to Attend Meeting - Failure To Report for Allocated Shift	GH11
22/02/19	Final Written Warning- Failure To Report for Allocated Shift	GH12
12/03/19	Notice to Attend Performance Review Meeting	GH13
01/04/19	File Note - Reckless Driving	GH14
03/05/19	File Note - Lateness	GH15
15/05/19	Notice to Attend Performance Review Meeting	GH16
07/06/19	Stand Down and Notice to Attend Meeting - Failure to Attend Allocated Shift	GH17
20/06/19	Stand Down and Notice to Attend Meeting	GH18
01/07/19	Final Written Warning - Misconduct (repeated and persistent breaches with respect to attendance and punctuality)	GH19

[10] In his reply statement, the Applicant provided some background and explanations for the disciplinary issues raised by the Respondent. That statement included the following (with references to “GH 6-7”, “GH 8”, etc being to correspondence attachments to the above table):

7. *I refer to GH6-7. This was the first time that I had received a warning for being late to work. On that occasion, as with the incident referred to in GH11-12, I was living off the grid. My alarm didn't go off and I recall calling SICTL as soon as I could to advise them I would be late.*

8. *As I had received two warnings for FTR (failure to report), my performance was monitored for a period of three months. At the commencement and finish of each shift I recorded my shift start time and shift finish time. Some of these appear to have been included at GH8 to Mr Hughes' statement. I recall having meetings to discuss my performance with the Shift Manager. I recall being told that I was doing well and to keep it up.*

9. *I refer to GH9 and state that I recall being in the ROS area with other workers when Mr Quinn spoke to us. We were waiting around and were all using our mobile phones. Mr Quinn entered the area and looked at everyone but singled me out and said words to the effect of "Mick get off your phone". No further action was taken against me or to my knowledge anyone else in relation to this.*

...

11. *I refer to G11-12. My recollection is that I stayed in Sydney the night before my final day of reachstacker operations training. GH12 appears to indicate I was not in Sydney as GH11 says I was running an hour and fifteen minutes late. My recollection for the reachstacker incident is that I missed my alarm as I did not have the volume up. I regretted this very much as I wanted to complete my training.*

12. *I refer to GH13-14 and state that I did not fully explain the incident at the time. I recall that I had dropped off one of my co-workers at a reachstacker and was coming back when Mr Summers beeped the horn of the vehicle he was driving and cut me off. This happened a couple of times and I recall he stopped for no reason. I recall feeling frustrated at Mr Summer's behavior and recall overtaking him. I acknowledged that my driving was not appropriate and I apologised for my behavior.*

...

14. *I refer to GH17-19 and state that I thought the reachstacker incident related to the final day of reachstacker operation training. I am not certain when I undertook the reachstacker operation training, but I do recall the incident itself when I was late for my last day of training. I recall sleeping through my alarm and that I called in late for work.*

15. *I received a final written warning in relation to this FTR and I was suspended for 3 months. This resulted in me receiving no income for that period of time, which impacted on me financially. The removal of my skill as a Reachstacker Operator from the skills matrix also had an impact on me financially as it meant I would not have a ticket to operate a reachstacker. I accepted these sanctions as I acknowledged that I was responsible for not attending work on time and apologised for this.*

[11] The position occupied by the Applicant of "First Aider" is a suitable qualified person responsible for:

(a) At all relevant times during the shift (other than meal breaks), being the first responder to any incident to administer first aid to any workplace attendants requiring first aid;

- (b) At all relevant times during the shift (other than meal breaks), being contactable and having his or her radio switched on to the nominated channel to ensure immediate response to a first aid request;
- (c) Ensuring the First Aid room is staffed and ready for any potential emergency or incident requiring first aid to be administered;
- (d) Ensuring the first aid mobile kit is accessible and contains all necessary medical equipment to administer first aid;
- (e) Conducting a stocktake of first aid supplies;
- (f) Cleaning of all common areas including the kitchen, meal room, first aid room and bus.
- (g) Carrying out transportation duties which involves ensuring that the bus is ready for use and accessible, dropping off or picking up crew members, stevedores, vessel agents, marine surveyors and other contactors to and from the ship and terminal by bus; and
- (h) Conducting a check of the bus at the commencement of each shift to ensure it is roadworthy.

[12] Since the introduction of COVID-19 initiatives and requirements by the NSW Government in March 2020, the Port Botany Site had introduced a number of control measures to mitigate the risk of COVID-19 at the workplace. One of the control measures includes the introduction of Standard Operation Procedure 041-S Coronavirus (COVID-19) Management (the SOP). Pursuant to the SOP, the “First Aider” is responsible for COVID-19 Additional Cleaning Tasks.

[13] On Friday 26 June 2020, the Applicant was advised that his father had been diagnosed with cancer. The Applicant, understandably, was incredibly scared for his father and concerned about his welfare. His father had asked that the Applicant keep the diagnosis to himself while he waited for further test results.

[14] The Applicant worked Friday 26, Saturday 27 and Sunday 28 June on afternoon shift from 2.00pm until 10.00pm, as the First Aider. On Sunday 28 June 2020, the Applicant got his radio, put on his green First Aider vest, and waited until workers began their operations. The Applicant started out cleaning the First Aid room, then moved onto the First Aid bus. After he completed cleaning these amenities, he cleaned the kitchen area and the common room area which includes shared surfaces like handrails. He then cleaned the benches inside the change room and the doors of the toilets. After the Applicant finished his cleaning duties, he went back to the First Aid room and waited by the radio. He did this until his break at 5.45pm. His scheduled break was for 45 minutes, and he left the worksite to get his dinner.

[15] At approximately 6.45pm on Sunday 28 June 2020, Mr Quinn stated he received a telephone phone call from one of the Respondent’s security contractors. The security contractor said words to the following effect:

"I need you to track down the First Aider. I have been trying to contact him via the radio and he is not responding. He is non contactable."

Mr Quinn replied: *"Why do you need him? Is it an emergency or is it transport?"*

The security contractor replied: *"There is a transport request from the vessel."*

Mr Quinn replied: *"Leave it with me, I will go and search the area for him."*

[16] Previously, the Applicant had returned to the worksite at about 6.25pm and returned to the First Aid room to commence the next half of his shift. His shift was due to resume at 6.30pm, and he still had his mobile phone with him when he got to the First Aid room, and he checked the phone to see if his father had messaged him with any updates about his test results. The Applicant says that when he checked his phone, it was about 6.31pm, and that after he checked his phone for messages, he looked at his radio and realised he hadn't turned it on. When he had gone out for his break, the Applicant had left the radio on the table in the First Aid room, and had turned the radio off before he left for his break as this was common practice. As he was turning the radio back on Mr Quinn, the Shift Manager at the worksite that day, walked into the First Aid Room. The Applicant recalls that he and Mr Quinn had a conversation to the following effect:

Quinn: *Why isn't the radio on? Security's been trying to get a hold of you for the last 5 or 10 minutes. The radio isn't on*

Keane: *I have been on my break.*

Quinn: *Have you done the cleaning?*

Keane: *I have done the first part and am now about to do the second part.*

[17] Mr Quinn's recollection of the conversation was not materially dissimilar, and was as follows:

Upon my entry to the room (at approximately 6.50pm), the Applicant took his feet and legs off the table. I said to him:

"Michael, people are trying to contact you on the radio. Why isn't your radio switched on?"

The Applicant: "Oh! I forgot to turn it on."

Myself: "Can you turn your radio on now and go to the vessel and pick up the crew member."

[18] There are two issues of factual dispute in the above recollections. They are:

(1) While the Applicant said the conversation occurred, and the radio was switched on, at 6.32pm, Mr Quinn says it occurred at approximately 6.50pm after he had been contacted by security contractors at approximately 6.45pm and had thereafter briefly searched for the Applicant; and

(2) Mr Quinn claims he saw the Applicant sitting in a chair with both his calves and feet elevated on the desk, and he was leaning back looking at his mobile phone. The Applicant denied he had his feet on the desk.

[19] The Applicant then went in the bus to pick up a passenger from a vessel. After he then returned to the First Aid room, he was sitting in the chair doing research on cancer treatments using Google on his mobile phone. Mr Quinn walked back into the first aid room at approximately 7.35 - 7.40 pm and said “*Why are you on your mobile phone again? You know the crib room needs cleaning.*” The Applicant then turned off his mobile phone, placed it in his pocket, and moved towards the crib room.

[20] Mr Quinn then prepared a letter of warning for the Applicant. When he had completed the letter, he printed off a copy of the letter and went back to the First Aid room to find the Applicant. A meeting was arranged to occur in the Shift Manager’s office at approximately 7.50 pm in the presence of the Shift Manager, Peter Tsagaris. At the commencement of the meeting. Mr Quinn said:

“Michael, I have caught you twice today on your mobile telephone. Here is a copy of the policy. “

[21] After the above meeting, Mr Quinn sent an email to Mr Brodtke, Mr Hughes and Mr Graham to advise them of the incident that occurred on 28 June 2020. He sent the email at 8.09 pm on 28 June 2020 in the following terms:

Gents,

Please see attached Mobile phone policy letter that I issue to Michael Kean on the EIS 28/06/20 at approx. 19:50.

Michael was discovered in the 1st aid room with the audio radio turned off and on his mobile phone, after security called me due to not being able to raise the bus driver.

‘When I returned from doing the round off the yard/wharf areas I went to discuss the issue with Michael and found him back on his phone.

During this time the cleaning of the meal room has not been completed as required and the bus had not had a prestart completed

Please add this to the long list of his ongoing issues.

[22] The reference in the above email to the bus “*prestart*” is a reference to a duty for which the Applicant was responsible. As part of the Applicant’s duties as a “First Aider/Bus Driver”, he was responsible for completing a roadworthy check of the bus and completing a checklist at the commencement of the shift, or immediately after the toolbox talk. In the case of an afternoon shift, this task is generally carried out sometime between 2.00 pm and 2.30 pm. Checking to ensure the work vehicle is road worthy and there are no safety issues present is a requirement of SafeWorkNSW.

[23] The Applicant claimed that at the commencement of his shift on 28 June 2020, he completed the prestart of the bus as required. The checklist for the prestart is kept in the First Aid room, however on that particular shift he forgot to complete the checklist for the prestart, but he had carried out the prestart as required.

[24] The Applicant attended the worksite the following day but his pass to enter the site did not work. He was advised that he was stood down pending a meeting. In the evening of that day he received an email attaching a stand down letter (the Stand Down Letter) that stated the following:

Dear Michael,

Re: Stand Down and Notice to Attend a Meeting

*This letter confirms that your employment is suspended on full pay. You are required to attend a formal meeting on **Wednesday, 1 July 2020 at 13:00** with Geoff Hughes (Manager- HR and Training) and myself to respond to allegations regarding a serious safety incident that occurred during your shift on 28 June 2020 . It is alleged you were uncontactable by 2-way radio whilst performing the role of First Aid/Bus Driver. It is further alleged that you breached the Company's Mobile Phone and Electronic Devices Policy (HSEQ3.24) on multiple occasions and failed to perform your duties as set out in SOP041-S Coronavirus (COVID-19) Management.*

This is a compulsory meeting. Failure to attend this interview without providing management with a reasonable explanation for your non-attendance prior to the commencement of the meeting may result in disciplinary action being taken against you. Please note that these are serious concerns and termination of your employment is a possible outcome of this process.

Our records indicate that you are currently on a Final Written Warning. I am concerned that this further incident indicates that you have not taken the final written warnings dated 7 September 2018, 22 February 2019 and 1 July 2019 seriously. This is particularly disappointing as the business has devoted a substantial amount of time to assist you in meeting your basic performance obligations.

During the meeting you will be provided with an opportunity to respond and provide further information to the concerns raised by the company in this letter. You have the right to have a support person present. Should you elect to have a support person present please advise me as soon as possible as to who will be attending.

The Company has an Employee Assistance Program available to all employees if they feel that they need assistance with any matter. The phone number is 1800 554 654. This is a free and confidential counselling service.

[25] A disciplinary meeting occurred on 1 July 2020 (the Disciplinary Meeting). It was attended by the Applicant, Mr Donato as the Applicant's support person, Mr Hughes, Mr Graham and Mr Brodtke. Meeting notes that accurately reflect the discussions that occurred at that meeting were kept by Mr Hughes. Those notes are as follows:

Outline of Interview - 1 July 2020

Geoff Hughes (by Webex):

"We are here to discuss the issues that took place on the evening shift of 28 June 2020 as set out in the letter to you from Jarrod Graham, dated 29 June 2020."

Jarrold Graham:

"We need to discuss the serious safety incident that occurred on your shift. You were allocated as the First Aider and you were uncontactable by radio for some time. As the First Aider, it is your responsibility to be a first responder to any incidents and when security and the shift manager were attempting to contact you, there was no response. The shift manager on shift, Darryl Quinn, came in from the shift to look for you and found you in the First Aid room with your feet up on the desk on your mobile phone."

Nathan Donato:

"This occurred right at the end of the smoko break, around 6.30 pm, and Mick was on the phone to his dad because he had just found out that his dad had cancer."

Brian Brodtke:

"If Michael wasn't feeling up to the task, or knew that he had to have his phone on him to take a phone call, he should have spoken to the Shift Manager at the beginning of the shift. The Shift Manager would have possibly allowed him to keep his mobile phone on him if it were an emergency and it could have placed him in another role where his lack of concentration would not have affected his performance."

Michael Keane:

"I had just found out two days ago that my father has cancer and I was awaiting news on potential treatment. I am the only person who knows about it. My father has not told my mother or my two brothers and I was the only person aware of it. I forgot to talk to the shift manager at the start of the shift because I was really concerned about my dad and my mind just wasn't on the job."

Brian Brodtke:

"This is the reason why we ask you to come and see the Shift Manager in these circumstances, you could have been moved to another position, for example lashing, where your concentration is not as important and the Shift Manager can assess at this time whether you are fit for work and may send you home."

Jarrold Graham:

"This most recent incident is fairly concerning and, coupled with the ongoing list of performance issues with yourself, termination of your employment is a likely outcome from this meeting. I can see you have had several warnings, including final written warnings, in the past for a range of issues. This current issue is fairly serious."

The Applicant:

"I know I fucked up, but my mind wasn't on the job. I had just found out about this and I was really concerned about what was going on with dad. This is kind of the way things go with me. Ever since I was a kid I fucked up every good thing I had going. I have worked as a chef, I have worked on ships at sea,

then I finally got this job and it has been going well for the past four years. Now I am in a situation where I might lose my job and I don't want that to happen."

Nathan Donato:

"Michael has been doing pretty well for the past 12 months. He hasn't had a warning since the last one and that was about a year ago. How long does a final written warning stay on file?"

Geoff Hughes:

"It has no statutory expiration and all of these warnings are considered in circumstances like this."

Nathan Donato:

"I don't want to see Michael's employment get terminated. Is there any other way around this?"

Jarrold Graham:

"We will take all of this into consideration and let you know the outcome within the next couple of days."

[26] After the Disciplinary Meeting Mr Hughes and Mr Graham discussed the Applicant's responses. A decision was made to terminate the Applicant's employment. A letter in the following terms (the Termination Letter) was sent to the Applicant:

Dear Michael,

Re: Termination of Employment

Thank you for your attendance at the meeting today with your support person, Mr Nathan Donato from the MUA.

We have carefully considered the matters raised by both yourself and Mr Donato, in particular the fact that you are currently going through some personal issues. This however does not adequately explain your behaviour. There seems to be a complete absence on your part, of self-awareness with respect to repeated performance issues.

Your last day of employment will be Wednesday 1 July 2020. You will be paid in lieu of notice and any accrued, untaken annual leave will be paid out. To the extent that you have left any personal effects at the workplace, they will be couriered to your home address. If you have retained any of our property, including any MSIC cards or documents, please arrange for them to be returned to me at the administration office.

I wish you well in any future attempts to obtain alternative employment. If you have any questions about your entitlements, please contact Geoff Hughes at hughes.geoff@hutchisonports.com.au.

In the circumstances, we will also send a copy of this termination notice to Mr Donato, marked "Confidential".

Yours Sincerely,

Contrition Expressed in Reply Statement

[27] In his statement in reply, the Applicant made numerous expressions of contrition that importantly record the Applicant's understanding of the requirements and obligations of his former position. While expressed after having reviewed the Respondent's materials, I

consider, particularly based on the evidence of the Applicant at the hearing, that it is clear that the Applicant held such understanding of the requirements and obligations of his position at all relevant times during his employment. They included the following:

20. *In relation to paragraphs 35, I note that I understand that I am required to be available at all times whilst working on shift and that it is important in this regard that I have the radio on. I apologise for not having it turned on after I came back from my break on 28 June 2020.*

21. *In response to paragraph 37 I accept that I used my phone on two occasions during the afternoon shift on 28 June 2020. I apologise for having my mobile phone with me, without permission. I understand this is an important policy and will ensure I comply with it moving forward. I was not thinking clearly on the night of 28 June 2020 due to what was going on with my dad.*

...

36. *I accept that the role of the First Aider is to be contactable by radio at all times, apart from meal-times. I accept responsibility for not having my radio turned on as soon as I returned from my meal break on 28 June 2020. I am deeply sorry for what happened. I was very concerned about my father and was extremely anxious about his health and the test results that he was waiting for.*

37. *I am aware of SICTL's mobile phone policy and that the use of private mobile phones whilst on duty is not permitted. I accept responsibility for using my phone that day. I was very stressed and anxious about receiving word from my father. I wasn't thinking clearly that day and now realise that I should have shared this confidential information with SICTL management. My thinking was clouded by the anxiety I felt and the burden I was bearing being the only one who was aware of my father's condition. I apologise for my conduct and assure the Commission it will not happen again.*

CONSIDERATION

Preliminary findings

[28] 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 International Container Terminals Pty Limited (SICTL) and Brisbane Container Terminals Pty Limited (BCT) and*

Maritime Union of Australia (MUA) Enterprise Agreement 2015, applied to his employment (s.382(3)(b)(ii)); and

(d) His dismissal was not a case involving the Small Business Fair Dismissal Code (s.385(c)).

Was the Dismissal Harsh, Unjust or Unreasonable?

[29] 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.

[30] 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);
- (b) Whether the person was notified of that reason;
- (c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
- (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;
- (e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal;
- (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;
- (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

[31] It is readily apparent from the stand down letter, there were three reasons for the Applicant’s eventual dismissal. It was primarily alleged that the Applicant was uncontactable by 2 way radio whilst performing the role of First Aid/Bus Driver (the Communication Ground). It was “*further alleged*” that the Applicant breached the Company’s Mobile Phone and Electronic Devices Policy on multiple occasions (the Mobile Phone Breach), and failed to perform his duties as set out in SOP041 – S (COVID-19) Management (the Covid SOP Breach). While the Termination Letter did not specify the Respondent’s conclusions in

relation to each reason, the evidence has established that the Respondent considered the conduct of the Applicant established to a level of satisfaction each reason.

[32] As the Full Bench found in *Sydney Trains v Hilder* :¹

“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.

(i) The Communication Ground

¹ [2020] FWCFB 1373, at [26].

[33] It is first necessary to determine the timeline of the Applicant's failure to turn on his radio. While the Applicant said he turned the radio on at approximately 6.32pm, some two minutes late, Mr Quinn placed the activation of the radio at approximately 6.50pm. I find that it is more likely that the radio activation occurred closer to 6.50pm, and could not have occurred only one to two minutes after the Applicant's break. I base that conclusion on the following:

- (a) There are clear times when the First Aider is and is not on call. Other than meal breaks, the First Aider is the first responder to any incident to administer first aid to any workplace attendants requiring first aid;
- (b) The Applicant would not have been contacted prior to the cessation of his meal break at 6.30pm. The Applicant's evidence was that Mr Quinn said to him, "*Security's been trying to get a hold of you for the last 5 or 10 minutes. The radio isn't on.*";
- (c) Some time must have transpired while the security contractors attempted to contact the Applicant prior to contacting Mr Quinn to advise that the Applicant was uncontactable, and even the telephone call between Mr Quinn and the security contractor would have taken close to a further minute; and
- (d) Then Mr Quinn commenced a search for the Applicant that, while requiring minimal distances being covered, involved a number of steps. Mr Quinn described those steps in his statement as follows:

7. *At the time of taking the call from security, I was situated in the Shift Managers office which is within the Administration Building at the Port Botany Site. Within the Administration Building is the First Aid room as well as the lunch rooms and ablutions block.*

8. *I immediately left my office and walked towards the crib room area, a distance of approximately 10 metres. I walked into the crib room. There was no one in the crib room. I then walked past the Shift Leaders office and said to the Shift Leader words to the effect: "Do you know where Michael is?" The Shift Leader responded: "No, I haven't seen him."*

9. *I then walked through the Shift Leader's office and walked in a direction towards the First Aid Room, which was approximately 10 metres away (but within the Administration Block). I walked into the First Aid Room. When I looked into the First Aid Room at approximately 18:50 hours, I saw the Applicant sitting in a chair with both of his calves and feet elevated on the desk.*

[34] I consider that the steps outlined in sub-paragraphs (c) and (d) in the above paragraph could not have occurred in two minutes after 6.30. I find such steps, particularly the attempts by security to contact the Applicant prior to contacting Mr Quinn, would have taken at least ten minutes, if not more. I do not consider I need to resolve the issue as to how the Applicant was seated (whether his feet were on the table). Neither party has pressed that issue as being of relevance.

[35] The Applicant advanced the following submissions regarding the time delay:

(a) In the Applicant's Submission:

It is accepted that Mr Keane was required, after coming off his break at 6:30PM, to turn his radio back on. He forgot to do this, on his evidence, for a couple of minutes. On Mr Quinn's account, the period Mr Keane's radio was off was somewhere between 15-20 minutes. It is not of any great moment as to whether Mr Keane had forgotten to turn his radio back on for 2 or 20 minutes. This was an honest and unintentional error on Mr Keane's part.

(b) In the Applicant's Reply:

The respondent fails to explain at RS47(c) why Mr Keane's radio being off for the contended 15-20-minute period was a 'material and significant breach' of the respondent's requirements. Assuming that the radio was off for this period, this was an innocent error, the only implication of which was that Mr Quinn walked around to the first-aid room to tell Mr Keane to collect someone from the vessel which had moored at the terminal.

[36] I reject those submissions. They misconstrue the Applicant's role as First Aider. While the contact from the security contractors on 28 June 2020 regarding the Applicant's whereabouts was, fortuitously, only in relation to a crew transport issue, it could very well have been in relation to the Applicant's core duties as a First Aider, being the first responder to any incident to administer first aid to any workplace attendants requiring first aid. The consequences of the Applicant being uncontactable could quite conceivably have been a whole lot worse.

[37] As the Applicant candidly and honestly stated in his reply statement, he accepted that the role of the First Aider was to be contactable by radio at all times, apart from meal times, and he accepted responsibility for not having his radio turned on as soon as he returned from his meal break on 28 June 2020.

[38] I find that the Applicant's failure to ensure he was contactable by radio during his shift was a valid reason for termination. While the Applicant expressed that he was deeply sorry for what happened, and noted he was very concerned about his father, and was extremely anxious about his health and the test results that he was waiting for, those matters are not relevant to the consideration of valid reason. Such matters of mitigation are considered under s.387(h) of the Act.

(ii) the Mobile Phone Breach

[39] The Respondent's Mobile Phones and Electronic Devices Policy (the Mobile Policy) required, at clause 3.2, the following:

"3.2 Employees are required to:

Only use mobile phones and electronic devices in non-operational areas when the worker is not allocated with a task.

Keep all mobile phones or electronic devices in the lockers provided to them.”

[40] The Mobile Policy also provides under the heading of “Policy Elements”:

“Mobile phones can only be used in Operational areas if authorised by a Senior Manager of HPA.

Mobile phones and electronic devices are permitted in the lunch room and locker rooms while on breaks or prior to, and after the rostered shifts, or when the worker is not allocated with a task. Once the worker is tasked, the mobile phone must be placed in the locker prior to proceeding to an operational area.”

[41] “*Operational areas*” were defined in the Mobile Policy as:

- Anywhere on the wharf, vessel, yard, rail, reefer gantry;
- Operating any piece of plant or equipment – including but not limited to Quay Crane, light vehicles, Shuttle Carriers, Reachstackers, Forklifts, operating ASC ROS (Remote Operating System) and Tower Clerk

[42] Mobile phones could be utilised in areas that were not operational areas, so long as employees were not allocated with tasks. Also, permission could be granted for employees to have their phones with them in emergency situations. Finally, clause 4 of the Mobile Policy provided that a breach of the policy would be referred to the “*Manager and Human Resources for disciplinary counselling*.”

[43] There was considerable focus in the cross-examination of the Respondent’s three witnesses as to whether the First Aid room was an “*operational area*” as defined in the Mobile Policy. Each of the Respondent’s witnesses was adamant that the First Aid room was an operational area. That focus was misplaced for the following reasons:

(a) If the First Aid room was not an operational area, the Applicant was nonetheless allocated with a very important task of First Aider who was required to monitor the radio. It is clear that he failed to complete that task, at least in part, because he was monitoring his mobile phone;

(b) Each of Mr Quinn, Mr Hughes and Mr Graham² identified the “*ASC ROS and Tower Clerk*,” which the Mobile Policy identified as operational areas, were in the same administration part of the building as the First Aid room. The Applicant’s previous warning for using his mobile phone was in the ROS area.³ I accept that the First Aid room was an operational area; and

(c) The Applicant in his reply statement, again candidly and honestly, accepted that he was aware of Mobile Policy and that the use of private mobile phones whilst on duty was not permitted. He conceded that he used his phone on two occasions during the afternoon shift on 28 June 2020.

[44] I find that the Applicant’s failure to comply with the Mobile Policy during his shift was a valid reason for termination. While the Applicant apologised for his conduct and noted

² Transcript at PN 562 to 567 (Quinn); PN 694 to 706 (Hughes); and PN 849 (Graham).

³ Hughes Statement at Annexure “GH9”.

that his thinking was clouded by the anxiety he felt, and the burden he was under, being the only one who was aware of my father's condition, again those matters are not relevant to the consideration of valid reason. Such matters of mitigation are considered under s.387(h) of the Act.

(iii) The COVID SOP Breach

[45] The Respondent's Safe Operating Procedure – SOP041 – S (COVID-19) Management (the COVID Policy) set out additional duties for First Aiders like the Applicant during their shifts. It outlined a number of specific cleaning tasks that First Aiders were to complete which included, amongst others, spraying and wiping meal and training room high touch areas, and cleaning and wiping common user items in toilet areas. The COVID Policy provided:

Note – most tasks are to be done twice per shift as a minimum (i.e. start of shift, before and after meal break or more frequently as required).

[46] The Respondent asserted the Applicant breached the COVID Policy by failing to perform the duties set out in the COVID Policy and/or by failing to clean the meal room *immediately* after the meal break concluded at 7:40pm. I do not consider that the Applicant breached the COVID Policy, and do not accept that the Applicant was obliged by the COVID Policy to immediately clean the meal room after the meal break. That is because:

- (a) The COVID Policy only required the Applicant to clean the relevant areas at least twice per shift. His shift concluded at 10.00pm on 28 June 2020. If the Applicant had not cleaned the meal rooms at least twice by 7:40pm, no breach of the COVID Policy could have been established at that point in time as he had over two-hours to comply with the minimum requirements of the policy;
- (b) The COVID Policy did not prescribe that the meal room had to be cleaned immediately after the meal break;
- (c) I accept the Applicant had performed some elements of cleaning the crib room after the meal break concluding at 6.30pm.

[47] It seems the Respondent's concerns relate to the Applicant focusing on his mobile phone, rather than any of his allocated duties of which COVID duties were a part. Failing to promptly perform tasks within a period of a shift does not mean those duties will not be adequately performed by the Applicant thereafter within the shift. There was no breach of the COVID Policy as alleged by the Respondent, and insofar as the Respondent relied on such breach as a valid reason for termination, which must be questionable as there was no mention of the breach of the COVID Policy in the Disciplinary Meeting, it was in error.

(b) Notification

[48] The Applicant was notified of the reasons for termination most particularly by the Show Cause Letter. Those reasons were ventilated in the Disciplinary Meeting, and which was followed by the Termination Letter.

(c) Opportunity to Respond

[49] The Applicant had an opportunity to respond in the Disciplinary Meeting (s.387(c)).

(d) Support person

[50] The Applicant was able to have Mr Donato, the Assistant Branch Secretary, Sydney Branch of the MUA. It is clear that Mr Donato vigorously agitated on the Applicant's behalf.

(e) Warnings

[51] While it is clear that the Applicant has a significant disciplinary history with the Respondent, that is not a relevant consideration under s.387(e). As the Full Bench observed in *Larcombe v Bis Industries Limited*:⁴

Thirdly, s.387(e) of the Act relates to warnings for unsatisfactory performance. The Decision appears to conclude that it was not appropriate to take into account under this head, the severity of past disciplinary action (the demotion). That appears manifestly correct. Moreover, we are not persuaded that there is an arguable case of error arising from the Commissioner's apparent decision not to take the severity of past disciplinary action into account. The Commissioner's reasons for so doing were that the disciplinary action was not challenged at the time and it was now not appropriate for him to try to "balance the ledger" by taking a matter not previously challenged into account. No arguable appellable error from that reasoning is disclosed. The scope of the consideration under s.387(e) is well settled and does not require further clarification by this Full Bench. The Appellant's prior disciplinary history is a matter the Commissioner was entitled to take into account under s.387(h). That the Commissioner may have taken prior warnings about conduct into account under s.387(e) instead of (h) does not enliven the public interest nor do the other matters raised by the Appellant as to s. 387(e) of the Act attract the public interest.

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

[52] These are not relevant considerations as the Respondent is a relatively large company and is well resourced.

(h) Other relevant matters

[53] There were sound, defensible and well-founded reasons for the Applicant's dismissal, relating to the Communication Ground and the breach of the Mobile Policy. Regarding other relevant considerations, the Applicant made the following submission:

Other matters under s 387(h)
41. If, contrary to the above, the Commission determines that one or other of the three matters relied on by the respondent constituted a valid reason for dismissal, the sanction of dismissal was disproportionate in circumstances where:

⁴ [2017] FWCFB 4545, at [34].

41.1 Mr Keane performed the cleaning required by the COVID Policy by the completion of his shift. He had, in fact, performed cleaning work during the course of the shift up to his second interaction with Mr Quinn. Further, no issues had ever been raised about his performance of cleaning work. Any failure to appropriately perform his cleaning duties on 28 June 2020 was an uncharacteristic aberration and any breach of the COVID Policy was, at best, minor in nature;

41.2 consistently with the matters recorded at [28] above, the breach of the Mobile Policy was not a grave one. There was nothing indicating that the respondent had ever communicated to Mr Keane or other employees that breach of the Mobile Policy would likely sound in dismissal. The breach was, in the circumstances, not a particularly grave one;

41.3 Mr Keane's failure to turn his radio on immediately after re-commencing his shift was an unintentional error. This misconduct was minor in the circumstances;

41.4 Mr Keane's conduct during the 28 June 2020 shifts needs to be seen in a broader context and in light of his heightened emotional state following the troubling news of his father's cancer diagnosis and the burden placed on him by his father's instruction not to inform anyone else of the potentially life threatening diagnosis. That direction, no doubt, played some part in Mr Keane not informing Mr Quinn or any other manager that he wished to have his mobile phone with him during his shift or that he was upset as a result of his father's troubling news. These circumstances operate to significantly mitigate any misconduct the Commission finds Mr Keane committed on 28 June 2020;

41.5 Mr Keane acknowledged his conduct and was remorseful for it. He has insight into his conduct and acknowledged that, with the benefit of hindsight, he should have informed the respondent's managers of his father's circumstances;

41.6 Mr Keane gave unchallenged evidence that he was committed to complying with the respondent's policies moving forward.

42. Further, the dismissal has had negative financial and psychological consequences for Mr Keane. Mr Keane has been unable to find employment following his dismissal.

43. These matters, taken together, indicate that the dismissal was harsh.

(Footnotes omitted)

[54] I have concluded above that the Applicant did not breach the COVID policy, though I note from the contents of the Disciplinary Meeting that such alleged breach was accorded little or no weight.

[55] I cannot accept the Applicant's characterisation of the failure to turn on the radio as "*minor in the circumstances*", nor the Mobile Policy breach as "*minor*." The breach of the Mobile Policy consequentially resulted in the failure of the Applicant to turn on the radio. As first responder, the Applicant's failures could have had serious safety consequences. The Applicant's evidence in cross-examination was as follows:

And that's a very serious failing on your part, sir, because, being the first aider, you need to be contactable when you are on duty? -Yes.

....

No, I want you to do two things, please, I want you to focus on my question and wait until the question's done. Putting aside for how long, not having the radio on and not being contactable is a very serious breach, isn't it, sir? -Yes.

It could have very bad consequences in the event of an emergency? -Yes.

[56] I have no issue in accepting the Applicant was in a heightened emotional state following the news of his father's cancer diagnosis and the burden placed on him by his father's instruction not to inform anyone else of his diagnosis. In hindsight he has acknowledged he should have informed his managers of those circumstances, and I consider he certainly should have done so at around 6.50pm on 28 June 2020, at the time of his first interaction with Mr Quinn. He did not do so which resulted in the frustration of Mr Quinn when he found the Applicant again breaching the Mobile Policy less than an hour later. When balanced against the Applicant's clear knowledge and understanding of his duties as a First Aider, and the requirements of the Mobile Policy, I consider the weight I can give to the Applicant's heightened emotional state must be reduced.

[57] I have noted in this decision a number of instances where I have relied on the Applicant's candour and honesty. While I have not accepted his evidence regarding the time of his first interaction with Mr Quinn, I have otherwise accepted his evidence, and note that in cross-examination he was an impressive witness who readily gave answers against his interest where such answers were the truth. However, I have difficulty accepting the submission that "*Mr Keane gave unchallenged evidence that he was committed to complying with the respondent's policies moving forward.*" The evidence referred to by the Applicant in his submissions is to the four paragraphs from the Applicant's reply statement extracted above under the heading "*Contrition Expressed in Reply Statement,*" together with a fifth paragraph being:

23. As to paragraph 38, I have made a serious and concerted effort to improve since being suspended in July last year. I have not had any incidents apart from those which happened on 28 June 2020. I am committed to my job and will ensure I comply with all of SICTL's policies and procedures if I am reinstated. I understand that these are important and must be complied with.

[58] With respect, the Applicant's evidence can be characterised as his expressing that he would in future comply with the Respondent's policies that he was fully aware of previously, but did not follow due to significant personal circumstances. I do not consider such a statement would provide any confidence to the Respondent, particularly in light of the disciplinary history of the Applicant. In a period of two and a half years of his almost four years of employment he had received three final written warnings.

[59] Mr Donato, in advocating on the Applicant's behalf at the Disciplinary Meeting, stated "*Michael has been doing pretty well for the past 12 months. He hasn't had a warning since the last one and that was about a year ago. How long does a final written warning stay on file?*" However, it is correct to observe that during that 12 month period the Applicant was stood down for one month without pay (or on the Applicant's evidence at paragraph [15] of

his reply statement the stand down was for three months), had skills removed from his skills matrix, and was warned that “... *any future failure to comply with Company Policy and or Procedure may result in further disciplinary action including the termination of employment.*”

[60] Finally, I accept the dismissal has had negative financial and psychological consequences for the Applicant, and that he had been unable to find employment following his dismissal until at least the time of the hearing.

Conclusion on Dismissal

[61] Taking into account the matters referred to above, while I consider the determination to be extremely finely balanced, I find that the dismissal of the Applicant was not harsh, unjust or unreasonable. The Respondent had two valid reasons upon which it relied to dismiss the Applicant, and the failure to establish the COVID Policy breach did not impact on either the finding of valid reason (s.389(a)) or the assessment of the degree of seriousness of misconduct attributed to the valid reasons for dismissal (s.387(h)).

[62] No procedural fairness issues arose, and the only countervailing factors were issues of harshness. While the truly devastating circumstances facing the Applicant must weigh in his favour, I cannot find that they can excuse repeated failures to comply with role requirements and policies which could have had significant safety consequences.

[63] The termination of the Applicant was not harsh, unjust or unreasonable. The Application is dismissed.



DEPUTY PRESIDENT

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