[2021] FWC 838

The attached document replaces the document previously issued with the above code on 24 March 2021.

Inserted additional paragraph numbers. Total paragraphs increased from 177 to 181.

Jack Patrick
Associate to Commissioner Riordan

Dated 25 March 2021

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Nathan MacDonald
v
Whitehaven Coal Mining Ltd
(U2020/13306)

COMMISSIONER RIORDAN SYDNEY, 24 MARCH 2021

Application for an unfair dismissal remedy.

[1] On 7 October 2020, Mr Nathan MacDonald (**the Applicant**) filed an application **(the Application**) with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (Cth) (**the Act**). The Applicant was terminated for serious misconduct by Whitehaven Coal Mining Ltd (**the Respondent**) on 28 September 2020. The Whitehaven Coal Open Cut Operations Production (Tarrawonga) Enterprise Agreement 2018 (**the Agreement**) applied to the Applicant's employment with the Respondent.

[2] The Applicant was employed by the Respondent on 21 March 2011. Prior to the Applicant's termination, he worked at the Tarrawonga Open Cut Coal Mine (**the Mine)**.

[3] The Applicant's termination letter provided that the Applicant was terminated for the following incident (**the Incident**):

> "At approximately 1:30pm on the 22nd of September 2020 you were driving a light vehicle L VE667 and failed to make positive communication with water cart WAT849. You approached on the left-hand side of WAT849 whilst WAT849 was stopped at the stop sign at Ramp 1 ROM haul road intersection. You failed gain positive communication before entering inside 50m of the mobile plant WAT849. This a clear breach of Tarrowonga Mine Safehaven rule #5 and the site operating procedure mainly, WHC-PRO-OC-APPROCHING MOBILE PLANT."[i]

[4] The Applicant's termination letter cited the following reasons for the Applicant's termination:

> "In addition to the above issues, the Company has lost faith and trust in your ability to remain as a Whitehaven Coal employee due to your lack of contact, participation in the processes and the core failing outlined above, which includes a general obligation to the health and safety of yourself and those around you. As outlined your employment is therefore terminated as of 28 September 2020."[ii]

[5] The matter was listed for Hearing on 22 December 2020. The Applicant was represented at the Hearing by Ms Jennifer Short of the Construction Forestry Maritime Mining and Energy Union (**the CFMMEU**). Leave was granted to allow the Respondent to be represented by Mr Simon Meehan of State Chambers.

Statutory Provisions

[6] The relevant sections of the Act relating to an unfair dismissal application are: -

381 Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

(b) to establish procedures for dealing with unfair dismissal that:

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

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

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

385 What is an unfair dismissal

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

(a) the person has been dismissed; and

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

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

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

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

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the FWC considers relevant."

[7] Regulation 1.07 of the Fair Work Regulations (Cth) 2009 provides that the meaning of serious misconduct:

> **Regulation 1.07 – Meaning of serious misconduct**
>
> Section 12 of the Act provides that the expression serious misconduct has the meaning prescribed by the Regulations. Regulation 1.07 provides that serious misconduct has its ordinary meaning. The regulation also identifies particular kinds of conduct that will amount to serious misconduct for the purposes of the Act. These include:
>
> - wilful, or deliberate, behaviour that is inconsistent with the continuation of the contract of employment; and
>
> - conduct that causes imminent and serious risk to health or safety or to business reputation, viability or profitability.

Establishing Jurisdiction

[8] Section 396 of the Act outlines several jurisdictional facts that must be addressed before the Commission turns to an assessment of the merits of a matter.

Section 396(a) of the Act - The application was made within the period required in subsection 394(2)

[9] It was agreed between the parties that the Applicant's dismissal took effect on 28 September 2020. The Applicant filed his Form F2 on 7 October 2020. The Application was filed within the 21-day time frame proscribed by section 394(2) of the Act.

Section 396(b) of the Act - The Applicant was protected from unfair dismissal

[10] The Respondent is a national system employer. The Applicant has been employed by the Respondent for more than six months. The Applicant's employment was covered by the Agreement. As such the Applicant is protected from unfair dismissal.

Section 396(c) of the Act - The Small Business Fair Dismissal Code does not apply

[11] The Respondent is a large entity with more than 15 employees, therefore, the Small Business Fair Dismissal Code does not apply.

Section 396(d) of the Act - The dismissal was not a case of genuine redundancy

[12] The Applicant's letter of termination provides that the reason for dismissal was serious misconduct for a significant safety breach.

Outline of the Applicant's Submissions

[13] The Applicant submitted that the Respondent bares the onus of proving that the Applicant engaged in the conduct of which he is accused.

[14] The Applicant claimed there was not a valid reason for his dismissal. The Applicant conceded that it may appear that the Applicant breached the Safehaven Rules, however, the Applicant submitted that the circumstances were such that he could not have complied with the relevant Safehaven Rule. The Applicant submitted that in making its determination the Respondent failed to consider the following:

> *"a. The Applicant rightfully assumed the water cart Operator would continue to proceed and turn right at the intersection, as the water cart moved forward into the intersection, had its right-hand blinker on, and the Applicant had heard of the water cart Operator's intended destination;*
>
> *b. Had the water cart Operator undertaken a thorough visual check, he would not have proceeded into the intersection, and the Applicant would not have proceeded to drive further towards the intersection;*
>
> *c. The water cart Operator took evasive action, as he did not undertake a thorough visual check to ensure a clear passage;*
>
> *d. As a result of the water cart Operator's evasive action, the Applicant was required to immediately stop, which did not provide him with sufficient time to make positive communication;*

e. The evasive action was without warning; and

f. The water cart Operator's actions were the sole contributing role in the incident."[iii]

[15] The Applicant claimed that the Show Cause letter did not particularise the alleged conduct that the Respondent claims to have breached the Safehaven Rules.

[16] The Applicant submitted that the Respondent did not provide the Applicant with a reasonable timeframe in which to respond to the Show Cause letter.

[17] The Applicant submitted that by notifying him of his dismissal via email the Respondent has acted in an unnecessarily callous manner which prevented him from having a support person present.

[18] The Applicant submitted that a Human Resources manager of the Respondent advised the Applicant to resign during the disciplinary process, implying that the Respondent intended to dismiss the Applicant regardless of any information provided by the Applicant.

[19] The Applicant submitted that the Respondent's failure to advise the Applicant of the nature of the first disciplinary meeting amounted to the Respondent refusing the Applicant an opportunity to have a support person present.

[20] The Applicant submitted that under section 387(h) of the Act the Commission should be mindful of the following facts in determining whether the dismissal was harsh, unjust or unreasonable:

"a. the Applicant's impeccable employment history with the Respondent;
b. the Respondent's failure to apply consistent disciplinary action for same or similar conduct;
c. the personal circumstances of the dismissal, namely financial hardship;
d. the disciplinary outcome was not proportionate to the incident;
e. the Applicant's inability to gain alternate employment to date; and
f. the Applicant's remorse."[iv]

[21] The Applicant submitted that there were three instances where a similar incident occurred at the Mine and the relevant employee was not terminated. The Applicant claimed that that incidents involving Mr Dawson, Mr Strickland and Mr Mutasah that evidence the proposition that the Applicant was treated inconsistently with his fellow employees.

Outline of the Respondent's Submissions

[22] The Respondent submitted the Applicant was on notice that any breach of the Safehaven Rules would be considered serious misconduct which may result in the final step of the disciplinary process being applied, ie. termination.

[23] The Respondent submitted the Applicant, in his submissions to the Commission conceded that he had breached Safehaven Rule #5. The Respondent contended that, unless the

Commission was of the view that the Applicant was unable to comply with the Safehaven Rules, the Commission should conclude that the Respondent had a valid reason for dismissal.

[24] The Respondent submitted that it was irrelevant that there was no injury or damage to person or property. Rather, the Respondent claimed:

> "It is not the manifestation of risk that is the gravemente of breaching duties under that legislation. It is the taking of all reasonably practicable steps to avoid or minimise risk, and so when the Commission comes to characterise the seriousness of this incident, the fact of no damage or the fact of no injury is no weighty consideration at all. Indeed it should not inform the proper characterisation of the seriousness of this incident in any way."[v]

[25] The Respondent submitted the Applicant was regularly and contemporaneously trained on the Mine's Safehaven Rules. Further, the Respondent submitted the Applicant did not claim that he was not aware of his obligations under the Safehaven Rules.

[26] The Respondent submitted that the Applicant was notified of the reasons for his dismissal.

[27] The Respondent submitted that the Applicant was given ample time to respond to the allegations of serious misconduct. The Respondent highlighted that it provided the Applicant with a 24-hour extension in which to respond to the allegations. The Respondent contended that the Applicant's Show Cause letter notified the Applicant that the Respondent was considering terminating the Applicant and that failing to respond to the Show Cause letter would result in the termination of his employment.

[28] The Respondent submitted that it did not refuse the Applicant a support person at any meeting held by the Respondent.

[29] The Respondent contended that because the Applicant was dismissed for serious misconduct, it was not relevant that the Applicant was not warned about unsatisfactory work performance.

[30] The Respondent submitted that its size and the fact that it has a dedicated human resource department did not affect the procedure followed when dismissing the Applicant.

[31] The Respondent claimed that, if the Commission were to find that there was a defect in the procedure by which the Respondent affected the Applicants termination, in light of the Applicant's conduct, the Commission should not find that the Applicant was unfairly dismissed.

[32] The Respondent submitted that the Commission should reject the Applicant's contention that the Respondent failed to apply a consistent disciplinary action for similar conduct. Specifically, the Respondent submitted that there were mitigating factors in Mr Dawson's circumstance that were not present in the Applicant's case. Further, the Respondent submitted that Mr Strickland and Mr Mutasah had not breached the Safehaven Rules.

Witness Evidence of the Applicant

[33] The Applicant claimed that on 22 September 2020, at around 12:10 pm, he was driving a light vehicle from dig floor 571 to the Mines crib hut.

[34] The Applicant stated that while he was driving, he heard the operator of the drill rig requesting water from the operator of the water cart. The operator of the water cart advised that he would drive up haul road 1. (I note that if a vehicle is travelling at 60 km/h, then it travels 1km every 60 seconds and 100 metres in 6 seconds. Allowing for the Applicant's need to slow down to a stop at the T intersection, it should have taken the Applicant approximately 10 seconds to travel the final 100 metres)

[35] As the Applicant drove along the ramp towards the haul road, he saw the water cart driving in front of him. He believed that given, the conversation he had just heard, the water cart would turn right at the T-intersection. The Applicant claimed that he stayed 50 metres behind the water cart until they reached the T-intersection. The Applicant claimed that at the T-intersection he was required to turn left. The Applicant explained the incident that followed in the following terms:

> "As the water cart drove up ramp 1 towards the T-intersection, I saw the right-hand blinker lights go on, confirming that Mr Strickland was turning right at the intersection. At that time, I was approximately 150 metres behind the water cart and driving at a speed of less than 60 km/h. The water cart came to stop at the T-intersection for a few seconds and then proceeded to turn right into the intersection. I continued to drive towards the intersection with my left-hand blinker engaged to turn left at the intersection. Given Mr Strickland's right-hand blinker was on, the water cart had started to move in to the intersection, and he was turning right, I intended to drive to the intersection, stop, check for oncoming traffic and if clear, turn left. As I approached the T-intersection, the water cart unexpectedly stopped as it was in the intersection turning right. I did not know why the water cart had stopped in the intersection, as he had already started to move off and turn right. At that time, I was within 50 metres of the water cart, positioned to the left of his rear and at the stop sign. I was required to stop suddenly, as a result of the water cart stopping without notice.
>
> As I was stopped at the intersection and within a matter of seconds, a light vehicle drove passed the water cart along the road from the direction of the crib hut towards the drill rig. I realised at that point that the water cart must not have seen the light vehicle driving along the haul road in his direction, before proceeding into the intersection and turning right."[vi]

[36] The Applicant stated that after the Incident he continued to work for a further two hours.

[37] It was the Applicant's evidence that Mr Clinton McCarthy, the Production Superintendent at the Mine, asked the Applicant to speak with Mr Stewart Bramich approximately two and a half hours after the Incident. Mr Bramich is a Human Resources Officer at the Mine. Mr Bramich took a statement from the Applicant. The Applicant stated that after Mr Bramich took the statement, the Applicant was asked to attend a meeting with Mr Bramich and Mr Mark Toshack. The Applicant provided that during the meeting he was stood

down on full pay as he had breached Rule 5 of the Safehaven Rules. It was the Applicant's evidence that he co-operated with the disciplinary process.

[38] The Applicant claimed that he signed his record of interview with Mr Bramich without reading it because he did not have his glasses with him on the day.

[39] The Applicant stated that he was provided with a show cause letter the next day on 23 September 2020 but only given until 5 pm on 24 September 2020 to respond. Upon receiving the correspondence, the Applicant contacted Mr Jeremy McWilliams. Mr McWilliams is the Vice President of the CFMMEU, Mining & Energy Division, Northern Mining and NSW Energy District.

[40] The Applicant claimed that on 25 September 2020, Mr Bramich contacted the Applicant via telephone and encouraged him to resign.

[41] The Applicant stated that he was terminated, via email, on 28 September 2020.

[42] The Applicant stated that he was aware of an incident in which Mr Beau Dawson breached Rule 5 of the Mine's Safehaven Rules. Mr Dawson's incident occurred approximately a year prior. The Applicant claimed that Mr Dawson was not terminated for the incident.

[43] It was the Applicant's evidence that he had an unblemished disciplinary record. The Applicant expressed remorse with respect to the incident and indicated that he was seeking reinstatement. The Applicant stated that should he be reinstated he would never engage in similar conduct again.

[44] The Applicant's evidence with respect to his personal circumstance is outlined below:

1. The Applicant is forty-six years old, married with two dependent children.
2. The Applicant lives in Manilla in the New England Region of New South Wales.
3. The Applicant cares for his elderly mother who lives nearby.
4. Prior to his termination, the Applicant's income accounted for approximately sixty percent of his family's income.
5. The Applicant has applied for ten jobs but not received a single call back.
6. There are three mines in the Gunnedah area two of which are owned by the Respondent.

[45] The Applicant testified that the water cart moves very slowly from a stationary start, on the basis that it weighs more than 30 tonnes when fully loaded.

[46] In response to a question from me, the Applicant claimed that there was no possibility of his being involved in a traffic accident when he was alongside the water cart at the intersection.

> "But is there a safety issue associated - were you in danger by being - - -? No. I don't - no, he couldn't run - he couldn't reverse over me there and he couldn't turn to his left and drive over me either."[vii]

[47] The Applicant testified that he had been a member of the Work Health and Safety Committee for 18 months prior to his resignation but that he had resigned because he believed that the Respondent did not act upon the safety issues raised at the meetings of the Committee. The Applicant claimed that he had never undertaken or been provided with any training as a Work Health and Safety representative

[48] The Applicant claimed that he was aware of an incident where a bulldozer and an overloaded oversized dump truck had recently been involved in a collision. The Applicant stated that this incident was a Reportable Incident (R1) to the Regulator, which resulted in the Regulator summarising the incident in its newsletter. The Applicant claimed that the two employees in the collision each received a 3-day suspension. The Applicant claimed that his incident was not reported to the Regulator as it was not a reportable incident.

[49] The Applicant stated that he was truly remorseful for his actions and was prepared to be involved in training his fellow employees in relation to the Respondent's safety policies.

Witness Evidence of Jeremy McWilliams

[50] Mr McWilliams is the Vice President of the CFMMEU, Mining & Energy Division, Northern Mining and NSW Energy District. Prior to commencing with the CFMMEU, Mr McWilliams had worked in the coal mining industry for 22 years.

[51] Mr McWilliams attempted to represent the Applicant during the disciplinary process that resulted in his termination. It was Mr McWilliams' evidence that the Applicant received a show cause notice on 23 September 2020 and that the Respondent required him to respond by 5 pm on 24 September 2020.

[52] Mr McWilliams stated that he contacted the Respondent and requested that the Applicant be given until 28 September 2020, to respond to the show cause letter. Mr McWilliams stated that he also sought to reschedule an allegation outcome meeting from 28 September to the following day so that he would be able to attend with the Applicant. Mr McWilliams claimed that the Respondent was aware that he was unable to participate in the meeting on 28 September 2020 because he was scheduled to appear before the Commission in a matter relating to another former employee of the Respondent. It was Mr McWilliams' evidence that the Respondent only granted a one-day extension in which the Applicant was able to respond to the show cause letter and denied his request to reschedule the outcome meeting.

Witness Evidence of Beau Dawson

[53] Mr Dawson is an Operator at the Mine. Mr Dawson gave evidence with respect to an incident that occurred on 2 October 2019.

> "On 2 October 2019, I was involved in a safety incident at the mine when I was driving a light vehicle. I drove the light vehicle within 50 metres behind an operational truck without making positive communication.
>
> In driving the light vehicle within 50 metres behind an operational truck without making positive communication, I breached the WHC-STD-Seven Safehaven Rules, 3.1.5

> Positive communication, the WHC-PRO-OC-Approaching Mobile Plant, Section 3, and the WHS-STD-OC-Vehicles and Driving, Section 3."[viii]

[54] Mr Dawson stated that he received a final warning because of his involvement in the 2 October 2019 incident.

Witness Evidence of Clinton McCarthy

[55] Mr McCarthy is a Production Superintendent at the Mine. Mr McCarthy gave the following account of the Incident:

- "On this day, I was a witness to a near miss incident involving a Watercart (WAT849) and Light Vehicle (LVE667).
- This incident occurred at the Intersection of Ramp 1 and the ROM haul road.
- The circumstances in which I was witness to this event are set out below.
- I was driving along the ROM haul road towards the Ramp 7 lookout in a light vehicle.
- Whilst travelling on this ROM haul road, I drove across the front of the Ramp 1 intersection, in which I observed a Light Vehicle (LVE667) and Watercart (WAT849).
- I noticed that LVE667 was on the left-hand side of WAT849, and they were both stationary at the stop sign together, and side by side.
- Annexed to this statement as CM-1 is a photo of a reconstruction of the near miss at the intersection which reflects the position LVE667 and WAT849 were in when I drove by.
- After passing the Ramp 1 intersection, WAT849 proceeded to turn right, whilst the LVE667 proceeded to turn left.
- At no point during this event did I hear positive communication from LVE667."[ix]

[56] Mr McCarthy stated that he believed the Applicant had breached the Respondent's positive communication obligation.

[57] Mr McCarthy stated that he did not see that the right-hand blinker was engaged on the water cart because he was travelling from the left-hand side of the water cart. Mr McCarthy also stated that he was approximately 25 metres away from the front of the water cart.

[58] Mr McCarthy did not hear the request two-way radio which resulted in the water cart turning right at the intersection.

[59] Contrary to the Respondent's safety rules, Mr McCarthy did not tell the Applicant to immediately stop and preserve the scene for an investigation

> "I believe, in your witness statement, you say the incident was serious, is that correct?---I don't think I used those words to say it.
>
> Do you believe that the incident was serious?---I think there was potential there, yes.

Potential to be serious?---Yes."[x]

[60] In response to a question from me, Mr McCarthy advised that he was not disciplined as a result of his error of judgment,

"So you've witnessed a near miss, failed to report it immediately, and allowed a dangerous driver - or a dangerous operator to continue working and you received coaching, is that what you're telling me?---Yes, that's correct."[xi]

[61] In relation to the collision between the bulldozer and the overloaded dump truck, Mr McCarthy provided clear and concise evidence

"Could you explain to me what happened, please?---So there was an incident, it was during night shift, a bulldozer was operating on an excavator floor, **doing floor clean up**, a truck got loaded underneath. The excavator left, the excavator - the dozer changed direction and travelled out into the path of the truck and they made contact with each other.

All right. Should the 50 metre rule have been observed in this incident?---Yes, it should have.

Should there have been positive communication?---Yes, there should have been.

Was there?---No, there was not."[xii]

(my emphasis)

[62] Relevantly, Mr McCarthy testified:

"Right. Is Mr MacDonald right in saying that Mr Mutasah and Mr Daniels, who were involved in the incident, weren't terminated?---Yes, that's correct, they were not terminated.

So why is the incident with Mr Mutasah and Mr Daniels not as serious as the one involving Mr MacDonald?---Commissioner, I was called out to that incident, on night shift. I came out to the site.

I just need you to answer the question, Mr McCarthy, I don't need - - -?---I can't answer that for you, Commissioner, because I was not part of that - I was not part of that ICAM investigation which took place and, like I stated earlier, I don't have any input into when people are terminated and when people are not. All I do, in my role - - -

I didn't ask you that question either, Mr McCarthy. I'm only asking this question to try and help me, okay, I'm not - I'm not trying to trap you or trick you or anything like that. I just want you to help me, because I've never been in an open cut mine. All I'm trying to ascertain, the union is arguing that Mr MacDonald was not treated in a consistent manner with others on the site, right? That's why they've raised Mr Dawson's incident and that's why they've raised this incident. So what I'm trying to work out is how an

> employee who did something in breach of the rules, which had the potential for an incident is dealt with with termination whereas these two individuals, where there was actually a collision, who breached the same rule, both received, I think it was a three day suspension. So I'm just trying to work out, from you, as the superintendent of the mine, **was the second incident, the collision incident, less serious than the incident or potential incident with Mr MacDonald?---I would say the answer to that would be no. The potential is equal to and probably greater than, the Mr MacDonald incident"**[xiii]
>
> (my emphasis)

Witness Evidence of Christian Oosthuizen

[63] Mr Oosthuizen is the Operations Manager at the Mine. Prior to commencing as the Mines Operations Manager, Mr Oosthuizen was the Mining Engineering Manager at the Mine. Mr Oosthuizen has over 20 years' experience in the mining industry.

[64] It was Mr Oosthuizen's evidence that he has a high degree of familiarity with the Mine's safety rules. Mr Oosthuizen stated that based on the Applicant's description of the Incident the Applicant was already within 50 meters of the water cart before he claims he was required to stop suddenly.

[65] Mr Oosthuizen stated that the Applicant was required to make positive communication when he was within 50 meters of the water cart. Further, Mr Oosthuizen stated that the Applicant's failure to make positive communication was a breach of the positive communication obligation that the Respondent requires of its employees.

[66] It was Mr Oosthuizen's evidence that there have been four other recent circumstances where an employee has been terminated or a contractor' site access has been revoked.

Date	**Employee/ Contractor**	**Seven Safehaven Rule Breach**	**Consequence**
August 2019	Employee	Positive Communications	Dismissed
November 2019	Employee	Isolation of Energy	Dismissed
March 2020	Contractor	Positive Communication	Site Access Revoked
September 2020	Contractor	Positive Communication	Site Access Revoked

[67] Mr Oosthuizen stated that Mr Dawson was not dismissed as a result of his failure to make positive communication. Mr Oosthuizen stated that Mr Dawson had not wilfully breached the positive communication obligation and that in Mr Dawson's circumstances it was difficult for him to comply with the obligation.

[68] Mr Oosthuizen agreed that the Incident could be described as a "near miss".[xiv]

[69] Mr Oosthuizen testified that his investigation did not conclude that the Applicant was turning left and the water cart was turning right.

[70] Mr Oosthuizen testified that he was unsure, based on the statement of Mr Strickland, who was the Operator of the water cart, whether the water cart was turning left or right. I note that Mr Strickland said that he waited for a light vehicle to pass (which was being driven by Mr McCarthy) before turning onto the road. I note that Mr Strickland would not have had to wait for Mr McCarthy's vehicle to pass if he was turning left because all of the roads at the mine are dual carriageways. Mr McCarthy's vehicle was on the other side of the road. Therefore, common sense dictates that Mr Strickland must have been turning right.

[71] Mr Oosthuizen testified that he did not seek further information or clarification from the Applicant as part of his investigation but simply relied upon the document dictated to Mr Bramich by the Applicant. Mr Oosthuizen claimed that further information was expected to be provided by the Applicant during the Show Cause process but the Applicant did not respond to the show cause notice.

[72] Mr Oosthuizen claimed that findings had only been partially made at the time of issuing the show cause notice to the Applicant.

[73] Relevantly, the Show Cause letter sent to the Applicant said:

> "Dear Nathan
>
> **Re: Show cause notice as to possible dismissal**
>
> I would like to advise that the Company requires you to respond to this notice, which is a show cause as to why your employment should not be terminated for a significant safety breach.
>
> Specifically the matter as you are aware pertains to -
>
> > Why you should not be terminated for failing to undertake positive communications upon the mine site on Tuesday the 22nd of September 2020.
>
> As you are aware the specific issue was brought to your immediate attention and an informal meeting took place on Tuesday the 22nd September 2020 at 4:30pm, at the Tarrawonga Office where you were stood down. This notice now requires you to respond as to why your employment should not be terminated for that significant safety breach.
>
> You are required to attend a meeting at 5:00pm Thursday 24th September 2020 at the Gunnedah Office to furnish your response as to why you should not be terminated.
>
> To be clear, the Company will move to terminate your employment based upon the information currently before us, for serious misconduct as at 5:00pm Thursday the 24th September 2020 should you fail to respond to this request. You are welcome to bring a support person to that meeting and it is expected we will talk through the Company's position and your response, and determine if in fact the dismissal will take effect or if there are substantive matters that the Company will need to consider, prior to a final decision.

> Please be aware independent and confidential consulling support is available for you at any time by contacting our Employee Assistance Provider (EAP EASA on 0407 111 003
>
> If you have any questions please contact me on [redacted]
>
> Yours sincerely
>
> Tian Oosthuizen
> Operations Manager – Tarrawonga Coal Mine"[xv]

[74] Mr Oosthuizen confirmed that he didn't need to confirm whether the water cart was turning left or right because of the simple fact that the Applicant was within 50 metres of the water cart and therefore deserved to be terminated:

> "There was no need to clarify any of the statements in Mr MacDonald's witness statement?---No, I think it was quite clear on what happened with that.
>
> All right. Well, one issue that isn't quite clear is whether or not Mr MacDonald was turning left and the water cart was turning right?---Yes.
>
> Mr MacDonald says that's what occurred?---Yes.
>
> Mr McCarthy said he didn't know, you said the investigation didn't know, so why didn't you clarify that with Mr MacDonald?---At the time for me it was irrelevant which one was turning left or right because the LV was within 50 metres of the water truck.
>
> So that was the issue. As far as you're concerned the problem for Mr MacDonald is that is he was within 50 metres of the water truck and that's why he deserved to be terminated?---Yes, and that was with - I believe it was in the statement, as well. He was beside him, within 10 metres, as per the second line in his statement."[xvi]

[75] In relation to the collision between the bulldozer and the dump truck, which was a reportable incident, and the incident involving the Applicant, Mr Oosthuizen testified that both situations were serious and the same

> "So was Mr MacDonald's incident reported to the regulator?---No, it was not.
>
> Why not?---Because it's not - it doesn't fit into the definition of reportable incident as per the resource regulator.
>
> But you just said it was?---No. No. The incident between a dozer and a truck you described was reported to the resource regulator.
>
> But what occurred with Mr MacDonald wasn't - was not - - -?---No."
>
> "But you believe that they're both the same severity?---Yes."[xvii]

[76] In relation to the issue of procedural fairness and the Union's request to extend the date to respond to the show cause notice, in response to questions from Ms Short, Mr Oosthuizen stated

> "Are you familiar - I think you have mentioned this, but just to confirm, are you familiar with the performance improvement and discipline guidelines?---Yes.
>
> It's the case, isn't it, that under that document the company is steered away from making hastily decisions; are you aware of that?---I'm not - I'm not (indistinct) sure how."[xviii]
>
> …
>
> "At the top of the page, 'Decisions should not be made hastily, but rather in a sensible timeframe.' Are you aware of that?---Yes.
>
> And you would agree, wouldn't you, that the request for an additional day by the union to respond to the show cause on behalf of the applicant is a sensible timeframe; you would agree with that, wouldn't you?---No.
>
> Was there urgency in dealing with this matter?---No.
>
> Are you aware that the union office is a four hour or so drive away from the mine?---I don't believe so. I think it's 45 minutes, because they've got an office in Gunnedah.
>
> Are you aware that the union office in Gunnedah does not have legal or industrial officers located at it?---No. Should I?"[xix]

[77] Later in his evidence, Mr Oosthuizen gave contradictory evidence in relation to the bulldozer – truck collision

> "So it is possible, isn't it, that there are other employees or contractors on site who have breached a Safehaven rule and not been dismissed; is that correct?---Apart from Mr Beau Dawson, no.
>
> What about Mr Desmond Mutasah?---What about him?
>
> Isn't it the case that he was involved in an incident recently where he failed to make positive communication?---No.
>
> So are you familiar with an incident where Mr Paul Daniels and Mr Desmond Mutasah made contact when Mr Mutasah was operating a truck and Mr Daniels was operating a dozer?---Yes.
>
> And you're aware of that. So was Mr Desmond Mutasah or Mr Paul Daniels dismissed?---No, because none of them was involved in a Safehaven breach. That was determined through the investigation.

Is it correct that Mr Mutasah did not make positive communication with Mr Paul Daniels?---Mr Mutasah didn't (need) to make communication with Mr Daniels, no.

Is it correct that Mr Daniels did not make positive communication when he changed direction of his travel and entered the work area of Mr Mutasah?---No. Again he's not required - he was not required to through the investigation which determined that they couldn't have because they didn't know each other they were there. If I may add I think - I think there's a lot of what (if) which people don't actually know what happened by not knowing the investigation actually of this incident between Mr Daniels and Mr Mutasah (and they are making) assumptions that it is a Safehaven breach, which it clearly was not."[xx]

[78] In relation to the weekly incident summary published by the NSW Resource Regulator, Mr Oosthuizen claimed the Regulator did not make any comments about the bulldozer – truck collision.

"And are you aware that the regulator issued a weekly summary which summarised the incident between Mr Paul Daniels and Mr Desmond Mutasah?---No, they just

Are you saying that the incident down the bottom is not the incident involving Mr Mutasah and Mr Paul Daniels?---That is the photo of the incident.

You're not aware of that?---They sent out a weekly incident summary, but there was no names and no site (indistinct) were named in that one.

And are you aware that the regulator made comments to the industry about the incident involving those two employees?---No, they did not make reference to the incident involving those two employees.

You're not aware of that?---No, I'm aware of it, but they didn't make reference to that incident - - -

If I can take you - - -?---Sorry?

If I can take you to page - - -?---Can I - can I just finish? Can I finish? They did not make reference to the incident involving Mr Daniels and Mr Mutasah.

If I can take you to page 278?---Yes.

Are you saying that the incident down the bottom is not the incident involving Mr Mutasah and Mr Paul Daniels?---That is the photo of the incident."[xxi]

I note that apart from a photo of the incident, the Regulator's publication states

INCIDENT TYPE	SUMMARY	COMMENTS TO INDUSTRY

Dangerous incident IncNot0038778 Open cut coal Roads or other vehicle operating areas	As an overloaded dump truck was travelling across the working area, a dozer doing floor clean-up changed the direction of travel and reversed into the driver side rear tyre (POS-3). No one was injured.	Mine operators must have protocols and procedures to ensure positive communications are established between vehicle operators in collision zones. Consideration should be given to proximity detection and collision avoidance technologies. Supervisors must ensure that vehicle operators comply with the protocols and procedures. Ensure that any equipment mounted inside the cab, such as a fan, does not impede operator vision. Refer to: Safety Bulletin 18-06 Lack of positive communications

Witness Evidence of Jacques De Toit

[79] Mr De Toit is the General Manager of the Respondent's Gunnedah Open Cut Operations, which includes the Mine. Mr De Toit is also a Director of the Respondent. Mr De Toit has 30 years' experience in the mining industry.

[80] It was Mr De Toit's evidence that the Board of the Respondent takes safety very seriously. Mr De Toit stated that in order for the Respondent to meet its health and safety obligations all employees must comply with the Seven Safehaven Rules.

[81] Mr De Toit stated that the Mine's Seven Safehaven Rules are as follows:

i. Never work at heights above 2 metres without fall protection.
ii. Always confirm equipment is correctly isolated and de-energised before commencing work.
iii. Never operate maintenance of operational equipment unless trained and authorised.
iv. Never work on a tyre without first deflating the tyre to a safe working pressure.
v. Always follow positive communication requirements.
vi. Never enter designated exclusion or no go zones without appropriate authorisations.
vii. Always ensure you are not standing or working within the fall zone of a suspended load, unsupported roof, unstable high wall or inadequately supported load.

[82] Mr De Toit stated that the Mine's employees are regularly trained on the Seven Safehaven Rules.

[83] Mr De Toit's evidence with respect to the other circumstances where an employee had been terminated for a breach of the Seven Safehaven Rules was consistent with that of Mr Oosthuizen.

[84] Mr Du Toit admits that he was not the final decision maker in the Applicant's termination, but that, following his review of every facet of the investigation, he endorsed the recommendation and elevated the decision to Mr Humphris.

[85] Mr Du Toit confirmed that he has focused on introducing a culture of "doing the right thing right every time".

[86] Mr Du Toit confirmed that he applies the principle of the culture to all of his dealings at work, including the way that employees are treated

> "You reference your culture that you've instilled at the mine of 'doing the right thing right every time.' Do you apply that culture in all facets of your dealings at work?---Yes, I believe I do.
>
> So you would also apply that culture in the way that employees are treated?---Yes, I would.
>
> Are you aware of the performance improvement and discipline guidelines of Whitehaven?---I am, yes.
>
> Are you familiar with that document?---I am.
>
> Do you agree that it requires a discussion to occur with an employee when they are being dismissed?---Yes.
>
> Are you aware that Mr MacDonald was dismissed by way of email?---I believe that a reason there would be because Mr MacDonald did not turn up for the discussion on the Monday."[xxii]

[87] In relation to the Applicant's termination and the endorsed culture, Ms Short raised with Mr Du Toit a number of perceived inconsistencies

> "There was no notice in that letter, was there, about a dismissal meeting, was there?---No, not a specific notice to a meeting, yes, but I think there is clearly - the notice requires you to respond as to why employment should not be terminated.
>
> Is doing the right thing right every time, does that also apply to ensuring that at the time employees are dismissed they have the ability to have a support person present?---That's correct.
>
> Does your culture of doing the right thing right every time also apply to giving employees an adequate opportunity to respond to a show cause letter?---Yes, not merely the culture of operational discipline, but also the procedures of the business provides for that to happen, yes.
>
> So yes, it's also adopted in the procedures is what you're saying, is that right?---That's right, yes."[xxiii]

[88] Mr Du Toit advised that the Respondent decided not to grant the extension of time sought by the Applicant of an extra day because the delay would have an adverse effect on the Applicant:

> "Taking into the account the company extending the time period by one day, are you saying that it was reasonable in the circumstances for the company to refuse the union's request on the applicant's behalf of one further day? --- At the time the justification was given for the one day extension was not to put the person involved through a whole weekend of being left at odds, and get the process completed in that same week.
>
> Are you saying the person involved being Mr Nathan MacDonald? --- That's correct.
>
> So the reason why the company did not grant the further extension, am I correct in saying, is because the company didn't want Mr MacDonald to be in suspense over the weekend, is that right? --- That's correct."[xxiv]

[89] Mr Du Toit advised that the "psychological" advice was provided by the General Manager of People and Culture of the Respondent. I note that this General Manager did not provide a statement, nor were they put forward as a witness in the proceedings.

[90] Mr Du Toit agreed that the Respondent's policies in relation to discipline requires that decisions be made in a sensible rather than a hasty timeframe.

[91] Mr Du Toit acknowledged that the Applicant had never been disciplined in his 9.5 year career with the Respondent.

[92] Mr Du Toit testified that the Applicant had caused serious and imminent risk to the health and safety of a person:

> "Do you agree that unacceptable conduct includes non-compliance with Whitehaven Coal's policy and procedures?---Yes, I believe that's how it's described.
>
> Do you agree that serious and wilful misconduct is taken to include conduct that causes serious and imminent risk to the health and safety of a person?---Yes.
>
> In relation to the incident involving Mr MacDonald, did you come to the conclusion that his conduct caused serious and imminent risk to the health and safety of a person?---Yes, we did.
>
> Did you do that on the understanding that the water cart was turning right and Mr MacDonald was turning left at the intersection?---No, the decision was based on the fact that the light vehicle was within the 50-metre exclusion zone of the heavy vehicle without confirming positive communication.
>
> Yes, I accept that, but by Mr MacDonald being in the location he was at the time, did you conclude that he put himself or anyone else at imminent risk to his health or safety or that of others?---Yes, I did.

> And you took into account that the water cart was turning right?---Once again, the risk is not in which way the water cart was turning. It is being within the exclusion zone and outside of the field of vision of the operator of the heavy vehicle, which provides the risk."[xxv]
>
> …
>
> "Do you agree that under Whitehaven's disciplinary policy, unacceptable conduct warrants a verbal warning?---Yes, depending on the circumstances, I agree.
>
> Mr MacDonald was dismissed without notice, wasn't he?---What does that mean? Can you just clarify what that means?
>
> Mr MacDonald was summary dismissed, wasn't he?---That's correct, yes.
>
> You didn't form the view that Mr MacDonald's conduct was repeated at all, did you?---The decision was based on the single incidence, so I do not claim/repeat the (indistinct), if that's what you meant."[xxvi]

[93] In relation to a collision between a dump truck and a fuel tanker truck in 2019 at a different mine of the Respondent, Mr Du Toit was unaware whether either of the employees operating the equipment were terminated, however, he agreed that the Respondent should be consistent in applying the safety rules

> "So the case is still going - okay, fine, that's fine. But on the basis that you've inferred certainly that there needs to be consistency in application in relation to these matters, don't you think it's relevant that Whitehaven would act consistently in relation to disciplining operators who may have breached the safety rules?---I believe you're right. We should be consistent in applying the safety rules. The reference to this major incident was made for the purpose of Whitehaven's board's renewed vigour in acting stronger insofar as a safety approach goes"[xxvii]

[94] In relation to the Reportable Incident between the bulldozer and the overloaded dump truck, Mr Du Toit stated:

> "All right. There has recently been an incident at the mine where an overloaded dump truck has collided with a bulldozer. Are you aware of that incident?---Yes, I think I know what you're talking about, yes.
>
> The evidence is that neither driver made the necessary reported communication or responsible communication, yet both employees are still employed by Whitehaven?---Yes.
>
> How is that consistent based on your previous answer with what's happened to Mr MacDonald?---In this case the incident occurred as - and I'm talking purely from what I can remember here; I haven't prepared this - the dump truck was in overload mode, which meant it slowed right down. It was still on the path where it was supposed to

run. It was in the dig face, so in this case it would have been an interaction - a vehicle interaction incident, and positive communications would not have been an issue as far as I'm aware.

But that's not what the regulator says. Can I ask you to turn to page 278 of the Court book?---Yes.

So the bottom column of the bottom third of the page is all about this incident at (indistinct) mine. The third column says:

> *Mine operators must have protocols and procedures to ensure positive communications are established between vehicles operating in collision zones.*

---That's correct, yes."[xxviii]

[95] Relevantly, in response to questions from me, Mr Du Toit testified:

"So clearly what has transpired here is that there wasn't a positive communication. I don't know who should have made the positive communication, but clearly someone should have?---Yes. Once again, under correction, neither of these two operators were aware of the other, so therefore no positive communications were made.

Is that because they reversed into each other?---No.

So how are they not aware of each other?---Because the bulldozer operator was backing up and the dump truck was on its normal path, but slowed down because of the overload situation, going into limp mode, and once again, talking under correction here, the bulldozer operator looked over his left shoulder but didn't see the truck and the bulldozer was in the blind spot of the truck operator. But this is an investigation separate, and I'm not fully conversant with the outcomes here.

All I'm suggesting though is that we've got the mine regulator, who has obviously carried out an investigation, identifying that there's an issue about positive communications. I find it extremely hard to believe that an employer such as Whitehaven would allow vehicles in close proximity to reverse willy-nilly without some policy or procedure in place?---You're correct, we wouldn't allow willy-nilly movement in a dig face. The reason why this incident is referred to, this is an incident that we self-reported to the investigator and the scene was released without an on-site investigation. However, I think I understand what you're saying. In this case the anomaly was the truck was slowed down and the person operating the bulldozer didn't see it, and again standing corrected, not being fully conversant with the investigation."[xxix]

[96] Mr Du Toit claimed that neither driver was required to contact the other driver because they had been working together in the pit, ie, they knew that they were in the area, they had not just turned up to the panel, they were already in the 50 metre zone.

[97] Mr Du Toit emphasised the reportable incident in the following manner :

"If I look at the 'positive communication' paragraphs on page 104, the examples that are included on this page, aren't they exactly what transpired in this incident?---You're talking about the first bullet point, 'Ancillary and clean up equipment operating within 50 metres of a loading operation?'

Yes, and then 'When approaching mobile plant in the pit?'---Yes. The loading operation includes the excavator, the dump truck and the bulldozer that looks after the floor for that excavator. So that would be the loading operation. Ancillary clean up equipment would be a water cart, grader - - -

So this - well I call it a bulldozer, but it's a grader - so the grader driver was required to initiate positive communication?---The bulldozer was feeding dirt towards the excavator. The grader is a metal grader that looks after grade surfaces.

Well this vehicle that I'll call a grader today - I call it a bulldozer myself, but - - -?---It is a bulldozer.

But it's a cleaning device, isn't it?---In this case it prepares the floor and pushes dirt towards the excavator in a production environment.

It would fall under that definition, wouldn't it?---It depends on what it was doing, yes. It could be cleaning up, or it could be productively pushing dirt towards the face or the excavator, yes. But it could be - you're right, it could be a clean-up operation."[xxx]

…

"This appears to be a front page of this regulator's report. On your information is this report based on an investigation undertaken by the regulator, or simply the report that is provided by the mine?---The one that - 'the dozer and the dump truck' on 278?

Well for any of them I suppose, for any of the incidents?---I can only talk to our one. Our one is based on self-reporting from the MEM on site, and we would maintain the scene until the regulator lets us know that he has done his desktop review based on the information provided, and then release the scene. So I do not believe that the regulator would have visited the site for this.

So based on the report which was submitted by Mr Oosthuizen, then the regulator has come out with this comment about ensuring that positive communications are established?---I'd say so, yes."[xxxi]

Consideration

[98] I have taken into account all of the submissions of the parties and the evidence from each of the witnesses.

[99] It is well established that in an unfair dismissal proceedings based on allegations of misconduct, including serious misconduct, the onus is on the employer to prove the allegations on the balance of probabilities to the satisfaction of the Commission.[xxxii] It is equally well

established, the onus reverts to the applicant to demonstrate if the dismissal was harsh, unjust and unreasonable.

[100] In determining this matter, I have been mindful of the Briginshaw principle. While the Briginshaw principle does not raise the standard of proof beyond the balance of probabilities, the strength of the evidence needed to establish a fact on the balance of probabilities 'may vary according to the nature of what it is sought to prove [xxxiii]

[101] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines (Byrne)* (1995) 185 CLR 410 is of significance:

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."[xxxiv]

Section 387(a) Valid reason

[102] The meaning of the phrase "valid reasons" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371:

> "In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…"[xxxv]

[103] In *Rode v Burwood Mitsubishi* Print R4471, a Full Bench of the Australian Industrial Relations Commission held:

> "… the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason."[xxxvi]

[104] I am not convinced that the incident identifies as a "near miss" on the basis that I don't believe the Applicant was in any danger of being killed or injured. In response to a question from Ms Short, Mr Oosthuizen testified:

> "Did the company incur any costs related to damage to the equipment as a result of the incident?---No.
>
> Were there any injuries that resulted from the incident?---No.
>
> Would you consider that this incident was a near miss?---Yes.
>
> Do you know where the definition of a near miss is in company policy and procedures?---I think it's (indistinct) to some various procedures on the reporting of a near miss incident.
>
> Is it the case that the definition of a near miss requires for there to be a potential of contact?---I would probably say yes."[xxxvii]

[105] I don't accept the evidence of Mr Oosthuizen that the water cart would travel around the corner at the same speed, from a stationary start, as the Applicant's vehicle. Even if it did, there would be no collision because the Applicant's vehicle would be travelling a shorter distance than the water court would on the arc of the turn. Without resorting to the use of a mathematical formula, it is why they have staggered starts in athletics for races over 400 and 200 metres where athletes have to stay in their lanes to ensure that every athlete runs the same distance. Therefore, in reality, the twenty times heavier water cart would have to accelerate much faster than the Applicant's vehicle for there to be a collision if they were turning in the same direction.

[106] However, the Applicant has admitted to breaching Rule 5 of the Safehaven Rules in that he travelled inside the 50-metre exclusion zone without making positive communication with Mr Strickland. Whilst the circumstances surrounding this incident may have been unfortunate due to an assumption by the Applicant that the water cart was in the process of turning right and would have exited the intersection before his arrival, the simple fact is that this did not occur. The Applicant should have stopped, attempted to stop or simply communicated with the water cart that he was driving up on his inside. The Applicant's failure to stop, attempt to stop or failure to communicate are conclusive factors in proving that the Applicant breached the Safehaven Rules. The Respondent's policy states that any breach of the Safehaven Rules will be treated as serious misconduct.

[107] As a result, I find that the Respondent had a valid reason to terminate the Applicant.

Section 387(b) Notified of the reason

[108] It is not in dispute that the Applicant was advised that he was terminated due to a breach of Rule 5 of the Safehaven Rules.

Section 387(c) Opportunity to respond

[109] In Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport Print (2000) 98 IR 137 a Full Bench of the Commission held:

> "**[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. Much like shutting the stable door after the horse has bolted. [xxxviii]

[110] In *Wadey v YMCA Canberra* [1996] IRCA 568 Moore J provided the following principle about the right of an employee to appropriately defend allegations made by the employer:

> "[T]he 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."[xxxix]

[111] Relevantly, Gaudron and Gummow JJ in *Minister for Immigration & Multicultural Affairs v Bhardwaj* (*Bhardwaj*) [2002] HCA 11 held:

> "Procedural fairness, which is one aspect of the rules of natural justice, requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it. T**he opportunity to answer must be a reasonable opportunity. Thus, a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness.**"[xl]
>
> (My emphasis)

[112] The investigation process of the Respondent is flawed. It is not appropriate, or in any way fair, to issue an employee with a show cause letter if the investigation is not complete or findings have not been concluded. The show cause process cannot be used, as propounded by Mr Oosthuizen, to gather further information about what transpired. An employee is entitled to have a full and thorough investigation conducted, including the interviewing of appropriate personnel, proper consideration of all of the evidence by the relevant management representatives and then have a written list of allegations provided to them. The employee should then be provided with an appropriate amount of time to seek advice and respond in writing to the allegations. The employer should only then consider any findings in relation to any incident.

[113] To highlight the inadequacy of the Respondent's investigation process, it is only necessary to go back to the incident involving Mr Dawson. Mr Dawson had his termination downgraded to a final warning after the Show Cause process because it was discovered that he breached the 50-metre rule to save his own life. A proper investigation would have established this material fact before placing Mr Dawson through the stress of a show cause process where he had been threatened with dismissal.

[114] The Applicant was provided a Show Cause letter on Wednesday, 23 September 2020. He was requested to respond by 5pm on Thursday, 24 September 2020. Mr McWilliams made a request to Mr Oosthuizen that the Applicant be given an extension to respond to the Show Cause letter until close of business on Monday, 28 September 2020, ie, a further 2 business days.

> "From: Jeremy McWilliams [email address redacted]
> Sent: Wednesday, 23 September 2020 4:12 PM
> To: Tian Oosthuizen [email address redacted]
> CC: Jennifer Short [email address redacted]; Jason Elks [email address redacted]
> Subject: Nathan McDonald – Show Cause
>
> Tian,
>
> I understand that you have issued a Show Cause letter to our Member Nathan McDonald today.
>
> I further understand that you require Nathan to attend a meeting tomorrow afternoon at 5pm to provide a response to your Show Cause Letter.
>
> Such a short timeframe to respond under these circumstances is totally unreasonable, accordingly we request an extension to tomorrow's deadline to respond.
>
> I can indicate that we would be in a position to formally respond in writing by COB Monday, 28 September 2020 and I further indicate that I will be in attendance at the follow up meeting representing Nathan and that I am available to meet on Tuesday, 29 September 2020 from 3pm.
>
> Please confirm as soon as possible that you are agreeable with the above requests"[xli]

[115] The Respondent denied the request but granted an extension of one day until Friday, 25 September 2020. Interestingly, Mr Oosthuizen claims that one of the reasons for the urgency was due to the seriousness of the Incident and also because the Applicant refused to participate in the investigation.

> "From Tian Oosthuizen [email address redacted]
> Sent: Thursday, 24 September 2020 7:38 AM
> To: Jeremy McWilliams [email address redacted]
> Cc: Jennifer Short [email address redacted]; Jason Elks [email address redacted]; Stewart Bramich [email address redacted]
> Subject: RE: Nathan McDonald – Show Cause
>
> Good Morning Jeremy,
>
> We note your email dated Wednesday 23 September 2020, and the request for additional time in which to respond.

> To allow you to assist your member, but given the seriousness of this incident and his failure to participate in the investigation, we have extended the response time to Friday 4.00pm 25 September 2020.
>
> Furthermore, whilst we note your availability on Tuesday, we welcome the employee organisation to include you via phone on Monday to include an alternate support person for a determination meeting at 9.00am Monday 28 September 2020, which is the new time set for the determination.
>
> Whilst we note the CFEMU desire to participate, we also need to ensure our process is a due process that is designed to remedy such situations expediently and fairly as practical, and significantly reduce the delays and impacts upon the employee and the business in these circumstances.
>
> We also note your representation and therefore will allow you to liaise with your member upon the updated Show Cause Response being Friday 4.00pm the 25th of September 2020 and the determination meeting being 9.00am Monday 28 September 2020.
>
> Regards,
> Tian Oosthuizen
> Operations Manager Tarrawonga Mine"[xlii]

[116] I note that Mr Du Toit testified that the urgency was due to the Respondent being concerned about the wellbeing of the Applicant and not dragging the matter out over the weekend. There is no evidence before the Commission of the Applicant failing or refusing to participate in the investigation between the time of the incident on 22 September 2020 and the email from Mr Oosthuizen at 7:38am on 24 September 2020.

[117] When considering the precursor to section 387(c) of the Act in *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200 a Full Bench of Fair Work Australia stated:

> **"[26]** The Full Bench in *Osman* described this obligation as requiring the employer to take reasonable steps to investigate the allegations and give the employee a fair chance of answering them. It adopted comments of Chief Justice Wilcox in *Gibson v Bosmac Pty Limited (Gibson)*, approved by Justice Northrop in *Selvachandran*, where Chief Justice Wilcox said:
>
> > "Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However, I also pointed out that the section does not require any particularly formality. It is intended to be applied in a practical common-sense way so as to ensure that the affected employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section."[xliii]

[118] Mr Oosthuizen had clearly made up his mind that the Applicant had breached the Safehaven Rules and that termination was the only outcome of any investigation, no matter what the Applicant said in his defence. The request by the CFMMEU for a two working day extension to allow the Applicant to converse with the Union Legal Officer and submit a response to the show cause letter was not an unreasonable request.

[119] The Applicant was entitled to an appropriate period of time to respond to the show cause letter, particularly when the Respondent's investigation had not yet concluded and when the Respondent was seeking additional information from the Applicant in relation to the Incident.

[120] How an employee gets their statutory right to a "fair go" is beyond my contemplation if they do not have the time to seek assistance from their Union representative. Based on the comments of Chief Justice Willcox in *Gibson*, for the Respondent to unilaterally proceed to terminate the Applicant without a response to the Show Cause letter based on the unavailability of the Applicant's legal representative displays a lack of procedural fairness.

[121] I find that the Respondent did not give the Applicant an opportunity to respond.

Section 387(d) Refusal of support person

[122] In relation to section 387(d) of the Act, paragraph 1542 of the Explanatory Memorandum of the Act states:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them. It will be one factor FWA must consider when determining whether a dismissal was unfair, having regard to all of the circumstances, including the capacity of the employee to respond to the allegations put to him or her without such a support person being present."[xliv]

[123] Commissioner Lewin in *Laker v Bendigo and Adelaide Bank Limited (Laker*)[2010] FWA 5713, held:

> **"[26]** Mr Laker was without representation at the termination meeting due to the unavailability of a representative of the Financial Sector Union on the 30 October 2009. Mr Laker made a request that the meeting be rescheduled in order to enable his chosen representative to attend. Bendigo Bank declined to reschedule the meeting because of the availability of Mr Petering, the Regional Manager - Eastern Region, on alternative dates. I consider that in the relevant circumstances there is an element of unreasonableness in Bendigo Bank's refusal to postpone the termination meeting to a later date which would have enabled Mr Laker to be represented at the postponed meeting. It is debatable if the refusal to postpone the meeting was a refusal of representation, however it had that effect."[xlv]

> **[32]** On balance, I have decided that there was an element of unreasonableness in the termination of Mr Laker's employment in all the circumstances of the case. While I have found that there was a valid reason for the termination of Mr Laker's employment, there was an element of unreasonableness in the conduct of the termination meeting at a time when Mr Laker had requested an adjournment. While I accept that Mr Laker had been notified of a meeting to take place on this date and he may well have failed to take adequate notice of it, nevertheless, in all the circumstances, his request for an adjournment did not present an unreasonable burden upon the Bank. The adjournment need not have been lengthy, but would have enabled Mr Laker to be represented. In addition, this would have allowed Mr Laker to take full advantage of preparation in order to respond to the reason for the termination for his employment when it arose. Whether this is considered under the heading of a reasonable opportunity to respond to the reason for the termination of Mr Laker's employment or an unreasonable refusal to allow Mr Laker to have a support person present for the purposes of discussion at the termination meeting or as another relevant matter to those criteria otherwise prescribed by s.387 of the Act, or all three when considered in context, is not axiomatic for the purposes of determining whether or not the termination was harsh, unjust or unreasonable."[xlvi]

[124] Mr McWilliams advised that he was unavailable on 28 September 2020 because he had to attend the Commission in relation to another former employee of the Respondent but would be available to meet on Tuesday, 29 September 2020 to discuss the outcome of the show cause process. The Respondent denied this request.

[125] Following the decision in *Laker*, I find that the action of the Respondent in not rescheduling the outcome meeting to another time to allow Mr McWilliams to attend is a breach of section 387(d) of the Act.

Section 387(e) Warning about unsatisfactory performance

[126] The Applicant was not dismissed for unsatisfactory performance. The Applicant had an exemplary employment record with not a single warning on his personnel file.

Section 387(f) Size of enterprise – procedures followed

[127] It is not in dispute that the Respondent is a large employer in the coal mining industry in NSW.

Section 387(g) Dedicated HR management

[128] It is not in dispute that the Respondent has a dedicated human resources team which employs human resources specialists.

Section 387(h) Any other matter

[129] Mr Oosthuizen's approach to the Work Health and Safety Committee meetings appears to be poorly focused. He claims that he was unaware of the Applicant being elected to the Work Health and Safety Committee and that he only attended one meeting. Further, there were a number of visitors at that meeting so he may have only been a visitor. I am unaware of how the Respondent's Work Health and Safety Committee meetings are conducted but for the Respondent's representative to be unaware of the identity of the Committee members and the names or identity of any visitors at a meeting is reprehensible.

[130] Mr Oosthizen attempted to justify the flawed investigation process that he undertook of the Incident. It is difficult to believe that any lead investigator would not inverview the three relevant employees, namely the Applicant, Mr McCarthy and Mr Strickland. It is also difficult to understand why the Applicant was sent a show cause letter if any findings against the Applicant had only been "partially made out" at that point.

[131] Mr Oosthuizen failed to adequately explain where and how there was potential for contact between the vehicle being driven by the Applicant and the water cart. He claimed that the water cart would simply take up all of the room on the road if it had turned left, thereby crushing the Applicant's vehicle. Such a scenario is simply not true. The re-enactment photo shows the worn tyre marks on the road – one set for heavy vehicles, one set for light vehicles.[xlvii] The tyre marks do not converge. The photo shows that there is more than sufficient room for both vehicles to turn at the same time, without the vehicles colliding. Based on the evidence of all of the witnesses, the water cart needs to use the full width of the road to turn the corner.

[132] The Applicant had worked for the Respondent for 9 ½ years. It is not in dispute that his record was unblemished. In *Streeter v Telstra Corporation Limited* [2008] AIRCFB 15 the Full Bench held:

> "In respect of s.652(3)(g) of the Act, we think it weighs in favour of a conclusion that the termination of Ms Streeter's employment by Telstra was harsh, unjust or unreasonable that Ms Streeter had worked for Telstra since 2002, that her employment record with Telstra had previously been satisfactory and that her termination was without notice."

[133] It is well established that an employer should not notify an employee of their termination via email. The Applicant argued that being advised of his termination by email showed a lack of dignity by the employer. In *Wallace v AFS Security 24/7 Pty Ltd* [2019] FWC 4292 Commissioner Cambridge observed as follows:

> "[51] Notification of dismissal should not be made by text message or other electronic communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous. Even in circumstances where text message or other electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation"

[134] The Applicant argued that he was treated differently to some of his colleagues. In *Sexton v Pacific National (ACT) Pty Ltd (Sexton)* PR931440 Lawler VP, held:

> **"[33]** It is settled that the differential treatment of comparable cases can be a relevant matter under s.170CG(3)(e) to consider in determining whether a termination has been "harsh, unjust or unreasonable". In *National Jet Systems Pty Ltd v Mollinger* the Full Bench concluded that in the particular factual circumstances it was appropriate for the member of the Commission at first instance to have regard to different treatment afforded to another employee involved in the same incident.
>
> …..
>
> **[36]** In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a "fair go all round" within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing "apples with apples". There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. Obviously, where, as in *National Jet Systems*, there is differential treatment between persons involved in the same incident the Commission can more readily conclude that the cases are properly comparable. However, even then the Commission must approach the matter with caution. Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of particular misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent. Another worker guilty of the same misconduct could not necessarily rely upon the leniency shown to the first worker as a basis for demonstrating that his or her termination was harsh, unjust or unreasonable. Many other examples could be constructed.

[135] In *Fagan v Department of Human Services* (*Fagan)* [2012] FWA 3043 it was held

> "**[64]** Having considered all of the material, I have formed the view that there was differential treatment of Mr Fagan compared with Mr Malloy in circumstances that were comparable. Both Mr Fagan and Mr Malloy were telephoned by clients requesting toilet paper and water respectively. Both staff members unlocked the client's doors during prescribed lockdown hours and were assaulted. In terms of the circumstances of the two incidents as set out above, I am satisfied that the comparison is "*apples with apples*".

[136] The Respondent argued that the conduct of the Applicant was not comparable to the two employees involved in the Reportable Incident. Mr Oosthuizen's evidence is contradictory. He initially said the severity of the two incidents were the same. Later he said that the collision was not a breach of the Safehaven Rules. Mr Du Toit evidence is inconsistent. The evidence of Mr McCarthy is at odds with that of Mr Oosthuizen.

[137] I find the evidence of Mr Oosthuizen in relation to the Reportable Incident to be inaccurate. Mr Oosthuizen claimed that the NSW Resource Regulator did not make a comment

or provide advice in relation to the collision between the bulldozer and the dump truck. Annexure NM 8 of exhibit 2 clearly shows this evidence to be inaccurate.[xlviii] The Regulator identified this collision to be a "dangerous incident" which required the establishment of positive communication.

[138] Mr McCarthy's evidence was that the 50-metre rule should have been observed and that positive communication should have been established. Mr McCarthy, who was called out on night shift to attend the Reportable Incident, testified that the Reportable Incident was more serious than the incident involving the Applicant.

[139] Mr Oosthuizen claimed that the Reportable Incident was not as serious because it did not breach the Safehaven Rules. That claim is debatable. Mr Du Toit accepted that the bulldozer in the Reportable Incident may have been performing "clean up" work. Mr McCarthy testified that the bulldozer was undertaking clean-up work. Relevantly, two of the examples used in association with Rule 5 – Positive Communication of the Safehaven Rules state:

- "Ancillary and clean up equipment operating within 50 metres of a loading operation
- When approaching mobile plant in the pit"[xlix]

I am satisfied that the Reportable Incident was bound by the Safehaven Rules.

[140] Even if I am wrong and the Reportable Incident does not breach the Safehaven Rules, common sense would dictate that a collision between two very large vehicles, for which it is compulsory to report to the Regulator, is a far more serious safety incident than an incident where a light vehicle has been driven up the left hand side of a heavy vehicle at an intersection where the driver of the heavy vehicle has verbally indicated that he is turning right, has switched on his indicator to turn right and has waited or baulked at the intersection whilst giving way to a vehicle traveling from his left.

[141] I am satisfied and find that the Applicant was subject of differential treatment compared to the two employees who were involved in the Reportable Incident. I am satisfied that my comparison fits with the "apples with apples" analogy.

[142] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* (*Australian Meat Holdings*) (1998) 84 IR 1 held:

> "The above extract is authority for the proposition that a termination of employment may be:
>
> - unjust, because the employee was not guilty of the misconduct on which the employer acted;
> - unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or
> - harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct"[l]

[143] The Applicant lives in Manilla in NSW. Manilla is less than one hours drive north from Tamworth and approximately one hours drive east of Gunnedah. The Applicant's evidence is

that there are only three mines in the area, two of which are operated by the Respondent. The Applicant advised that he was offered a role at the Respondent's other mine but that offer was subsequently withdrawn. The Applicant advised that there were no employment vacancies at the third mine. There are no coal mines in the Tamworth region.

[144] In *Dennis Sipple v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Warkworth Operations (Sipple)* [2015] FWCFB 5728, the majority of the Full Bench held:

> "**[28]** A dismissal almost invariably has adverse consequences for the employee dismissed. In Mr Sipple's case, those consequences are likely to be somewhat greater than average because of his injury, his age and his poor literacy. His family commitments, while no doubt genuine, do not appear to be out of the ordinary. His length of service is relatively long, and is a factor that points to unfairness."

[145] *Sipple* can be distinguished on the facts. There are no employment opportunities for the Applicant within the New England or Namoi Valley region of NSW which offer a similar or even comparable rate of pay, except for the three mines near Gunnedah. For the Applicant to pursue his career in the mining industry he would basically have to move his family to either the Hunter Valley in NSW or to Queensland. That was not the scenario in *Sipple*. Further, the Applicant advised that he has caring responsibilities for his elderly mother.

[146] Paragraph 1541 of the Explanatory Memorandum of the Act states:

> "FWA must consider all of the above factors in totality. It is intended that FWA will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative."

[147] A Full Bench of the Commission in B, C and D v Australian Postal Corporation t/a Australia Post (*Australia Post*) [2013] FWCFB 6191

> **"[41]** Nevertheless, it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" for the dismissal": *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *J Boag & Son Brewing Pty Ltd v John Button* [2010] FWAFB 4022; *Windsor Smith v Liu* [1998] Print Q3462; *Caspanello v Telstra Corporation Limited* [2002] AIRC 1171; *King v Freshmore (Vic) Pty Ltd* [2000] Print S4213; *Dahlstrom v Wagstaff Cranbourne Pty Ltd* [2000] Print T1001; *Erskine v Chalmers Industries Pty Ltd* [2001] PR902746 citing Allied Express Transport Pty Ltd (1998) 81 IR 410 at 413; *Qantas Airways Limited v Cornwall* (1998) 82 IR 102 at 109; *ALH Group Pty Ltd T/A the Royal Exchange Hotel v Mulhall* [2002] PR919205. That principle reflects the approach of the High Court in *Victoria v Commonwealth* and is consequence of the reality that in any given case there may be "relevant matters" that *do not* bear upon whether there was a "valid reason" for the dismissal but *do* bear upon whether the dismissal was "harsh, unjust or unreasonable"."

Conclusion

[148] The Respondent has a statutory obligation to provide a safe workplace. I welcome the recent focus of the Board of the Respondent to improve the safety standards at the Mine. The mining industry is an inherently dangerous industry.

[149] Whilst the Applicant's breach of the Safehaven Rules could be described by some as minor and the description of the Incident as a "near miss" could be regarded as being improbable, there is no doubt that the Applicant did not positively communicate with the operator of the water cart, as required by Rule 5 of the Safehaven Rules. The Applicant should have either stopped or communicated with the water cart operator. As a result, I have earlier found that the Respondent had a valid reason to terminate the Applicant.

[150] However, the Applicant was denied basic procedural fairness in the termination process. As a Full Bench of the Commission stated in *Australia Post*, "it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" for the dismissal."[li]

[151] The Applicant's representative, the CFMMEU, asked for a two-business day extension to respond to the Show Cause letter. This request was not agreed to. The Applicant's representative asked for the meeting between the parties to discuss the Show Cause outcome be delayed by 24 hours to allow his attendance. This request was also denied. The Applicant did not provide any further information. These refusals amounted to the Applicant being denied a *reasonable opportunity to answer the case against him*. Thus, in accordance with the obiter in *Bhardwaj* and also the decision in *Laker,* the Respondent's *failure to accede to a reasonable request for an adjournment constituted procedural unfairness.*[lii] This lack of procedural fairness makes the Applicant's termination unjust.

[152] Taking guidance from the decisions of *Fagan* and *Sexton* the Commission must be cautious when determining a claim of differential treatment. Essentially, the Commission must be confident that it is comparing "apples with apples." I find that the Applicant was dealt with in an inconsistent and different manner to two of his former colleagues who were involved in an actual collision between a bulldozer and an overloaded dump truck (**the Reportable Incident**). In this regard, I prefer the evidence of Mr McCarthy over that of Mr Oosthuizen. The Reportable Incident was a more serious incident than the Incident involving the Applicant. The differential treatment handed out to the Applicant compared to some of his colleagues, in accordance with the decisions cited above, renders the termination of the Applicant unreasonable.

[153] Following the ratio decidendi in *Australian Meat Holdings,* I have examined the Applicant's personal circumstances. I find that the personal circumstances of the Applicant to be out of the ordinary. The Applicant lives in a small town in regional NSW. There is no prospect of the Applicant obtaining a job within a few hundred kilometres of his residence with rates of pay or conditions of employment which are remotely comparable to what he was receiving at the Respondent. The Applicant was the primary source of income for his family. I also find that it would not be fair to the Applicant's elderly mother, if a family member who is providing her care was forced to move away to find work based on all of the circumstances in this case. For these reasons, the Applicant's termination was harsh.

[154] The Applicant has apologised for his conduct. I believe that he is truly remorseful. It is undoubtedly very embarrassing for the Applicant, who had been elected by his peers to sit on the Workplace Health and Safety Committee, to be dismissed for breaching one of the Safehaven Rules. I accept that the Applicant has learnt his lesson from this misconduct.

[155] The human resources disciplinary process adopted by the Respondent are inadequate. The hastiness adopted by the Respondent in investigating the Incident was not in accordance with its own policy. There were no justifiable reasons to conclude the investigation into the Incident so expeditiously. The actions of the Respondent effectively turned a very strong case with a valid reason to one with little or no procedural fairness.

[156] For the reasons stated above, I find that, despite the Respondent having a valid reason to terminate the Applicant, the Applicant's termination was harsh, unjust and unreasonable.

Remedy

[157] Having found that the Applicant was unfairly dismissed within the meaning of section 385 of the Act, I now must determine the appropriate remedy.

[158] Section 390 of the Act states as follows:

> **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.

[159] Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless I am satisfied that reinstatement is inappropriate.

[160] The Respondent made the following submission with respect to whether the Commission should reinstate the Applicant:

> "if the Commission were to conclude that there was a valid reason and contrary to these submissions that the dismissal was nonetheless harsh, unjust or unreasonable, in my respectful submission this Commission could not in good conscience reinstate Mr MacDonald given the gravity of the conduct"[liii]

[161] Taking the above submission at its highest the Respondent is stating that they have lost trust and confidence in the Applicant and thus it is not feasible to re-establish the employment relationship.

[162] In *Perkins v Grace Worldwide (Aust) Pty Ltd* (*Perkins*) (1997) 72 IR 186 a Full Court of the Industrial Relations Court considered how a 'loss of trust and confidence' will affect a determination as to whether it is 'practical' to reinstate an Applicant.

> "Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.
>
> It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. **But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making.** If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable."[liv]
>
> (My emphasis)

[163] As extracted above, in *Perkins* the Full Court refers to the potential inconvenience felt by an employer when an employee is reinstated by the Commission. Notably, the Full Court states that this occurrence arose because the employer terminated an employee *"without a valid reason or without extending procedural fairness to the employee"*. The Full Court clearly envisages a circumstance where an employer had a valid reason to terminate an employee, but despite this it is not impractical for the Commission to reinstate that employee.

[164] I note that *Perkins* was determined under the *Industrial Relations Act 1988* (**the IR Act**). A Full Bench of the Commission in *Nguyen v Vietnamese Community in Australia t/a*

Vietnamese Community Ethnic School South Australia Chapter (Nguyen) [2014] FWCFB 7198 applied the reasoning of Perkins to a test of appropriateness as is required by section 390 of the Act:

> "…although Perkins was decided under the IR Act, the Court's observations reproduced above remain relevant to the question of whether reinstatement is appropriate in a particular case."[lv]

[165] In *Nguyen* the Full Bench of the Commission outlined the propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate. At [27] the Full Bench stated:

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

[166] The Respondent's submission on reinstatement is that the Commission should not reinstate the Applicant because of the "gravity of the conduct." In fairness to the Respondent, each of the Respondent's witnesses spoke about the importance of employees of the Respondent complying with the Safehaven Rules. This evidence must be accepted and given significant weight when considering whether there is a *'sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed'*.

[167] The Respondent did not put evidence to the Commission that demonstrated the Applicant's singular breach of the Safehaven Rules suggested that the Applicant would, if reinstated, breach the Safehaven Rules on another occasion. In fact, other than evidence that established why it is important for employees to comply with the Safehaven Rules, the Respondent did not lead any direct evidence that went to why the Respondent has lost trust and confidence in the Applicant.

[168] The Applicant on the other hand has conceded that he has breached the relevant Safehaven Rules and accepted responsibility for his lapse in judgement. The Applicant's contrition is clear from his witness evidence:

> "67. I am sincerely remorseful for failing to make positive communication with the water cart prior to entering the 50/30 zone. I am willing to do anything to show how remorseful I am. For example, I am willing to receive a Warning, and stand up in front of all crews and deliver a speech about the importance of positive communication. I am also willing to forgo a period with no pay. I am also willing to provide a formal apology to the Respondent's leadership team who I have caused an inconvenience to.
>
> 68. I pride myself on placing safety as the number one priority at work. This is evident by my nine (9) years and (5) months at the mine, with no involvement in an incident and no discipline.
>
> 69. I am disappointed with myself.
>
> 70. The incident was not intentional and was a lapse in judgement. I can assure you I have learnt my lesson and from this and going forward I will be totally focussed on everything I do."[lvii]

[169] As noted in *Nguyen,* the Respondent bares the onus of establishing that on a *sound basis* they have lost trust and confidence in the Applicant. Having *carefully scrutinised* the parties' evidence, I find that there is no such basis to conclude that the Respondent has lost trust and confidence in the Applicant or if trust and confidence has been lost then it can be restored.

[170] The Respondent did not contend any other basis by which the Commission should not conclude that reinstatement is inappropriate. The Applicant is physically and mentally able to return to work. The Applicant appreciates the seriousness of his conduct and has committed to work consistently with the Respondent's Safehaven Rules.

[171] I find that, in all of the circumstances, reinstatement is appropriate.

[172] I am satisfied that it is open to me to make an order reinstating the Applicant within 7 days of the date of this decision to the position in which the Applicant was employed immediately before the dismissal.

[173] I so Order.

[174] In all the circumstances, I consider it appropriate to make an order to maintain the Applicant's continuity of employment and period of continuous service with the employer.

[175] I so Order.

[176] Section 391(3) of the Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to the Applicant an amount for the remuneration lost, or likely to have been lost, by the Applicant because of the dismissal.

[177] Section 391(4) of the FW Act provides that, in determining an amount for the purposes of such an order, the Commission must take into account:

a. the amount of any remuneration earned by the Applicant 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 Applicant during the period between the making of the order for reinstatement and the actual reinstatement.

[178] I am satisfied that the Applicant has been unemployed since the dismissal some 26 weeks ago.

[179] I am satisfied that the Applicant has attempted to mitigate his loss by seeking alternative employment. Unfortunately, the Applicant has not been successful in finding another job. I find that any order I am to make for lost remuneration should be discounted by 3 days to equate the discipline for the Applicant in the same manner as those involved in the Reportable Incident. It would also be appropriate for the Applicant to be issued with a final warning in acknowledgement of the Applicant's misconduct.

[180] I considerate it appropriate to make an order for the Respondent to pay the Applicant 25 weeks' pay at the Applicant's normal rate.

[181] I so Order.

COMMISSIONER

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[i] The Witness statement of Nathan MacDonald 20 November 2020, Annexure 6.

[ii] The Witness statement of Nathan MacDonald 20 November 2020, Annexure 6.

[iii] The Applicant's Outline of Submissions [46]

[iv] The Applicant's Outline of Submissions [67]

[v] Transcript of proceedings, PN1027

[vi] The Witness statement of Nathan MacDonald 20 November 2020, [24]-[25]

[vii] Transcript of proceedings, PN159

[viii] The Witness statement of Beau Dawson 23 November 2020, [3]-[4].

[ix] The Witness statement of Clinton McCarthy 14 December 2020, [5] [13].

[x] Transcript of proceedings, PN317-319

[xi] Transcript of proceedings, PN383

[xii] Transcript of proceedings, PN449-452

[xiii] Transcript of proceedings, PN455-458

[xiv] Transcript of proceedings, PN495

[xv] The Witness statement of Nathan MacDonald 20 November 2020, Annexure 4.

[xvi] Transcript of proceedings, PN561-565

[xvii] Transcript of proceedings, PN637-641

[xviii] Transcript of proceedings, 664-665

[xix] Transcript of proceedings, PN667-669

[xx] Transcript of proceedings, 684 -690.

[xxi] Transcript of proceedings, PN691-698

[xxii] Transcript of proceedings, PN863-868

[xxiii] Transcript of Proceedings, PN871-874

[xxiv] Transcript of Proceedings, PN877-879

[xxv] Transcript of Proceedings, PN896-901

[xxvi] Transcript of Proceedings, PN904-907

[xxvii] Transcript of Proceedings, PN937

[xxviii] Transcript of Proceedings, PN942-948

[xxix] Transcript of Proceedings, PN949-952

[xxx] Transcript of Proceedings, PN967-972

[xxxi] Transcript of Proceedings, PN986-988

[xxxii] See generally *Michael King v Freshmore (Vic) Pty Ltd* [2000]; *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3)* (1990) 35 IR 70.

[xxxiii] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

[xxxiv] *Byrne v Australian Airlines (Byrne)* (1995) 185 CLR 410 [128].

[xxxv] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[xxxvi] *Rode v Burwood Mitsubishi* Print R4471, [19].

[xxxvii] Transcript of proceedings, PN493-497

[xxxviii] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport Print* (2000) 98 IR 137, [73].

[xxxix] *Wadey v YMCA Canberra* [1996] IRCA 568, [85].

[xl] *Minister for Immigration & Multicultural Affairs v Bhardwaj* (*Bhardwaj*) [2002] HCA 11, [40].

[xli] Witness statement of Jeremy McWilliams 20 November 2020, Annexure 1

[xlii] Witness statement of Jeremy McWilliams 20 November 2020, Annexure 2

[xliii] *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200, [26].

[xliv] Explanatory Memorandum of the Fair Work Act, [1542].

[xlv] *Laker v Bendigo and Adelaide Bank Limited* [2010] FWA 571*3, [26].*

xlvi Laker v Bendigo and Adelaide Bank Limited [2010] FWA 5713, *[32].*

[xlvii] The Witness statement of Nathan MacDonald 16 December 2020, Annexure 9.

[xlviii] The Witness statement of Nathan MacDonald 16 December 2020, Annexure 8.

[xlix] The Witness statement of Nathan MacDonald 20 November 2020, Annexure 2.

[l] *Australia Meat Holdings Pty Ltd v McLauchlan* (1994) 53 IR 224

[li] B, C and D v Australian Postal Corporation t/a Australia Post (*Australia Post*) [2013] FWCFB 6191, [41].

[lii] *Minister for Immigration & Multicultural Affairs v Bhardwaj* (*Bhardwaj*) [2002] HCA 11 at [40]

[liii] Transcript 22 December 2020 [1038]

[liv] *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186, 191.

[lv] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 [21]

[lvi] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 [27].

[lvii] Witness statement of Nathan MacDonald dated 10 November 2020