



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Rodney Roach

v

Pacific National Services Pty Ltd
(U2021/8860)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 21 JANUARY 2022

Application for relief from unfair dismissal – valid reason for dismissal – dismissal not harsh, unjust or unreasonable – application dismissed.

Introduction

[1] Mr Rodney Roach was employed by Pacific National Services Pty Ltd (*PN*) as a train driver until his dismissal on 13 September 2021. Mr Roach was paid five weeks' pay in lieu of notice on his dismissal. Mr Roach contends that his dismissal was harsh, unjust and unreasonable. PN denies those allegations.

[2] Initially Mr Roach sought the remedies of reinstatement and backpay. At the commencement of the hearing, Mr Roach's representative informed the Fair Work Commission (*Commission*) that he was no longer seeking reinstatement and backpay and was instead seeking the remedy of compensation for his alleged unfair dismissal.

[3] I heard Mr Roach's unfair dismissal case against PN on 17 January 2022. Mr Roach gave evidence in support of his case. He also tendered a statement made by Mr Gregory Cameron of the RTBU, who was not required for cross examination. PN adduced evidence from Mr Peter Cowan, Manager Operations Gracemere depot (Qld) for PN.

Initial matters to be considered

[4] Section 396 of the *Fair Work Act 2009* (Cth) (*Act*) sets out four matters which I am required to decide before I consider the merits of the application.

[5] There is no dispute between the parties and I am satisfied on the evidence that:

- (a) Mr Roach's application for unfair dismissal was made within the period required in s 394(2) of the Act;
- (b) Mr Roach was a person protected from unfair dismissal;

- (c) the Small Business Fair Dismissal Code did not apply to Mr Roach’s dismissal; and
- (d) Mr Roach’s dismissal was not a genuine redundancy.

Was the dismissal harsh, unjust or unreasonable?

[6] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Roach’s dismissal was harsh, unjust and/or unreasonable. I will address each of these matters in turn below.

Valid reason (s 387(a))

General principles

[7] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.¹ In order to be “valid”, the reason for the dismissal should be “sound, defensible and well founded”² and should not be “capricious, fanciful, spiteful or prejudiced.”³

[8] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁴ The question the Commission must address is whether there was a valid reason for the dismissal related to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees).⁵

[9] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.⁶ It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.⁷

[10] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.⁸ In cases such as the present where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.⁹

PN’s case re valid reasons

¹ *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

² *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

³ *Ibid*

⁴ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

⁵ *Ibid*

⁶ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213
[24]

⁷ *Ibid*

⁸ *Ibid*

⁹ *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J

[11] Mr Roach's employment was terminated because he presented for work on 20 July 2021 and returned a positive result for cannabinoids (cannabis) in a random drug test conducted that day. PN contends that Mr Roach's conduct in that regard amounted to a breach of PN's Drug and Alcohol at Work Policy (*D&A Policy*), Drug and Alcohol Management Policy (*D&A Management Policy*), and its Code of Conduct.

Relevant facts

[12] Mr Roach was employed by PN for about 41 years prior to his dismissal. He commenced with PN as a trainee engineman and worked his way up to become a fully qualified locomotive driver. During a period of about 12 months prior to his dismissal, Mr Roach worked for PN as a Terminal Operator so that he could work a more predictable roster.

[13] On both Friday, 16 July 2021 and Saturday, 17 July 2021, Mr Roach drank a substantial amount of alcohol. On one of those nights, he cannot now recall which, he also smoked marijuana from a pipe while he was extremely intoxicated. I accept Mr Roach's evidence that he cannot recall smoking the marijuana. On the morning after he had done so, his wife informed him that he had inhaled 2-3 times from her marijuana pipe.

[14] On Monday, 19 July 2021, Mr Roach attended for work as usual. He was not subjected to a random drug and alcohol test on that day. On Monday, 19 July 2021, Mr Roach drove a PN 4WD work vehicle on a public road to the Port Waratah Coal Terminal, before he entered a restricted site and undertook his role monitoring the unloading of two coal trains carrying approximately 15,000 tonnes of coal. As part of his role on that day, Mr Roach was responsible for the safe unloading of two 1.5km long coal trains weighing approximately 10,000 tonnes. Mr Roach was the sole PN employee monitoring the unloading process, checking the wagon door operation and the flow of coal from the wagons into the unload pit. It was Mr Roach's responsibility to communicate with the train drivers located at the front of the train (up to 1.5km away) in the event there was an unload process issue. This may include a wagon door malfunction or coal build up in the pit, both of which have the potential to cause a derailment. These events could have required Mr Roach to enact the necessary isolation process to rectify the issue.

[15] Mr Roach's role on 19 and 20 July 2021 involved safety critical work. Mr Roach's safety, and the safety and wellbeing of his team members, depended on each team member being alert, vigilant and performing their role safely.

[16] On Tuesday, 20 July 2021, Mr Roach attended for work as usual. I accept Mr Roach's evidence that he did not feel impaired, unwell or any effects from the marijuana he had consumed a few days earlier. That evidence does not, however, establish that Mr Roach was not, in fact, impaired. In any event, Mr Roach was not dismissed for being discernibly affected by drugs at work; he was dismissed because he attended work with a proscribed level of cannabinoids in his system.

[17] I also accept Mr Roach's evidence that although he does not understand the science associated with how long marijuana stays in a person's system after consumption, he understood that there was a "slim possibility" that cannabis remained in his system when he attended work on Monday, 19 July 2021 and Tuesday, 20 July 2021. That explains why Mr Roach said words to the effect of "I may not pass" when he was asked on the morning of 20 July 2021 to undertake a drug and alcohol test at work.

[18] Mr Roach recorded a negative reading for the alcohol test on 20 July 2021, but he recorded a non-negative result for his urine drug test. Mr Roach was stood down on pay pending the results of the urinalysis test at a laboratory.

[19] Mr Roach tested positive for cannabinoids at 97 ug/L, which is above the Australian Standard urine test (MS109) threshold of 15 ug/L.

[20] By letter dated 26 July 2021, it was put to Mr Roach that by failing the drug test on 20 July 2021 he had breached the D&A Policy, the D&A Management Policy and the Code of Conduct.

[21] On 2 August 2021, Mr Roach responded to the letter of allegations. He admitted to smoking cannabis, raised various points in mitigation, and apologised to PN for his actions.

[22] Mr Roach had the assistance of his union (the RTBU) to respond to the letter of allegations.

[23] By letter dated 11 August 2021, Mr Roach was invited to show cause as to why his employment should not be terminated.

[24] By letter dated 23 August 2021, Mr Roach responded to the show cause letter. In his response, Mr Roach accepted that he had failed to comply with his responsibility not to take illegal drugs, apologised again for his actions, and raised a number of points in mitigation.

[25] On 23 August 2021, Mr Roach visited Laverty Pathology at East Maitland of his own accord and underwent another urine drug test. The results of that test indicated that there were no cannabis metabolites in Mr Roach's urine.

[26] On 13 September 2021, Mr Roach attended a meeting, by video conference, with PN. During this meeting Mr Roach was informed that his employment with PN was being terminated. Mr Roach was also provided with a letter of termination. The reason for dismissal was put in the following way in the letter of termination:

“Pacific National is committed to ensuring the health and safety of its employees, which requires all employees to attend for duty fit and able to safely perform their duties and not present for work with any illicit drug(s) in their system. Pacific National no longer has trust and confidence in you to perform your role in a safe manner. Your misconduct has resulted in a breach of trust and confidence in the employment relationship.”

[27] There is no dispute that Mr Roach understood his obligations under the relevant policies. Those policies relevantly provide:

- PN has a drug-free standard for its work sites
- It is the responsibility of all employees to present for work unaffected by alcohol or other drugs

- If an employee is found to have attended for work with a non-negative test for drugs, they will be subject to disciplinary action up to and including termination of employment
- While at work no one is permitted to have an illicit drug in their system, including cannabis
- PN has an Employee Assistance Program which is available to employees who have difficulty in controlling their use of drugs and/or alcohol to seek qualified help
- Employees must notify their line manager if they are aware that their work performance or conduct could be adversely affected as a result of a prescribed or non-prescribed drug
- Employees must tell their line manager if they know or are concerned that someone at work is affected by drugs or alcohol
- Employees must act honestly and comply with PN's policies and procedures

[28] There is no doubt that by failing the drug test on 20 July 2021, Mr Roach breached the D&A Policy, the D&A Management Policy, and the Code of Conduct.

Conclusion re valid reason

[29] Mr Roach accepts (rightly) that there was valid reason to terminate his employment. His conduct in attending work with cannabinoids in his system, in breach of the relevant policies, was serious and gave PN a sound, defensible and well-founded reason to terminate his employment.

[30] In all the circumstances, I am satisfied that PN had a valid reason to terminate Mr Roach's employment.

Notification of reason (s 387(b))

[31] Mr Roach was notified of the reasons for his dismissal in the allegation letter dated 26 July 2021, the show cause letter dated 11 August 2021, and in the letter of termination dated 13 September 2021.

Opportunity to respond (s 387(c))

[32] During the investigation process Mr Roach was given opportunities to respond, and did in fact respond, to the reasons for his dismissal. In particular:

- (a) Mr Roach responded to PN's allegations in his letter to PN sent on 2 August 2021; and
- (b) Mr Roach responded to the show cause letter in his letter of 23 August 2021.

[33] I do not accept Mr Roach's contention that PN did not give genuine consideration to his responses. Mr Cowan gave detailed evidence as to the matters he took into account in

making his decision to terminate Mr Roach's employment.¹⁰ I accept that evidence. It was largely unchallenged. Mr Cowan's evidence demonstrates that, prior to making his decision to terminate Mr Roach's employment, he took into account the matters raised by Mr Roach in his written communications with PN in the period leading up to his dismissal. One matter which was addressed in the questioning of Mr Cowan was his assessment of Mr Roach's reliance on COVID-19 as a mitigating factor. Mr Cowan gave evidence, which I accept, that "because we were in the second year of being impacted by COVID-19 ... this factor should not be given considerable weight ..."¹¹ It is clear from this evidence that Mr Cowan did give genuine consideration to the matters raised by Mr Roach.

[34] Having regard to all the circumstances, I am satisfied that Mr Roach was given an opportunity to respond to the reasons for dismissal which related to his conduct.

Unreasonable refusal to allow a support person (s 387(d))

[35] Mr Roach had a support person with him throughout the investigative process. Accordingly, I am satisfied that there was not any unreasonable refusal by PN to allow Mr Roach to have a support person present to assist in any discussions relating to his dismissal.

Warnings of unsatisfactory performance (s 387(e))

[36] Mr Roach was not dismissed for unsatisfactory performance. This criterion is not relevant to the present case.

Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))

[37] PN is a substantial enterprise. It has human resource management specialists and expertise. In all the circumstances, I am satisfied that neither the size of PN's enterprise nor any absence of human resource management specialists or expertise had any impact on the procedures followed in effecting Mr Roach's dismissal.

Other relevant matters

[38] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[39] The basis upon which a dismissal may be found to be harsh, unjust or unreasonable, notwithstanding a finding that there was a valid reason for dismissal based upon conduct in breach of employer policy was explained by the Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post* in the following terms:¹²

“[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*

¹⁰ Ex R1

¹¹ Ex R1 at [15]

¹² [2013] FWCFB 6191

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 a 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”.

[42] Broadly speaking, circumstances bearing upon whether a dismissal for misconduct is harsh, unjust or unreasonable fall into three broad categories:

- (1) The acts or omissions that constitute the alleged misconduct on which the employer relied (together with the employee’s disciplinary history and any warnings, if relied upon by the employer at the time of dismissal) but otherwise considered in isolation from the broader context in which those acts or omissions occurred.
- (2) The broader context in the workplace in which those acts or omissions occurred. [This may include such matters as a history of toleration or condonation of the misconduct by the employer or inconsistent treatment of other employees guilty of the same misconduct.]
- (3) The personal or private circumstances of the employee that bear upon the substantive fairness of the dismissal. [This includes, matters such as length of service, the absence of any disciplinary history and the harshness of the consequences of dismissal for the employee and his or her dependents.]

[43] The determination of whether there was a “valid reason” proceeds by reference to the matters in category (1) and occurs before there is a consideration of what Northrop J described as “substantive fairness” from the perspective of the employee. Matters in categories (2) and (3) are then properly brought to account in the overall consideration of the whether the dismissal was “harsh, unjust or unreasonable” notwithstanding the existence of a “valid reason”.

...

[47] In *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 41 IR 452 Sheppard and Heerey JJ observed (at p 460):

“Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.”

[48] Thus, a finding that an employee has failed to comply with policies and procedures does not mean that a dismissal is not harsh, unjust or unreasonable. The Commission has consistently applied the proposition that instant dismissal of an employee for non-compliance with his or her employer’s policies may, in the

particular circumstances of an individual case, be harsh, unjust and unreasonable: *Kangan Batman TAFE v Hart* [2005] [PR958003](#), Ross VP, Kaufman SDP and Foggo C at para [51]; *Fearnley v Tenix Defence Systems Pty Ltd* [2000] Print S6238, Ross VP, Polites SDP and Smith C (Fearnley) at [61]; *Atfield v Jupiters Ltd* (2003) 124 IR 217 (Jupiters) at [12]-[13].”

Length and quality of Mr Roach’s service with PN

[40] Mr Roach was employed by PN for a very long period of time – about 41 years. I do not accept the submission put on behalf of Mr Roach that he had exemplary service with PN during those 41 years. Mr Cowan included in his witness statement information pertaining to what he described as a “significant history of performance and safety concerns”.¹³ The information on which Mr Cowan relied to form that view was provided to him by Ms Kerri Smith, PN’s People and Culture Manager, who accessed Mr Roach’s electronic employee file and provided Mr Cowan with a summarised timeline of relevant events.¹⁴ Although the information contained in the summarised timeline of relevant events is hearsay, Mr Roach did not file a witness statement in reply to the witness statement made by Mr Cowan and Mr Roach agreed with the propositions put to him in cross examination about a number of the incidents referred to in the summarised timeline of relevant events. In those circumstances, I accept the accuracy of the information contained in the summarised timeline of relevant events.¹⁵ Those events were as follows:

- (a) In September 2011, Mr Roach received a verbal warning as a result of his involvement in an incident resulting in the derailment of empty wagons at Kooragang.
- (b) In June 2013, Mr Roach swore at a co-worker. Mr Roach apologised and gave a commitment to follow directions. Mr Roach accepted in cross examination that his behaviour in this instance was not professional.
- (c) In July 2014, Mr Roach was the driver of a service discharging coal when it failed to stop under the indication of a stop signal. No action was taken against Mr Roach in respect of this incident.
- (d) In October 2015, Mr Roach sent an offensive email to a colleague who was trying to raise money for a driver who had been killed in a motor vehicle accident while on duty. During the discussion with Mr Roach, he was observed to be shaking. Mr Roach stated that he was not in a good place and that he had given up alcohol 12 months prior due to a drinking problem. Mr Roach stated that the reason for which he started drinking remained an issue. Mr Roach noted that he hated work, that he wanted time off, and that he was bored and anxious. Mr Roach left work in a disgruntled manner. Mr Roach was advised by the supervisor to seek support from PN’s Employee Assistance Program.
- (e) Mr Roach was involved in a series of incidents from 1 August 2019 to 14 August 2019 where he called his supervisor a “cunt”, both in a voicemail message and to other employees. On meeting with Mr Roach, he disclosed that he had personal issues and

¹³ Ex R1 at [29]

¹⁴ Ex R1 at [29] (table)

¹⁵ Ex R1 at [29] (table)

raised concerns around other matters. He ultimately acknowledged that his conduct was inappropriate and agreed to re-set his relationship with his supervisor. Mr Roach was provided with a letter outlining the discussion and future expectations of him.

(f) Mr Roach failed to attend his shift on 10 August 2020. His supervisor contacted him to check on his welfare. Mr Roach advised that he had cancelled his alarm and remained sleeping through the night. Mr Roach was directed to contact his supervisor in the future if he missed a shift. A record of discussion was issued.

(g) In December 2020, Mr Roach was spoken to about his excessive use of personal leave over the previous 12 months and his failure to provide medical evidence. He explained this was to care for his sick wife. He also noted that he had a medical condition which required medical treatment and he kept forgetting to obtain medical certificates from his doctor. A record of discussion was issued.

[41] On balance, although Mr Roach did not have an exemplary record with PN, the length of his employment with PN and the number and nature of the issues raised with him concerning his performance and conduct are such that I consider his length and quality of service with PN to weigh in support of his contention that his dismissal was harsh and unreasonable.

Contrition, remorse and apologies

[42] I accept that Mr Roach was contrite, remorseful and repeatedly apologised during the investigation process for his actions. These matters weigh in support of Mr Roach's argument that his dismissal was harsh and unreasonable.

Honesty during the investigation process

[43] Mr Roach contends that he was open and honest from the very outset of the investigation into his conduct concerning attending work with cannabinoids in his system. I do not accept that submission.

[44] On 2 August 2021, with the assistance of his union, Mr Roach responded in writing to the allegations put against him by PN. In that response, Mr Roach stated:

“...Approximately 4 weeks ago after a particularly stressful week I drank in excess and became extremely intoxicated. I do not recall much of that night however my wife since confirmed that while intoxicated I smoked cannabis...”

[45] Accordingly, Mr Roach was contending in his response to PN that approximately four weeks prior to 2 August 2021 (i.e. on about 5 July 2021) he smoked cannabis and tested positive for cannabinoids about 15 days later (i.e. on 20 July 2021).

[46] In his witness statement filed in these proceedings, Mr Roach relevantly stated:¹⁶

¹⁶ Ex A1

- “16. While I cannot specifically remember, approximately 3 days prior to 20 July 2021, I recall that I drank a substantial amount of alcohol and became very drunk.
17. When I woke up the following morning, my wife informed me that I had inhaled 2-3 times from her marijuana pipe while extremely intoxicated...”

[47] These events were explored with Mr Roach during his cross examination. He gave evidence, which I accept, that he had not smoked marijuana for at least 40 years prior to the incident in July 2021, which meant that it was a memorable event when Mr Roach’s wife informed him the morning after he had smoked marijuana that he had done so. I therefore accept Mr Roach’s evidence that the weekend on which he smoked marijuana was 16/17 July 2021. It was put to Mr Roach in cross examination that he had stated in his response to PN on 2 August 2021 that he smoked marijuana “approximately 4 weeks ago” because he was effectively trying to put a greater distance, or time period, between when he smoked marijuana and when he attended work on 19 and 20 July 2021. Mr Roach denied this proposition but could not explain how he “got it wrong”. I do not accept this evidence. I do not consider it is plausible that when Mr Roach provided his response to PN on 2 August 2021 that he honestly believed he smoked marijuana “approximately 4 weeks ago” (i.e. on about 5 July 2020), when in fact he had smoked it a couple of days prior to attending work on 19 and 20 July 2020. I find that Mr Roach was not open and honest with PN throughout the investigation into his drug use. This weighs against Mr Roach’s argument that his dismissal was harsh and unreasonable.

Other mitigating factors

[48] Mr Roach raised a range of mitigating circumstances which support his contention that his dismissal was harsh and unreasonable, including the following:

- (a) During the 12 month period prior to drug incident in July 2021, Mr Roach suffered from depression and anxiety, which was brought on by a number of factors from both home and work.
- (b) Since about 2015, Mr Roach’s wife has been suffering from chronic arthritis, resulting in her being in constant, chronic pain. As a result, Mr Roach had to take on all the cooking, housework etc, as well as taking her to medical appointments. This extra work put a strain on Mr Roach’s physical and mental health.
- (c) Mr Roach had several months off work in 2021 due to being classified as medically unfit. Mr Roach believed that the communication between Sonic Health, PN and himself was very poor, which resulted in time off being taken from Mr Roach’s personal leave and annual leave.
- (d) Mr Roach has had a difficult relationship with his supervisor at work. Mr Roach believes that his supervisor was abrupt and confrontational, and PN has “brushed aside” issues raised by Mr Roach about his supervisor.
- (e) The situation with COVID-19 affected Mr Roach. He is worried, given his age and underlying health conditions, about being infected with COVID-19. He is also very worried about taking COVID-19 home and infecting his wife.

- (f) As a result of these difficulties, Mr Roach found himself turning to alcohol more regularly, which resulted in him smoking cannabis on one occasion. The cannabis was in Mr Roach's home because his wife's doctor recommended it to assist with her chronic pain.
- (g) After the positive drug test on 20 July 2021, Mr Roach realised he needed help. He reached out to PN's Employee Assistance Program, visited his general practitioner, commenced taking a medication called Antabuse, sought treatment and counselling from the drug and alcohol unit at the Mater Hospital, and took a urine drug test on 23 August 2021 with Laverty Pathology to demonstrate that he was free from any drugs.

Age and employment prospects

[49] Mr Roach is 58 years old. He has worked for PN in the rail industry since he was 17 years old. Mr Roach has not been able to obtain alternative employment since his dismissal, despite his attempt to do so. I accept that he will find it difficult to obtain full time employment in the future. These matters support Mr Roach's contention that his dismissal was harsh and unreasonable.

Family and financial circumstances

[50] Mr Roach lives with his wife in Maitland, New South Wales. He has five children and eight grandchildren, but they do not live at home. Mr Roach's wife has significant health difficulties. Mr Roach is the sole bread winner in his family. He has not paid off the mortgage on the family home and is concerned that he may need to access his superannuation in order to pay off his mortgage.

[51] Mr Roach gave evidence that his house is a five bedroom home on a large block of about 1,000 square metres. He did not give any evidence as to the value of his home, the amount remaining to be paid off his mortgage or the value of any other assets or debts. Absent a more fulsome picture of Mr Roach's overall financial position, I am not able to, and do not, give significant weight to Mr Roach's contention that his dismissal has put him in a precarious financial position.

Seriousness of the conduct

[52] The mitigating factors to which Mr Roach points, and which weigh in favour of his contention that his dismissal was harsh and unreasonable, must be balanced against the gravity of the conduct in which he engaged and all other relevant factors in reaching an overall assessment as to whether the dismissal was harsh or unreasonable.

[53] PN operates in a safety critical industry. Mistakes within the rail industry can lead to significant personal injury or death, and substantial financial loss. It is therefore reasonable for PN to require its employees to attend work without having any illicit drugs in their system, including cannabis. It is also reasonable for PN to require its employees to notify their line manager if they are aware that their work performance or conduct could be adversely affected as a result of a prescribed or non-prescribed drug.

[54] On the morning of Saturday or Sunday, 17 or 18 July 2021, Mr Roach was aware that he had smoked marijuana on the previous evening. That was obviously a mistake on Mr Roach's part. However, he could have avoided that mistake giving rise to a serious breach of his obligations to his employer by taking some type of leave on 19 and 20 July 2021. He elected not to do so. Instead, Mr Roach made the decision to attend work on 19 and 20 July 2021. He was aware that he may not pass a drug test on those days. He was correct.

[55] Mr Roach's decision to attend work and perform a safety critical role on 19 and 20 July 2021 so soon after he knowingly consumed cannabis was reckless behaviour and potentially placed him and his team members at serious risk of harm. Mr Roach's conduct was serious, notwithstanding that this was the first occasion on which he had tested positive for drugs or alcohol at work.

[56] PN accepts that the proportionality of an employer's response to conduct in question is a matter that might be relevant under s 387(h) of the Act. However, PN submits that it is relevant only where the employer fails to take into account mitigating circumstances in its decision. I reject that submission. PN relies on a decision of the Full Bench of the Commission in *Sydney Trains v Hilder*¹⁷ (*Hilder*) in support of its contention. In *Hilder*, the Full Bench did not state that the proportionality of an employer's response to conduct in question is a matter that is relevant only where the employer fails to take into account mitigating circumstances in its decision. The Full Bench in *Hilder* observed (at [30]) that:

“If the consequence of Sydney Trains' “zero tolerance” was that it would not give any consideration to any mitigating circumstances advanced by any employee who has been found to have breached the Policy, that may be relevant to s 387(c) since it would arguably constitute a denial of a real opportunity to respond to the reason for the putative dismissal. If dismissal was a disproportionate response to the conduct in question because Sydney Trains had failed to take into account mitigating circumstances, that would be a matter relevant to s 387(h). But in the context of s 387(a), they were simply distractions.”

[57] The Commission is required to determine an application for unfair dismissal on the basis of the material before the Commission, regardless of whether the employer took into account any of that material in making its decision to dismiss the employee. Consider, for example, an employer that takes into account all mitigating circumstances but decides to dismiss a long serving employee with an exemplary record for a trivial breach of policy, such as attending work on one occasion 30 seconds late. The Commission would have little hesitation in concluding that the dismissal was harsh because it was disproportionate to the gravity of the conduct, regardless of whatever the employer did or did not take into account.

Circumstances pertaining to other employees

[58] The written submissions filed on behalf of Mr Roach included a submission that PN's differential treatment of other employees weighs in favour of a finding that Mr Roach's dismissal was harsh. In final oral submissions, Mr Matthews, appearing on behalf of Mr Roach, expressly disavowed any submission to the effect that Mr Roach's dismissal was unfair because PN treated Mr Roach differently from other employees in similar circumstances. Mr Matthews accepted that such a submission was not available because there

¹⁷ [2020] FWCFB 1373 at [30] & [38]

is not sufficient evidence before the Commission to make a proper assessment between the circumstances of Mr Roach and the circumstances of other employees who have tested positive to a drug and alcohol test during their work with PN. Mr Matthews' submission was correct in that regard. The evidence concerning the circumstances pertaining to other employees was very limited and does not permit the appropriate comparison to be undertaken.¹⁸

[59] Even though Mr Matthews expressly disavowed reliance on a comparative unfairness argument, he submitted that because other employees had returned a positive result to a drug and alcohol test and been permitted by PN to return to work, it was not “off the table” for Mr Roach to have been permitted to retain his job. I accept that PN could have made a decision to maintain its employment relationship with Mr Roach notwithstanding his positive drug test result. Mr Cowan gave that matter serious consideration as part of his deliberation.¹⁹ Ultimately, Mr Cowan formed the view that he no longer had trust and confidence in Mr Roach as an employee of PN. My role in these proceedings includes determining whether Mr Cowan's decision was harsh or unreasonable in all the circumstances.

Duration of effect of cannabis

[60] A submission was put on behalf of Mr Roach that PN's policies did not provide an employee such as Mr Roach with any information as to how long cannabis may stay in an employee's system and this supported the argument that his dismissal was harsh. I do not accept this argument. This is not a case where there could have been any real doubt about whether there was any cannabis in Mr Roach's system when he was tested on 20 July 2021. He knew that he had smoked cannabis about two or three days earlier (on the evening of 16 or 17 July 2020). As soon as Mr Roach was directed to undertake the drug and alcohol test on 20 July 2021, he said that he “may not pass” the test.²⁰ He did not.

[61] Further, Mr Roach was under an obligation pursuant to PN's policies to notify his line manager if he was aware that his work performance or conduct *could* be adversely affected as a result of a prescribed or non-prescribed drug. Any reasonable person would accept that their work performance in a safety critical industry such as rail *could* be adversely affected by smoking marijuana a few days earlier. Mr Roach did not provide any notification to his manager prior to being subjected to drug and alcohol test on 20 July 2021.

Conclusion

[62] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that PN's dismissal of Mr Roach was not harsh, unjust or unreasonable. PN had a valid reason for the dismissal, and it afforded procedural fairness to Mr Roach prior to making a decision to bring his employment to an end. PN operates in a safety critical industry. It is entitled to require its employees to not to have any illicit drugs in their system while they are at work. Mr Roach made a conscious decision to attend work on 19 and 20 July 2021 knowing that he had smoked cannabis a few days earlier. His conduct in that regard was reckless and serious. Mr Roach was not open and honest with PN throughout the investigation into his drug use. Notwithstanding the long tenure of Mr Roach's

¹⁸ *Darvell v Australian Postal Corporation* [2010] FWA 4082 at [21]-[24]

¹⁹ Ex R1 at [26]-[28]

²⁰ Ex A1 at [19]

employment with PN and all the other relevant mitigating circumstances put forward by Mr Roach, I consider that Mr Cowan’s decision to terminate Mr Roach’s employment because he no longer had trust and confidence in Mr Roach to “exercise sound judgment going forward and to operate in a safe manner”²¹ was not harsh in all the circumstances and was within the “range of action”²² that a reasonable employer might impose in the circumstances. On balance, I am satisfied that PN’s dismissal of Mr Roach was not unfair. The application is dismissed.



DEPUTY PRESIDENT

Appearances:

P Matthews, Industrial Officer of the RTBU, for the Applicant

J Darams, counsel, for the Respondent

Hearing details:

2022.

Newcastle (by video conference):

17 January.

Printed by authority of the Commonwealth Government Printer

<PR737640>

²¹ Ex R1 at [19]

²² *CFMMEU v Mt Arthur Coal* [2021] FCWFB 6059 at [77]-[79]