

[2023] FWC 1500 [Note: An appeal pursuant to s.604 (C2023/4669) was lodged against this decision - refer to Full Bench decision dated 18 September 2023 [[\[2023\] FWCFB 159](#)] for result of appeal.]



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Ramesh Bhela

v

Busways Group Pty Ltd
(U2023/1615)

DEPUTY PRESIDENT CROSS

SYDNEY, 19 JULY 2023

*Application for an unfair dismissal remedy - loss of Working with Children Check Clearance
– valid Reason – application dismissed*

[1] On 28 February 2023 Mr Ramesh Bhela (the Applicant) lodged an application in the Fair Work Commission (the Commission) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act) (the Application). The Applicant commenced full-time employment as a bus driver with Busways Group Pty Ltd (the Respondent) on 23 April 2012. The Applicant was dismissed by the Respondent on 8 February 2023 for failing to hold and maintain a Working With Children Check (‘WWCC’).

[2] In the hearing of the matter Mr Bhela represented himself, and Mr Plummer of EmploySure represented the Respondent.

[3] On 19 April 2023, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). The parties complied with the Directions. In particular:

(a) On 12 May 2023, the Applicant filed an Applicant’s Outline of Submissions and;

(b) On 29 May 2023, the Respondent filed an Outline of Submissions, with a Witness Statement from Mr Diego Perez.

(c) The Applicant filed an Applicant's Outline of Submissions and materials in reply on 5 June 2023.

[4] The Hearing of the Application occurred on 23 June 2023 (the Hearing).

Background

[5] There were only minor factual disputes between the parties. The Applicant and Mr Perez gave evidence at the Hearing, and both were cross-examined.

[6] On 3 April 2012, the Applicant commenced full-time employment with Westbus as a Bus Driver. In around May 2012, the Respondent successfully won the tender contract for area SMBSC 1 in Western Sydney which was formerly operated by Westbus. On 13 May 2013, the Applicant accepted the Respondent's offer of employment and signed an Employment Agreement to commence full-time employment as a Bus Driver.

[7] The Applicant's Employment Agreement relevantly included the following under the heading "Eligibility":

You are required to hold and maintain the following:

NSW Bus Driver Authority;

NSW license to drive Medium Rigid Vehicle (MR); and

Working with Children clearance.

The Company will require you to provide evidence that you hold the above licenses/certificates.

You must notify the Company immediately in the event that you no longer hold, or are no longer eligible to hold, any of the above licenses/certificates.

The Company reserves the right to terminate your employment without notice in the event that you fail to maintain these licenses/certificate

[Emphasis added]

[8] On 13 May 2013, the Applicant accepted and signed the Respondent's Driver Accreditation Policy. The Respondent's Driver Accreditation Policy relevantly stated:

A Working with Children Check is a pre-requisite for anyone in child-related work. It involves a national criminal history check and review of findings of workplace misconduct. Drivers must have a current Working with Children certification to be able to drive a bus for Busways.

It is an offence to engage an employee/driver in any child-related employment without a Working with Children certification.

When Busways receives notification that a WWC number has been barred and the employee has been identified, the Operations Manager will be notified immediately. If the driver is rostered to work, or currently working, they must be taken off the road immediately and suspended until such time as their WWC certification is current.

Employees/Drivers will be given 10 weeks to get their WWC certification changed to current - failure to do so in this time frame may lead to termination of employment.

An Occurrence Report is to be raised stating the action taken and include a copy of the "Current" status report once the WWC certification has been reinstated.

Busways take the safety of its passengers very seriously, therefore failure by depot administration staff to follow the above procedure will result in disciplinary action...

[Emphasis added]

[9] On the morning of 6 October 2022, the Applicant attended a medical appointment. In the Hearing the Applicant described what occurred regarding a work related injury he said he suffered, that was shortly thereafter the subject of a workers' compensation claim by the Applicant, as follows:¹

THE DEPUTY PRESIDENT: Sorry, are you saying on 6 October you were at the doctor? -Yes. I was with the doctor. I sent the - Diego's call regards - Diego's SMS to the insurance company also regarding that. Because if the injury happened in the morning around 6 am or something, and that time, by the 11 am, when I was with the doctor and I got informed that my - this thing happened, the Working with Children Check.

MR PLUMMER: You've raised the issue of workers compensation there, Mr Bhela. Your workers compensation claim was declined, wasn't it? -Yes. Then at least declined but it doesn't mean this not happened at work and is still I cannot work anywhere else.

[10] Also on 6 October 2022, the Respondent received a notification from the Office of the Children's Guardian that the Applicant's Working with Children Check (WWCC) had been barred. It was accepted by the parties that the barring of the WWCC arose from an allegation of domestic violence that remained unproven and did not relate at all to the Applicant's conduct as an employee.

[11] On 6 October 2022 at 12.25 pm, the Respondent sent an email to the Applicant and it relevantly stated:

...We have been advised today from the Office of the Children's Guardian that your Working with Children (WWC) has been barred.

As a result, please refer to the attached letter confirming your suspension from duties. Please read the letter in its entirety as you have a defined period to re-gain your WWC. I understand that you're currently on a period of sick leave. Upon your clearance to be fit for work (considering your sick leave), you will then need to advise George Pellatt of your intention to either use your accrued annual leave or RDO's for the relevant suspension period, otherwise the period will be unpaid.

If you require clarification regarding the abovementioned and attached information or have any questions, please contact me directly...

[12] The Respondent attached a Confirmation of Suspension Letter to the above email, and it relevantly stated:

On 6 October 2022 Busways received notification that your Working with Children certification was barred.

An inherent part of your position with Busways as a bus driver is that you hold a current WWC certification, as you do not hold a current certification you are suspended from employment effective immediately.

Before you can return to normal duties you are required to submit a current WWC certification. You will be required to submit this before 15 December 2022. Failure to submit the WWC certification before this date may lead to termination of your employment. During this period you may utilise any annual or RDO leave you have accrued, once you have exhausted this leave you will be deemed absent and the suspension will be unpaid.

[13] On 25 October 2022 the Applicant's workers' compensation claim was declined.

[14] As of 15 December 2022, when the 10 week time period for renewal of the WWCC had expired, the Applicant did not have a valid WWCC.

[15] The Respondent gave the Applicant an additional four weeks to obtain a valid WWCC. Mr Perez stated that additional time was accorded to the Applicant based on the long standing working relationship that the Applicant had with the Respondent.

[16] On 19 December 2022 at 12.47 pm, the Respondent sent an email to the Applicant that attached an invitation to a show cause letter. That letter included the following:

The purpose of this letter is to formally advise you that issues have arisen in relation to your ongoing employment which Busway Group (the Company) directs you to explain or justify. The Company is aware that your ability to lawfully perform the inherent requirement of your role of Bus Driver is at risk. The reasons for this are as follows:

- *As of 6 October 2022, it is alleged that you have failed to hold a credential that is required to perform your duties as a professional bus driver, specifically your Working with Children credential.*

The impact of this issue on the Company is that you will be unable to complete the duties inherent to your role, in this case driving a motor vehicle (bus).

The purpose of this meeting is to give you an opportunity to respond with an explanation and show cause in relation to the above concerns the Company has, and with regards to the outlined impact these issues will have on the business.

We wish to discuss these issues with you, along with the impact of this on your ongoing employment with the Company. You are therefore required to attend a meeting with Diego Perez at 2:00pm on 20 December 2022 at Blacktown depot in order to obtain your response to the above.

You are expected to make every effort to attend this meeting.

You are of course welcome to bring a support person to this meeting should you choose. After the meeting, the business will proceed to make a decision about your employment, having regard to your responses and feedback you provide during the meeting. Should the business confirm its preliminary view about next steps, this may involve the termination of your employment on a summary basis.

All matters and information contained within this letter is confidential and you are directed not to discuss this with any other Busways employee without my express prior consent. Any failure by you to maintain confidentiality may lead to disciplinary action.

[17] On 19 December 2022, the Applicant sent a text message to the Respondent notifying them that he could not attend the Show-Cause Meeting on 20 December 2022 at 2.00 pm.

[18] On 20 December 2022 at 10.16 am, the Respondent sent an email to the Applicant and it relevantly stated:

Thank you for your text message yesterday, unfortunately I didn't see it until this morning.

Nonetheless, I've rescheduled the meeting upon Dimitri's request for Thursday, 22 December 2022 at 2pm – Blacktown depot.

As such, I've attached a new show cause meeting letter.

Should you have any questions, you're welcome to contact me directly...

[19] On 22 December 2022, at 9.16 am, the Applicant emailed the Respondent as follows:

Hi Diego

Good morning,

As I informed you that after the telephone conversation with you, I am not feeling well and I am too stressed. Due to stress and hypertension, blood vein in my left eye gone busted, see the photo attached. I called my doctor regarding my situation, my doctor advised me not to attend any meeting which can cause more stress and serious health problems, until clearance from doctor.

Also I just wanted to inform you that my works Compo case is still under investigation. GIO booked an independent medical examination on 13th of January 2023, please see the letter attached.

So its my humble request that please postpone this meeting until clearance from my treating doctor.

Thanks.

Kind regards,

Ramesh Paul Singh Bhela

[20] On 22 December 2022 at 11.42 am, the Respondent sent an email to the Applicant, and it relevantly stated:

Thank you for your email and recent text message.

I understand and recognise the stress associated with having to attend such meeting. Without demeaning that position and the recommendations of your Dr., it is normal to feel stressed with respect to attending such meeting however, I don't believe that your current position constitutes a reasonable excuse to delay the meeting.

As such, but in recognising your current position, I'm happy to postpone the meeting until tomorrow, 2:00pm. I'll draft a new letter to that effect and send it shortly. However, please be advised that your attendance at the meeting is no longer a request, but rather a reasonable direction. Should you feel unable to attend the meeting in person, I would be happy to give you the option to provide a written response to the 'show cause' letter – this will be explained in more detail in my eventual new drafted letter. Otherwise, failure to attend the meeting or at a minimum respond to the show cause concerns, will result in the Company determining an outcome in your absence.

With regard to the information surrounding your workers' comp claim, thank you for clarifying. I'll take this on notice however, this show cause process has nothing to do with your worker's comp claim.

Should you have any questions, you're welcome to contact me.

[21] On 22 December 2022 at 2.03 pm, the Respondent sent an email to the Applicant, and it relevantly stated:

I've recently spoken with Dimitri [the TWU representative], I'm certain he'll speak with you too.

I've attached the new show cause letter. I'll be as clear in my explanation as possible given English isn't your first language. I do not accept your current circumstances as a reasonable excuse to postpone the meeting or at a minimum provide a written response. I'm providing three reasonable options, they are as follows:

1. Attend the meeting for 2pm tomorrow or;

2. *Submit a written response by 5:30pm tomorrow regarding the show cause letter or;*
3. *Have Dimitri attend the meeting tomorrow and have him advocate on your behalf regarding a response to the show cause letter.*

Should you have any questions, please don't hesitate to let me know...

[22] On 22 December 2022 at 2.30 pm, the Applicant emailed the Respondent and he relevantly stated:

I have already informed you in my last email and informing you again, that English is not my first language, I am unable to understand, what you want to say. As per my current mental health, I am unable to attend and also unable to give any statement in response to your email or show cause. So again requesting to postpone this meeting until clearance from my treating doctor.

[23] On 23 December 2022, Mr Mavro [the TWU representative] sent Mr Perez an email as follows:

Hi Diego

I received this correspondence this morning from Ramesh.

Could this request be factored in to your consideration of his position in addition to the show cause response.

*“Hi Dimitrios,
As you know my mental health, due to stress, I just realised that I have annual leave and long service leave hours, those are more than enough for six months. So I would like to use my annual leave and long service leave first until I regain my WWCC or my works Compo case gets accepted. Thanks Regards Ramesh Paul Singh Bhela “*

Thank you for your consideration in this matter.

Kindest regards and all the best to you and your family over Christmas and New Year's.

[24] As at 12 January 2023, after the additional four week time period had expired, the Applicant did not have a valid WWCC.

[25] On 17 January 2023, the Applicant sent by email to the Respondent a medical certificate dated 6 January 2023, that provided:

Mr Ramesh Paul Bhela has a medical condition-left shoulder work related injury and will be unfit for work from 06/01/2023 to 06/03/2023.He is currently undergoing stress and anxiety related issues and is unable to attend any meetings. I am referring him to see a psychologist for further management.

Dr Regy Joseph

[26] On 20 January 2023, the Applicant's representative from the TWU, Mr Mavro, telephoned the Respondent and had a conversation. Mr Mavro explained that the Applicant was not able to attend any Show-Cause Meetings as he was experiencing pain in his shoulder and mental health problems. The Respondent explained that holding and maintaining a WWCC was critical to the Applicant completing his role as a Bus Driver, and in New South Wales, it was a legal requirement for a person to hold a valid WWCC if they worked around children.

[27] On 20 January 2023 at 12.44 pm, the Respondent emailed the Applicant and Mr Mavro. That email relevantly stated:

We refer to the matter of employee Ramesh Bhela (your member), their current health status, and the ongoing issue regarding the suspended working with children check (WWCC).

We note that, as indicated in our previous correspondence, the holding and maintaining of a WWCC is critical to the role to which your member (our employee) undertakes. This is because the holding and maintaining of a WWCC is required for anyone who

works or volunteers in child-related work in NSW, and the interaction with children is a regular and routine part of the employee's position. Notwithstanding the current information regarding Ramesh's current physical capacity, it is our position that the WWCC matter constitutes the main issue/concern relating to the employee's ongoing employment, as any and all medical issues represent a separate Capabilities consideration.

Considering the inherent requirement of the WWCC to the role undertaken by Ramesh, and in line with company protocol and procedure, (of which is applied equally to all similarly impacted employees) the business has provided 10 weeks for the issue to be rectified. This period has now elapsed, and no further information has been supplied regarding the status of this issue, or likelihood of rectification of this issue.

This matter has now gone on for an extended period, and in review of the proposals outlined by the TWU and Ramesh, the business is unable to grant the requested 6-month period of absence either by way of entitlement use or unpaid.

Accordingly, in view of the current circumstance, your correspondence, and to ensure as fair a process as possible (in addition to the reasonable steps already taken above), the business is seeking the following:

That immediately, and without delay, Ramesh supply information pertaining to the likelihood of the resumption of the WWCC. We require this to be submitted by no later than close of business Wednesday, 25 January 2023.

Please note, if information regarding the WWCC is not supplied in line with the above, the business will proceed with the show cause process, and will provide one final opportunity for response. Following this, the business may be given no further option but to consider termination of employment on the basis of this issue...

[28] On 25 January 2023 at 1.55 pm, the Applicant emailed the Respondent a work capacity certificate, screen shot evidence and a written response. The screen shots were of text messages (one of which was dated 19 September 2022), approving leave from 13/02/23 to 31/03/2023, and 03/04/2023 to 07/04/2023. The Applicant in his written response relevantly stated:

Thank you for allowing me the opportunity to respond and show cause for continuing my employment.

I have over tens years' experience and I am extremely committed to my full time role at Busways. I am extremely diligent with shifts and have a good record of service. I have a positive rapport with my co-workers and pride myself on being safe, flexible and reliable.

I have shown loyalty to my employer, have a very strong work ethic, I am a TWU delegate and HSR. I understand the seriousness of this matter and I appreciate all that has been done for me this far by the company. I am aware of Drivers Accreditation procedure and I do acknowledge that failure to comply in 10 weeks "may" result in termination

I did not know when the alleged incident happened on the 4 October 2022 would affect my working with children's check (WCC), I was not advised by police at the time and only become this was an issue when you informed me on 6 October 2022.

Originally, the matter was set for 18 January 2023 and I was hoping for an outcome but the opposing lawyer asked for an extension and with the court system being so backlogged currently this will not happen until 1 March 2023.

My Lawyer is making an application for a variation on my conditions which will allow me to have my WWC unsuspended. Given the lack of prior convictions and the merits of the case, they are confident I will be able to have the WWC back to "current" for work purposes.

Once this variation is in place I will be able to perform all my inherent duties and there will be no reason why I cannot return to my role until the matter is heard in court. I am the sole income earner and rely on my salary to sustain my livelihood. I would ask that you consider continuing my employment in good faith. I have been without any livelihood since November and this has an effect on my financial and mental health.

I would like to point out I have approved annual leave periods for most of end of January to start of April and currently over 24 weeks in combined annual and long service leave.

I have not willfully or deliberately put the company in disrepute. I would ask you to consider approving and paying me leave until my approved leave ends. I will update my employer with the outcome of the hearing on 1 March 2023. In the unlikely event the variation to my conditions are not approved I will understand what processes need to happen by Busways moving forward, but I would like to be given the opportunity to be treated fairly until proven otherwise...

[29] On 6 February 2023 at 12.42 pm, the Respondent emailed the Applicant as follows:

First and foremost, thank you for your patience and response(s) provided to date by you and the TWU in relation to this matter.

The intention of this email is to advise you that I've had suitable time to review this matter in its entirety, and as such I'm ready to conduct an outcome meeting. I propose to conduct an outcome meeting in person at Blacktown depot on Wednesday, 8 February 2023 at 10:00am.

In alternative to meeting in person, the business is prepared to arrange a Teams meeting consistent with the date and time acknowledged above. If you're unable to attend either meeting, please advise me accordingly (including reasons for non-attendance). Please confirm your preference by no later than close of business Tuesday, 7 February 2023.

Should you have any questions, you're welcome to contact me directly...

[30] On 7 February 2023 at 6:23 am (AEST), the Applicant emailed the Respondent and he relevantly stated:

I just wanted to inform you that I am unable to attend meeting in person or via teams meeting due to following reasons:-

I am in India nowadays.

I am sick.

Very poor internet signal here in my village.

Please advise. Thanks

[31] On 8 February 2023 at 11.17 am, the Respondent emailed the Applicant and it relevantly stated:

Thank you for clarifying your ability to attend a show cause meeting.

In light of the circumstances, I will be advising you of the outcome via email. I would like to note that we have been more than reasonable throughout this process and the decision I've taken is not one that I've made lightly. As such, please be advised that as you've failed to regain your WWCC accreditation (which is contingent upon your role as a Bus Driver) and as there are no other suitable alternatives that can be provided, I've been left with no choice but to terminate your employment with immediate effect. Please refer to the attached PDF document detailing the termination of your employment.

As part of the termination process, any accrued annual leave, RDOs and LSL will be paid out to you within the next pay cycle.

Given your current whereabouts in India and upon return to Australia, you will need to return any/all Company property in your possession to Blacktown depot (specifically, George Pellatt or Karthik Pazhanan). Please advise of your return to Australia and when we can expect the return of Company property.

I would like to take this opportunity to thank you for your service at Busways and to wish you well in your future endeavours. Should you have any questions, you're welcome to contact me directly.

[32] The Respondent attached a Letter of Outcome to a Show-Cause Meeting to this email and it relevantly stated:

We refer to our letter concerning issues regarding your ongoing employment with the Company dated 19 December 2022 and 22 December 2022, along with further email correspondence dated 20 January 2023.

The Company attempted to conduct a show cause meeting however, due to your inability to attend, accepted written representations supplied by both you and the Transport Worker's Union (TWU). In doing so, the Company allowed you the opportunity to respond with an explanation to discharge our concerns regarding the impact that the outlined issues has on the Company, and any suggestions you may have to negate this.

Those issues, together with our findings are noted below:

- *As of 6 October 2022, it is alleged that you have failed to hold a credential that is required to perform your duties as a professional bus driver, specifically your Working with Children credential;*

In summary, the responses provided are outlined as follows:

i. Mr Bhela is in the process of retaining his Working with Children Check credential, with the suspension period arising from an allegations Mr Bhela strongly opposes. The process is lengthy and not conducive for the Company or Mr Bhela.

ii. Originally, the WWCC matter was set for hearing on 18 January 2023, however, has now been postponed till 1 March 2023. Furthermore, Mr Bhela's lawyers are applying for a variation to his conditions that will allow the resumption of his WWCC accreditation.

iii. Mr Bhela sustained an injury on his shoulder whilst operating a bus on 6 October 2022. Mr Bhela has appointed legal representation to represent him in relation to a workers compensation claim. The injury will be investigated by two

independent Doctors in early January 2023. At this stage, he's not fit for duty and the current suspension period is not impeding him from performing his duties.

iv. A request that Mr Bhela be granted a 6-month period of paid and/or unpaid leave to address the issues that will prevent him from fulfilling his duties. In addition, Mr Bhela has periods of pre-approved annual leave during the months of February and March 2023.

As discussed, the impact of these issues on the Company is that you will be unable to complete the duties inherent to your role, in this case driving a motor vehicle (bus).

During the show cause process you advised that you have over 24 weeks of combined annual leave and long service leave, and requested that this be used to pay you until you regained your WWCC.

The Company has considered your responses, concerns and has since reviewed its operations again and regrettably informs you there are no vacancies at the Company and unfortunately no available opportunities within the business at alternative locations that would suit your employment.

In the circumstances, and for the reasons outlined above, the Company maintains the view that it is appropriate that your employment should be terminated due to your inability to lawfully perform the inherent requirement of your role as a Bus Driver, and there is no other position the Company can offer you in the business.

We therefore advise you that your employment will be terminated effective 8 February 2023.

[33] As at the time of the Hearing the status of the Applicant regarding his WWCC had not changed. He was next to be before the Court on 30 June 2023, when the charge certificate was to be filed. After that there would be case conference and later possibly a hearing.

[34] Up to the Hearing the Applicant had not obtained alternate employment, and he said he had only been in receipt of social security payments from around 25 May 2023. The Applicant's evidence was:²

Mr Bhela, since the termination of your employment, have you sought any other work? -Yes, I tried but I couldn't get anything because of the two things, one is the shoulder injury and the other is the Working with Children Check thing.

Surely not every job requires a Working with Children Check? -I - where I was able to, like to drive the buses with the other companies, they all want the Working with Children Check and the thing, wherever the - the cleaning jobs, the trolley pushing jobs, everywhere in the market also is the - my shoulder is the problem so I couldn't work and I didn't work due to my pre-existing injury.

[35] At the conclusion of the Hearing this decision was reserved, and the parties were advised that if there were further developments either for or against reinstatement of the WWCC the Commission should be advised.³ No such notification has been made.

Applicants Submissions

[36] The Applicant highlighted that he was in the process of re-attaining his WWCC, and the allegation being investigated is not substantiated or proven. He noted that he was strongly opposing that allegation however the process was unfortunately lengthy and not in his hands.

[37] The Applicant noted he requested that he be granted unpaid leave to address the issues preventing him from fulfilling his duties, and further noted that he was on workers compensation for his shoulder injury that he alleged he sustained at work.

[38] The Applicant further noted that he was on approved leave until the first week of April, but Busways terminated him on 8th February 2023.

[39] The Applicant submitted the reason why Busways was in a hurry to terminate him was because he was a Union Delegate and Health and Safety Representative, and raised many safety issues at workplace with Busways.

[40] The Applicant also submitted that other employees who were medically unfit or otherwise unable to drive buses, were still in company roles, and many of Busway's staff were allowed "*plenty of time*" to sort out personal issues, yet that courtesy was not extended to the Applicant.

[41] The Applicant submitted that he was a long serving loyal employee with a good record of service. He is the sole income earner for my family, and they rely on his salary.

Respondent Submissions

[42] The Respondent submitted that the Applicant's failure to hold and maintain a WWCC amounted to a valid reason for dismissal. The Applicant's failure to hold and maintain a Working with Children Check was a breach of:

- (a) the Applicant's Employment Agreement;
- (b) the Respondent's Driver Accreditation Policy; and
- (c) section 6 of the *Child Protection (Working with Children) Act 2012 (NSW)*(the CP Act).

[43] As at 15 December 2022, after the 10 week time period to regain the WWCC had expired, the Applicant did not have a WWCC. He was nonetheless given an additional 4 weeks to obtain a WWCC based on the long standing working relationship that the Applicant had with the Respondent. As at 12 January 2023, after the additional 4 week time period had expired, the Applicant did not have a WWCC.

[44] The Respondent's decision to terminate the Applicant's employment was a valid reason for dismissal as it related to the Applicant's capacity or conduct to perform their job as a Bus Driver.

[45] The Respondent submitted the Applicant was notified of the reason for dismissal in the Respondent's Letters of Invitation to a Show-Cause Meeting sent to the Applicant on 19, 20 and 22 December 2022. Further, the Applicant was notified of the reason for dismissal in the

Respondent's Show-Cause email sent on 20 January 2023, and the Letter of Outcome to a Show-Cause Meeting sent on 8 February 2023.

[46] The Respondent submitted the Applicant was given an opportunity to respond and did in fact respond to the reason for dismissal when he responded in writing through his representative from the TWU on 25 January 2023.

[47] The Respondent rejected the submission that it was in a hurry to terminate the Applicant as he was a Union Delegate and HSR who had raised health and safety issues. The Respondent expected the Applicant as an elected HSR to raise issues of health of safety as it was his duty and responsibility to do so. The Respondent welcomed and always encouraged the Applicant as the HSR to bring issues of health and safety to its attention.

[48] The Respondent noted that by the time of the Hearing, the Applicant had been non-compliant with the inherent requirement of his role to hold a WWCC for more than 6 months. Requiring the Respondent to hold his role open for such an extended period of time would be an unreasonable imposition upon the Respondent's business and militates against the dismissal being harsh unjust or unreasonable, especially when applying the fair go all round approach.

CONSIDERATION

Preliminary Findings

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

- (a) the Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));
- (b) his unfair dismissal application was lodged within the 21 day statutory time limitation found at s 394(2) of the Act;
- (c) the Applicant is a person protected from unfair dismissal in that:

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

(ii) his salary was below the high income threshold;

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

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

[50] The only outstanding issue is whether the Applicant’s dismissal was ‘harsh, unjust or unreasonable,’ and therefore an unfair dismissal. To this end, I must direct attention to s.387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. It is trite to observe that each of the matters must be considered and a finding made on each of them, including whether they are relevant or not.

Was the Dismissal Harsh, Unjust or Unreasonable?

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

(a) Whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees);

(b) Whether the person was notified of that reason;

(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;

(d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;

(e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal;

(f) The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal;

(g) The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) Any other matters that the FWC considers relevant.

Whether there was a valid reason for the applicant's dismissal – s 387(a)

[52] In *Rode v Burwood Mitsubishi*,⁴ a Full Bench of the then Australian Industrial Relations Commission discussed the meaning of valid reason in the context of the relevant provisions of the *Workplace Relations Act 1996*, and referring to *Selvachandran v Peteron Plastics Pty Ltd*⁵ (*Selvachandran*). The Full Bench found:

[18] While Selvachandran was decided under the former statutory scheme the above observations remain relevant in the context of s.170CG(3)(a). A valid reason is one which is sound, defensible or well founded. A reason for termination which is capricious, fanciful, spiteful or prejudiced is not a valid reason for the purpose of s.170CG(3)(a).

[19] We agree with the appellant's submission that in order to constitute a valid reason within 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.

[53] The Respondent contended that there was a valid reason for dismissal related to the Applicant's ability to perform an inherent requirement of his job. The Respondent's decision to terminate the Applicant's employment was justified as he failed to hold and maintain a valid WWCC. The Respondent terminated the Applicant due to his lack of capacity in performing his job as a Bus Driver, through failing to attain the appropriate accreditation.

[54] It is abundantly clear that the Applicant's employment agreement required that he hold and maintain a NSW Bus Driver Authority, NSW License to drive Medium Rigid Vehicle, and a WWCC. It also required Mr Bhela to obey all lawful and reasonable directions of his employer. The Respondent's Driver Accreditation Policy also stated that a WWCC was a pre-requisite.

[55] The above requirements were unremarkable as Section 6 of the CP Act relevantly states the following:

6 Child-related work

- (1) *A worker is engaged in child-related work for the purposes of this Act if—*
- (a) *the worker is engaged in work referred to in subsection (2) that involves direct contact by the worker with a child or children and that contact is a usual part of and more than incidental to the work, or*
 - (b) *the worker is engaged in work in a child-related role referred to in subsection (3).*
- (2) *The work referred to is work for, or in connection with, any of the following that is declared by the regulations to be child-related work—*
- ...
- (l) *transport services for children transport services especially for children, including school bus services and taxi services for children with a disability and supervision of school road crossings,*
-
- (4) *In this section—*
direct contact with children means—
- (a) *physical contact, or*

(b) *face to face contact.*

[56] It is clear from the evidence that the Applicant was a person who regularly engaged in child-related work, and as such he is required to hold a WWCC to perform the inherent requirements of his job.

[57] Having regard to the fact that Mr Bhela worked with children, I am satisfied that it was, at the time of dismissal, an inherent requirement of Mr Bhela's job that he hold such accreditation. An inherent requirement is something that is essential to the position held by an employee regardless of the terms of the employment contract.

[58] An employee's inability to lawfully perform work or fulfil an inherent requirement of the job will generally provide a valid reason for dismissal. In *Reseigh v Stegbar Pty Ltd*,⁶ the Full Bench observed:

*"A capacity related reason for dismissal might be concerned with an employee's performance, the employee's physical capacity to perform the work, **the loss of a qualification or licence necessary to perform the work, or an inability to perform the inherent requirements of the job because of some injury, illness or other disability.**"*

[Emphasis added]

[59] The Respondent did not have an obligation to provide the Applicant with work that did not require him to drive buses and transport children whilst his WWCC was barred. An employer is not required to provide a modified or restricted position, or just create a position which would not otherwise be required. As the Full Bench observed in *J Boag and Son Brewing Pty Ltd v Allan John Button*,⁷

When an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered.

[60] There was a valid reason for the termination of the Applicant's employment by the Respondent. That reason was the Applicant's inability for an extended period of time to carry out his duties.

Whether the employee was notified of the reason for his dismissal – s 387(b)

[61] The Applicant was notified on 6 October 2022 that his WWCC was barred and that he was to be suspended from his duties. The email noted that the Applicant was on a period of sick leave, and requested that when he return, he advise the relevant person of any intention to use accrued annual leave for the suspension period. The email further stipulated that the Applicant would need to submit a valid WWCC before 15 December 2022, meeting the 10-week time period in clause 9.4 of the Driver Accreditation Policy.

[62] After multiple attempts to engage in a show-cause meeting, the Applicant was provided with an additional 4-weeks to obtain the relevant accreditation.

[63] On 20 January 2023, the Applicant's representative from the TWU explained that the Applicant was not able to attend any Show-Cause Meetings as he was experiencing pain in his shoulder and mental health problems, however the Respondent explained that holding and maintaining a WWCC was critical to the Applicant completing his role as a Bus Driver.

[64] On 8 February 2023 the Applicant was advised in his dismissal:

In light of the circumstances, I will be advising you of the outcome via email. I would like to note that we have been more than reasonable throughout this process and the decision I've taken is not one that I've made lightly. As such, please be advised that as you've failed to regain your WWCC accreditation (which is contingent upon your role as a Bus Driver) and as there are no other suitable alternatives that can be provided, I've been left with no choice but to terminate your employment with immediate effect. Please refer to the attached PDF document detailing the termination of your employment.

[Emphasis Added]

[65] The Applicant was notified on numerous occasions of the reason for his dismissal.

Whether the Applicant was given an opportunity to respond to reasons for dismissal – s 387(c)

[66] I am satisfied that the Applicant was given an opportunity to respond to the reasons for his dismissal. For reasons set out above, I do not accept that the Applicant was under any misapprehension about those reasons. Further, I am satisfied that the Applicant was given numerous opportunities to respond to the reasons for dismissal.

Any unreasonable refusal to allow the Applicant to have a support person- s 387(d)

[67] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[68] There is no positive obligation on an employer to offer an employee the opportunity to have a support person.

[69] The Applicant was given the opportunity, and did have, a support person present at relevant times.

Whether Applicant warned about unsatisfactory performance - s 387(e)

[70] The Applicant was not dismissed for unsatisfactory performance and this consideration is not relevant.

Impact of size of enterprise impacted on the procedures followed in effecting dismissal - s 387(f)

[71] The Respondent is a large employer. There is no basis for considering this matter.

Impact of dedicated human resource managers on procedures followed in effecting dismissal – s 387(g)

[72] Given the size of the Respondent and its access to dedicated human resource managers, this is also not a relevant consideration.

Any other matters that the FWC considers relevant – s 387(h)

[73] The other matters relied upon by the Applicant may be broadly grouped into the following contentions:

- (a) That the Applicant should have been allowed more time to regain his WWCC, particularly where the Applicant was on approved leave until early April 2023;
- (b) The Applicant should have been granted greater flexibility, as had been granted to other employees who were medically unfit or unable to drive busses; and
- (c) The Applicant was targeted for early dismissal as he was an active HSR.

(a) The Applicant Should have been Allowed More Time

[74] While the Applicant was granted an extension over and above the 10 week period outlined in the Respondent's Driver Accreditation Policy, there is some substance to his submission that in all the circumstances he should have been allowed more time to regain his WWCC. Mr Perez certainly agreed that the Driver Accreditation Policy provided that failure to obtain a WWCC "may" result in termination, and consequently there was some discretion available.

[75] Mr Perez, who was a considered, open and admirable witness, readily making concessions where appropriate notwithstanding that they did not assist the Respondent's case, had given the following evidence when questioned by the Commission:⁸

THE DEPUTY PRESIDENT: I've got a few questions. Look at the exhibit R2 which was the payslip, the final payslip for the pay period ending 12 February. I don't think you've got a copy of it there. We can get one handed up. Now, if I look at the very rough

calculations of annual leave and long service leave that were paid out to Mr Bhela, it would appear to me that he was paid out approximately five weeks annual and approximately a bit over eight weeks' long service leave. Is that correct?--- I would say that's correct.

Roughly. So that's about 13 weeks paid - - -? I would say that's correct.

- - - which if Mr Bhela was allowed to have that recognised prior to his termination would have extended his termination date for some period of time?--- I would say that's correct.

Now, applying 13 weeks roughly to 8 February, that would have taken him now to some time in May 2023 to get his Working with Children certification sorted out. Why was it not possible to give that leeway? ---The company works as per the driver accreditation policy. So in this specific instance, we were alerted that an employee has had their Working with Children check suspended for whatever reason. We would refer to that policy and enact it.

For which reason?--- For whatever reason.

For whatever, sorry?-- Yes. The Working with Children check is suspended for whatever reason. Normally we're not aware of the specifics as to why it's been suspended, just that it has been. We would enact the policy. The policy clearly outlines that a driver will be provided for a period of up to 10 weeks to regain their Working with Children check, and from memory, it also outlines that failure to do so within that timeframe may result in the termination of employment. I'd like to add that Mr Bhela was given nearly 18 weeks which is over and above our obligation as per the driver accreditation policy.

[76] Mr Perez also subsequently gave the following evidence:⁹

Bearing in mind that Mr Bhela's annual leave and long service leave would have taken him well past that 1 March date, why was there not consideration as to at least giving him up to 1 March to see if the cessation or suspension of his Working with Children could have been resolved?--- The reason for that is we had provided him with more - and I would say, over and beyond what our obligations were, and we believed that we were

acting in a rather reasonable and transparent manner throughout. Thus allowing him, essentially, nearly another eight weeks on top. We thought that that was reasonable, under the circumstances.

Well, I see from the form F3, you've got 3000 employees?--- That is

Approximately?--- correct, give or take.

So you're a large bus company, with thousands of drivers, possibly. Would that be a unfair estimate?--- That's a reasonable estimate.

Yes. So it wasn't a case of requiring to backfill Mr Bhela's particular position to cover workloads?--- Not necessarily. We are recruiting constantly for drivers. It was more so a case of, well, we do have these scenarios unfold. We would obviously have specific policies and procedures in place for them. And we would, of course, work towards those.

Is it the case that Mr Bhela, or than what might have occurred with his certification, is somebody that you see as a commendable bus driver, and one that would be employed ordinarily by Busways?--- I would say so.

[77] The Applicant focussed his submissions on screen shots of text messages (one of which was dated 19 September 2022), approving leave from 13/02/23 to 31/03/2023, and 03/04/2023 to 07/04/2023, and that he sent those screen shots to the Respondent on 25 January 2023. The Respondent was certainly aware of the Applicant's approved upcoming leave at the time of dismissal.

[78] It is not unusual for the Commission to deal with certain periods of inability to perform inherent requirements, such as in driving licence suspensions,¹⁰ and yet find valid reason and absence of harshness. Where, as here, the suspension is indefinite, I do not accept, as the Applicant urged,¹¹ that he should be granted indefinite leave without pay until the WWCC issue is determined. I accept that the Respondent requires some certainty.

[79] I do, however, consider it would have been in the circumstances reasonable for the Respondent to have, as requested by the Applicant, allowed the Applicant six months from the

loss of certification to regain his WWCC before effecting dismissal. That would have resulted in dismissal not occurring before 6 April 2023. As the Respondent did not allow such further time, I find the dismissal to be harsh.

(b) The Applicant Should have been Granted Greater Flexibility as Granted to Others

[80] The Applicant's assertions of greater flexibility afforded to other employees was tested in cross-examination, and it was at that time the Respondent first learnt the identity of those other employees. It was clear from the Applicant's evidence that the alleged incidents of inconsistent treatment occurred between 10 and 12 years prior,¹² and well before the employment of Mr Perez. That evidence was vague, uncertain, and apparently hearsay.

[81] There was no cogent evidence supporting the Applicant's allegations of inconsistent treatment.

(c) The Applicant was Targeted as He was an Active HSR.

[82] The Applicant's assertions that his active role as a Union Delegate and HSR resulted in his rushed dismissal rose no higher in his evidence as "*maybe*" that's why he was terminated,¹³ and he "*hoped you had not been adversely treated for being a strong union delegate and a HSR*".¹⁴ Those assertions first arose after dismissal, and were not raised by the Applicant or the TWU representative prior, notwithstanding that the Applicant noted he was a Union Delegate and HSR in his letter of 25 January 2023.

[83] There was a complete absence of evidence to support the Applicant's assertion that his active role as a Union Delegate and HSR resulted in his rushed dismissal.

Conclusion

[84] I have made findings in relation to all matters specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal.

[85] I have found the Respondent had a valid reason for the dismissal of the Applicant, and there were no failures in procedural fairness afforded to the Applicant. I have found, however, that it would have been reasonable in the circumstances for the Respondent to have allowed the Applicant six months from the loss of certification to regain his WWCC before effecting dismissal, and the failure to allow such further time resulted in the dismissal being harsh, and so unfair.

Remedy

[86] The circumstances as to when the Commission may order remedy for an unfair dismissal are set out in s.390 of the Act.

[87] Section 390 is in the following terms:

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.**

[88] In respect to s.390(1)(a), it is not in dispute that the Applicant was protected from unfair dismissal. In respect to s.390(1)(b), for the reasons set out above, I am satisfied that the Applicant has been unfairly dismissed, and the Applicant has made an application in satisfying s.390(2).

[89] Having regard to the matters in s.390(3)(a), while the Applicant sought reinstatement, such a remedy would be inappropriate as the Applicant still does not possess a WWCC. Accordingly, I am satisfied that reinstatement is inappropriate.

[90] Having regard to s.390(3)(b), I do not consider an order for compensation is appropriate in all the circumstances of the case. My reasons for that conclusion are as follows:

(a) While I have been persuaded that termination on 8 February 2023, was premature, the effluxion of time has shown that had the Respondent not have acted in the intervening period and until the six months had expired, that prematurity would have been remedied without having yielded a different result;

(b) The Applicant's evidence was clear that he has been unable to work due to the absence of a WWCC and his shoulder injury. Were my conclusion under s.390(3)(b) different, and a compensation calculation to have been considered (s.392), the amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation would have been nil (s.392(e)); and

(c) In order to provide "*a fair go all round*" to both the Applicant and the Respondent in the provision of remedies (381(1)(c) and (2)), it is appropriate that no compensation be awarded.

Conclusion and order as to remedy

[91] I consider that reinstatement is not an appropriate remedy and that an award of compensation is inappropriate.

[92] The application is dismissed.



DEPUTY PRESIDENT

Appearances:

The applicant appeared for himself.

Mr T *Plummer* and Mr B *Field*, Solicitors, Employsure for the Respondent.

Respondent Representatives: Mr Plummer, T and Mr Field, B

Hearing details:

2023.

Sydney (in-person).

22 June.

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¹ Transcript PN 194 and 195.

² Transcript PN 335 and 336.

³ Transcript PN 818.

⁴ Print R4471, at [18] and [19].

⁵ (1995) 62 IR 371

⁶ [\[2020\] FWCFB 533](#) at [42].

⁷ [\[2010\] FWAFB 4022](#), at [22].

⁸ Transcript PN 558 to 563.

⁹ Transcript PN 571 to 576.

¹⁰ *Chand v Endeavour Energy* [\[2014\] FWC 7414](#); *Gidon v Isis Primary Care Ltd* [\[2010\] FWA 2101](#).

¹¹ Transcript PN 815.

¹² Transcript PN 270.

¹³ Transcript PN 59.

¹⁴ Transcript PN 359.